ANIMAL PROPERTY RIGHTS

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The animal rights movement largely focuses on protecting species whose suffering is most visible to humans, such as pets, livestock, and captive mammals. Yet, we do not observe how unsustainable land development and fishing practices are harming many species of wildlife and sea creatures. Fish and wildlife populations have recently suffered staggering losses, and they stand to lose far more. This Article proposes a new legal approach to protect these currently overlooked creatures. I suggest extending property rights to animals, which would allow them to own land, water, and natural resources. Human trustees would manage animal-owned trusts managed at the ecosystem level—a structure that fits within existing legal institutions. Although admittedly radical, an animal property rights regime would create tremendous gains for imperiled species with relatively few costs to humans.

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INTRODUCTION

First-year property law courses often begin with *Pierson v. Post*,[1] a case in which one hunter kills and claims a fox, which another hunter pursued first. Working through this case helps students understand when and how property comes to be owned. Although *Pierson* has been taught thousands of times across the country, there has yet to be a serious discussion about a potential third property owner in the fact pattern—whether the fox itself could be considered the owner of its own body, or even the land on which it was found. What if nonhuman animals could own property? This Article is the first by a legal scholar to consider extending property rights to nonhuman animals.

Animal law is a burgeoning field[2] but also one marked by deep polarization.[3] Although virtually everyone believes that

1. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

2. Congress has passed over fifty animal welfare statutes in the past fifty years. Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003). In the past twenty years, a majority of states have enacted statutes allowing pets to receive property upon their owner's death. *See infra* sources cited note 118. Legal education has followed this trend: Harvard Law School opened an Animal Law and Policy Program in 2015, joining programs at University of Virginia (animal law program), George Washington (animal law focus area), Rutgers (animal law clinic), Duke University (animal law clinic), and Lewis & Clark (clinic and post-JD master of laws (LL.M.) in animal law). Over 130 law schools in the country operate animal law classes, a course virtually nonexistent twenty years ago. Kathy Hessler, *The Role of the Animal Law Clinic*, 60 J. LEGAL EDUC. 263 (2010). The first animal law casebook was published in 2000. PAMELA D. FRASCH ET AL., ANIMAL LAW (1st ed., Carolina Academic Press 2000).

3. *See* GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? (2010) (presenting an essay from Francione, a rights advocate, criticizing the welfarist agenda for not significantly improving animal

[nonhuman] animals[4] are entitled to protection from human harm, the degree and form of protection are hotly contested.[5] For over forty years, leading legal minds have debated whether the welfare approach[6] or rights approach[7] is the best tool for improving the legal treatment of animals.[8] Animal advocacy groups have made significant improvement in the treatment of farm animals through welfarist measures.[9] Although litigation strategies based on animal rights theory have captured public

welfare while reinforcing the status of animals as property and an essay by Garner, an animal protectionist, defending welfare reforms and criticizing the rights agenda as politically impossible and too idealistic).

4. For the remainder of the Article, I use the term "animal" to refer to nonhuman animals. Clearly, humans are animals—this is merely a stylistic choice designed to make the Article more readable.

5. Joyce Tischler, *Building Our Future*, 15 ANIMAL L. 7, 7 (2008) ("The chasm between the animal rights ideal and the widespread, institutionalized exploitation and oppression of animals seems insurmountable.").

6. The welfare approach views animals as the property of humans and focuses on anti-cruelty laws banning inhumane treatment of pets and some livestock. Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 539–40 (2000); Richard Epstein, *Animals as Objects, or Subjects, of Rights* (Univ. Chi. Olin Law & Econ., Working Paper No. 171, 2002).

7. In the 1970s, influential thinkers rejected the welfarist approach as insignificantly protective of sentient creatures kept in inhumane conditions. Animal rights theory emerged, providing a variety of philosophical arguments for extending some degree of human rights to animals with human-like qualities. Welfarists argue for more immediate, incremental change, whereas animal rights theorists advocate for a broader social revolution, analogous to the civil rights movement. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 1–2, 16 (2nd. ed. 1990) (analogizing animal rights to women's struggle for the right to vote); GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995); Martha Nussbaum, *Beyond 'Compassion and Humanity': Justice for Nonhuman Animals*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

Of course, welfarism bleeds into animal rights theory, and vice versa—some welfarist measures are justified on the philosophical work of animal rights theory, and animal rights litigation strategies sometimes point towards welfarist advances to demonstrate a shifting tide in public and judicial opinion.

8. Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001); ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); Posner, *supra* note 6, at 528 (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)) (distinguishing between animal welfare and animal rights).

9. In the fortieth anniversary of his canonical book, *Animal Liberation*, Peter Singer lists among the success of the animal rights movement a number of improvements in the condition of farm animals, and those used for cosmetics testing. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR THE TREATMENT OF ANIMALS (2014).

attention, they have gained little traction with courts.[10]

In truth, both approaches have shortcomings. Most notably they do little to help wildlife, sea creatures, or species low on the so-called tree of life.[11] Current approaches have also faired relatively poorly in legal forums, with prominent judges rejecting the animal rights theory as too slippery a slope[12] and state legislatures acting to protect ranching interests from welfarist interventions.[13] Meanwhile, the virtually nonexistent legal status and inhumane treatment of some animals persists,[14] despite widespread public support for improved

10. *See* Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?,* N.Y. TIMES MAG. (Apr. 23, 2014), https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html [https://perma.cc/Z4LB-4UY5]; Nonhuman Rights Project *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392 (N.Y. App. Div. 2017) (denying habeas corpus relief for two adult male chimpanzees); Matter of Nonhuman Rights Project, Inc. v. Presti, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015), *leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015) (same); People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014), *leave to appeal denied*, 38 N.E.3d 828 (N.Y. 2015); Matter of Nonhuman Rights Project Inc. v. Stanley, 2014 N.Y. Slip Op. 73149(U) (N.Y. App. Div. 2014) (declining to sign an order to show cause for a habeas petition seeking release of two different chimpanzees confined for research purposes).

11. Some animal species "saved" by the Endangered Species Act are kept captive in zoos; their habitat wholly eliminated. *See* IRUS BRAVERMAN, ZOOLAND: THE INSTITUTION OF CAPTIVITY (2012).

12. Posner, *supra* note 6, at 533; *see* cases cited *supra* note 10.

13. For a list of efforts to implement "ag-gag legislation" at the state level, see *What is Ag-Gag Legislation?*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.aspca.org/animal-protection/public-policy/what-ag-gag-legislation#Ag-Gag%20by%20State (last visited Nov. 3, 2017) [https://perma.cc /K8KZ-7PNZ] (reporting efforts to enact such legislation in more than twenty states). *But see* Wild Earth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222 (10th Cir. 2017) (upholding the right of citizens to gather data on public land, with a fact pattern emerging from ag-gag legislation).

14. For example, the Supreme Court recently struck down a statute that would ban 'crush videos' of animals being smashed, finding that posting such videos constituted speech protected by the First Amendment. United States v. Stevens, 559 U.S. 460 (2010). Meanwhile, almost a third of Americans believe animals should "have the same rights as people," and nearly two-thirds believe animals "deserve some protection." Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP NEWS (May 18, 2015), http://www.gallup.com/poll/183275/say-animals-rights-people.aspx [https://perma.cc/8HDR-PBFE]; *see also* Lisa Beck & Elizabeth A. Madresh, *Romantic Partners and Four-Legged Friends: An Extension of Attachment Theory to Relationships with Pets*, 21 ANTHROZOÖS 43 (2008); Frank Newport et al., *Americans and Their Pets*, GALLUP NEWS (Dec. 21, 2006), http://www.gallup.com/ poll/25969/americans-their-pets.aspx [https://perma.cc/E6HR-FGBU]; *More Than Ever, Pets Are Members of the Family*, HARRIS POLL (July 16, 2015, 1:00 PM), http://www.theharrispoll.com/health-and-life/Pets-are-Members-of-the-Family.html [https://perma.cc/RH25-DWUZ] [hereinafter *Members of the Family*].

treatment.[15]

This Article charts a new path forward in animal law: It proposes affording animals property rights, the legal ability to own land and chattel.[16] This model envisions human representatives vested with a fiduciary duty to oversee the intergenerational wellbeing of all creatures within an animal-owned ecosystem. Wildlife and sea creatures are the primary beneficiaries of this model, although pets would also gain additional protections.[17] Focus on wildlife within the animal rights movement is sorely needed. Tens of thousands of species become extinct annually,[18] largely due to habitat loss caused by land development and other human activities.[19]

Absent conscientious and coordinated action, nature will

For a discussion of how criminalization of animal-protecting behaviors is out of tune with social values, see Justin F. Marceau, *Killing for Your Dog*, 83 GEO. WASH. L. REV. 943, 947 (2015) (noting that common law doctrines and statutes were developed at a time when the relationships between humans and animals were different).

15. Richard Posner has noted that "[t]he law's traditional dichotomy between humans and animals is a vestige of bad science." Posner, *supra* note 6, at 528. A 2006 Gallup poll reflected that six in ten Americans own some type of pet. Newport et al., *supra* note 14. Pets are increasingly seen as members of the family with more than half of American pet owners giving their pets Christmas presents and forty-five percent purchasing birthday presents for them. *Members of the Family, supra* note 14. People, on average, rate their relationships with their pets as more secure on every measure than their relationships with their significant others. Beck & Madresh, *supra* note 14, at 43; *Members of the Family*, *supra* note 14.

Despite the strong connections between many people and their pets, some people are committed to maintaining the age-old theological divide between people and animals. Siebert, *supra* note 10.

16. Pets can already inherit property from their human owners in most states. I flag the effects of my proposal on pets at a few points throughout this Article, but do not give the topic the sustained attention.

17. TOM REGAN, THE CASE FOR ANIMAL RIGHTS 78 (1983).

18. E.O. WILSON, THE DIVERSITY OF LIFE 280 (1992) (noting that three species are being lost hourly, seventy-four species daily, and 27,000 species annually); Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145, 145–47 (2008) (predicting that 15 to 37 percent of the study sample species will be "committed to extinction" due to climate change over the next half century).

19. Jamison E. Colburn, *Permits, Property, and Planning in the Twenty-First Century: Habitat as Survival and Beyond, in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 81, 82 (Jonathan H. Adler ed., 2011) (noting that "habitat disruption and loss" is the "most serious and pervasive threat to biodiversity today"); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 607 (1998) (noting that "scientists agree that habitat destruction is the primary legal agent" to wildlife).

disappear, and so too will the animals living in it.[20] Habitat loss is endemic and worsening.[21] Public land has provided a vital safety zone for nature, yet it is imperiled by threats at both the state and federal level.[22] I suggest that responsibility for habitat loss lays at the feet of the anthropocentric system of property.[23] By excluding animals from our property regime, we have discounted their need for shared natural space.[24]

According to some scientists, only a massive set-aside of devoted wildlife habitat can prevent widespread extinctions. Recently, biologist E.O. Wilson set forth a proposal to set aside half of the land on earth for animals to avoid catastrophic species loss.[25] This Article outlines a legal strategy that may facilitate more rapid and stable actualization of Wilson's goal. Privatized animal interests also insulate species conservation from changing political tides or budget cuts affecting public lands—a particularly salient consideration in the current political push to divest public lands.[26]

20. ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014). To my mind, there is no difference between animal suffering caused immediately at the hands of humans (e.g., an abused pet or a lab animal) and the less-direct but still knowing infliction of suffering through land development (e.g., death by starvation or being hit by a car, both of which are statistically inevitable outcomes given land development patterns and the continued foreclosure of natural habitat). In each case, human action directly causes animal suffering. If we are culpable for our treatment of captive animals, then we also bear responsibility for undertaking actions that we know will lead to the inevitable suffering of wildlife.

This is not a normative claim about the need for, or degree of, suffering which we might appropriately inflict (which I believe is more than none, as humans too are part of the ecosystem). It is instead limited to the claim that a distinction between harming captive and non-captive animals based upon the directness of harm is likely insufficient, given the knowledge that harm will be the inevitable outcome of human activity in either case.

21. E.O. WILSON, HALF EARTH: OUR PLANET'S FIGHT FOR LIFE (2016) [hereinafter WILSON, HALF EARTH].

22. Agency action to set aside habitat designations on private lands is famously mired by controversy. In the backdrop, public lands have provided a less dispute-ridden home for wildlife.

23. Karen Bradshaw, *Natural Systems Theory: The Biological Origins of Property* (N.Y.U. Classical Liberal Inst., Working Paper No. 9, 2018).

24. The exception to this trend is the maintenance of habitat for game hunting through private conservation programs, like Ducks Unlimited, and private hunting and fishing clubs.

25. WILSON, HALF EARTH, *supra* note 21.

26. Heather Hansman, *Congress Just Made It Easier to Sell Off Federal Land, Including National Parks* (Jan. 20, 2017), http://www.businessinsider.com/congress-lays-groundwork-to-get-rid-of-federal-land-and-national-parks-2017-1 [https://perma.cc/9LHW-N9KL].

Trusts would largely operate under a system of private governance against a backdrop of trust law. Each trust would be required to conform to rules based upon evolving social, ecological, and economic factors created by a centralized body of credible biologists.[27] Human trustees would manage animal-owned land at the ecosystem level, in trust or corporate form, operating under a fiduciary duty to their animal clients. Animal-owned property would be fully alienable. Trustees could sell the land or resources, however, only in accordance with rules designed to ensure the continual protection of animals.[28] Advocates could use either legislation[29] or litigation[30] to formalize an existing, but largely unrecognized, body of animal property law.[31]

Others have begun to think about the philosophical questions of animal property rights;[32] I explore the legal issues. This includes grappling with implementation challenges, such as: establishing standing for animals to bring suit; clarifying a standard for human representation of animal interests; determining how competing claims of various animals on the landscape would be managed; the comparative claims of native and invasive species; and resolving the inherent paradox of animals both being and owning property.[33] Some of these questions have already been addressed by philosophers, advocates, and legal scholars who have spent decades of careful attention to animal rights issues.[34] Several outstanding issues

27. *See infra* text accompanying notes 159–161.

28. For an overview of the problems that can emerge from inalienable property rights, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

29. Congress could pass a statute granting animals the legal right to own land and standing to enforce their claims in court. It could also transfer title of public lands in the western United States currently managed for wildlife to animal owners collectively. *See infra* Section IV.A.

30. This model relies upon private governance and, potentially, international governance. A private body of conservation biologists would determine the standards for certifying trusts. On the international level, countries could agree to transfer the currently un-owned High Seas to ocean animals.

31. *See infra* Part IV.

32. John Hadley, an Australian philosopher, has set forth the philosophical arguments for animal property rights. JOHN HADLEY, ANIMAL PROPERTY RIGHTS: A THEORY OF HABITAT RIGHTS FOR WILD ANIMALS (2015). I focus on the legal aspects of the project, with specific application to the United States.

33. *Id.*

34. For example, the Ninth Circuit has suggested that Congress has the Constitutional authority to pass legislation granting animals standing. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) (stating that "nothing in the

would require judicial resolution, however.[35] I flag potential grey areas, then outline their current doctrinal and theoretical treatment.

A property rights approach may gain more traction than current approaches in animal law. Relying upon property law provides a substantial body of precedent supporting rights expansion, particularly given that animals are customary users of lands.[36] Existing, expansive property rights for nonhumans limit the concerns surrounding slippery slope arguments that have plagued efforts to extend human rights to animals.[37] Even many animal lovers are hesitant to accept social shifts that would criminalize eating a burger or swatting a mosquito. A property rights approach allays such fears by limiting the changes to property law and social norms.[38] As a result, it should appeal to a broad array of groups ranging from pet owners to hunters, free market environmentalists to conservationists.[39]

Admittedly, there is much that the property rights approach does not achieve. It sets aside the important work of welfare: improving the conditions of pets and livestock. Property rights also fall short of full human rights; they do little to help sensitive and intelligent primates locked in cages. The shortcomings of each approach illustrate why the field of animal law is poised for a broader shift, one in which advocates

text of Article III of the U.S. Constitution explicitly limits the ability to bring a claim in federal court to humans") (citing to U.S. CONST. art. III); *see* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) (arguing that Congress could grant standing to animals, but has not) [hereinafter Sunstein, *Standing for Animals*]; Katherine A. Burke, *Can We Stand For It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633 (2004) (arguing the same).

35. How humans would discern animal interests instead of imputing human desires to animals, for example, is challenging. Such considerations are not without precedent—however, New Zealand has afforded a river legal personhood, and the Ecuadorian constitution was recently amended to grant nature legal personhood. Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (May 16, 2017), https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being [https://perma.cc/DH7Z-KGXX]; Constitución de la República del Ecuador, Sept. 28, 2008, art. 71.

36. *See infra* Part II.

37. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000); *see* Posner, *supra* note 6; *see also* Epstein, *supra* note 6.

38. Posner, *supra* note 6, at 528 (questioning where nonhuman animal rights would end).

39. *See infra* Section III.A.3.

overcome the rights/welfare divide and instead adopt a pluralistic approach. Just as the issues of animal treatment are complex and varied, so too must be the legal solutions. Too close a focus on the false dichotomy of rights or welfare has caused some commentators to overlook new and creative approaches. My proposal's radical departure from current conversations suggests that unexplored alternative paths to improving animal wellbeing exist.

The Article proceeds in four parts. Part I outlines the current state of polarization in animal law, with a growing chasm between welfare and rights approaches. Part II explores a previously unidentified body of animal property law, showing that millions of acres of land in the United States are already being managed, at least in part, to benefit wildlife. Part III considers the possibility of formally incorporating animals into our system of property rights and walks readers through difficult questions about how rights would be managed, by whom, and under what standards. Part IV considers how granting animals property rights would affect animal welfare, species conservation, and property theory. The Article concludes by suggesting that the field of animal law should move beyond the familiar rights versus welfare divide and embrace new, pluralistic approaches to improving animal welfare.

I. POLARIZED ANIMAL LAW

"Every reasonable person believes in animal rights," according to Cass Sunstein.[40] Law has lagged public opinion, however, failing to provide even basic protections to many animals.[41] One-third of Americans believe that animals should have the same rights as people,[42] yet a growing body of

40. Sunstein, *supra* note 2, at 401.

41. Only three percent of Americans believe that animals need little protection from harm "since they are just animals." Riffkin, *supra* note 14; Marceau, *supra* note 14, at 952–59 (noting the discord between social attitudes of pets as family members and the legal status of pets); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482 (2003) ("[T]he law fails to reflect the special relationships shared between animal guardians and their companion animals [because the] animals are legally classified as property.").

42. Riffkin, *supra* note 14 (reporting Gallup poll result that one-third of

jurisprudence rejects progressive advances to improve the legal status of animals.[43] Animal law is a burgeoning practice area with rapidly increasing inclusion in the law school curricula[44] yet it remains largely undertheorized. For forty years, leading legal thinkers have remained theoretically split between welfare and rights approaches, with much infighting between the camps and little outside innovation.[45]

Western religious, philosophical, and cultural traditions have distinguished humans and animals for thousands of years,[46] and animals in the United States today are considered the property of human owners.[47] The legal rights animals possess[48] center around protection from physical harm and mistreatment.[49] This largely reflects the welfarist approach, in which animals are property owned by humans and protected by anti-cruelty measures.[50]

The Animal Welfare Act, an anti-cruelty statute, reflects this approach by outlawing egregious cruelty and abuse to some categories of animals.[51] Modern welfarists focus on

Americans want animals to have the same rights as people).

43. Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004); Tilikum *ex rel.* People for the Ethical Treatment of Animals v. Sea World Parks & Entm't Inc., 842 F. Supp 2d 1259 (S.D. Cal. 2012). *But see* Palilia v. Haw. Dep't Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988).

44. In 2001, only nine law schools in the United States offered a course in animal law; today over 150 do. *Where Should You Go to Law School*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/resources/law-professional-law-student-resources/law-students-saldf-chapters/where-should-you-go-to-law-school/ (last visited Dec. 26, 2017) [https://perma.cc/P77T-WYEU].

45. This is admittedly an oversimplification given the relationship between the animal rights and animal welfare approaches.

46. Some ancient societies deified animals. Mayans, for example, regarded jaguars as sacred. DAVID E. BROWN & CARLOS A. LOPEZ GONZÁLEZ, BORDERLAND JAGUARS: TIGRES DE LA FRONTERA 68 (2001).

47. Liesner v. Wanie, 145 N.W. 374 (Wis. 1914) (describing American law regarding wild animals as things to be possessed).

48. Cass R. Sunstein, *Standing for Animals* 3 (Univ. Chi. Pub. Law & Theory, Working Paper No. 06, 1999) ("[I]t is entirely clear that animals have legal rights, at least of a certain kind."); Sunstein, *Standing for Animals*, *supra* note 34, at 1333. *Cetacean Cmty.*, 386 F.3d at 1175 ("Animals have many legal rights, protected under both federal and state laws.").

49. Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012).

50. Famed naturalist Aldo Leopold suggested investing responsibility for wildlife with landowners. ALDO LEOPOLD, GAME MANAGEMENT (1933).

51. §§ 2131–2159. For additional examples of statutes addressing only some members of the animal kingdom, see Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d (2012); Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2012); Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–1543 (2012).

pragmatic, instrumentalist lobbying and litigation, with goals like criminalizing dog fighting, reducing market opportunities for "puppy mills" with inhumane breeding conditions, and preventing cruel factory farm practices.[52] Economic arguments for welfarism suggest that human owners invest in proper care for their animals because they internalize the benefits of doing so.[53] Against this backdrop, a mix of local, state, and federal legislation serves to prevent socially unacceptable treatment of animals.

Critics argue that the welfare approach is insufficiently protective in practice, and both theoretically and morally wanting.[54] The Animal Welfare Act, for example, provides no protection for farm animals, birds, rats, and mice.[55] Further, existing statutes frequently do not grant standing to animals or activists to enforce rights, leading to under-enforcement.[56] An anti-cruelty approach also permits dignity harms to creatures, who some view as the mental and moral equivalent to humans.[57] Animal rights theory emerged in the 1970s as an alternative to welfarism designed to dramatically improve the legal treatment of animals. It focused on providing an alternative basis for granting legal protection to, and even legal personhood for, animals.[58]

Animal rights theorists suggest that some animals possess sufficiently human-like characteristics and that it is immoral to kill them for use as food or fur, or keep them in captivity.[59]

52. SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS (5th ed. Carolina, 2014).

53. Posner, *supra* note 6, at 539 ("One way to protect animals is to make them property, because people tend to protect what they own."); Epstein, *supra* note 6.

54. *See, e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS (3d ed. 2004).

55. 9 C.F.R. § 1.1 (2017); *see* Animal Legal Def. Fund v. Espy, 23 F.3d 496 (D.C. Cir. 1994).

56. U.S. CONST. art. III. The Supreme Court has understood Article III as requiring plaintiffs to show an injury in fact, as a result of an action by the defendant, that could be redressed if the court ruled for the plaintiff. Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992). Congress may eliminate standing rules if it does so expressly by statute and meets a variety of prudential requirements. Sunstein, *supra* note 2, at 11.

57. *See* Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS U. L. REV. 397, 398–99 (1996) ("The rights theorist rejects the use of animals in experiments, or for human consumption, because such use violates fundamental obligations of *justice* that humans owe to nonhumans, and not simply because these activities cause animals to suffer.").

58. *Id.*; SINGER, *supra* note 7.

59. For a philosophical discussion on why animals are worthy of protection, see Nussbaum, *supra* note 7. For a discussion on the philosophical considerations

Peter Singer argued that all beings capable of suffering should be considered equally for humane treatment.[60] Tom Regan suggests that mammals possess consciousness and thus have an identity that vests them with inherent value.[61] He takes a more aggressive stance than Singer, suggesting that mammals should not be used for food, testing, or research.[62] Regan captured the distinction between animal welfare and animal rights theory saying: "Not for larger cages, we declare, empty cages."[63] More recently, Rachel Nussbaum Wichert and Martha Nussbaum have argued for applying the capabilities approach to animals, suggesting that they have an inherent right to ten vital characteristics of a well-lived life.[64] Collectively, these approaches formed the basis for the animal rights litigation strategy.[65] Progress has proven slow, however.

Although animal rights theorists are doing important work on numerous fronts, the current legal posture is at once overly and insufficiently broad. Judges resist even moderate advances, raising concerns of a slippery slope.[66] Yet, the animal rights approach also fails to capture many animals worthy of protection, including wildlife and sea creatures. It does little to limit habitat loss due to land development, the leading cause of wildlife loss.[67] Moreover, many theorists focus on creatures

surrounding extending animals property rights, see HADLEY, *supra* note 32.

60. SINGER, *supra* note 7 (arguing that all beings capable of suffering should be considered equally, regardless of suffering).

61. REGAN, *supra* note 54.

62. *Id*.

63. *Id.* at xiv.

64. Rachel Nussbaum Wichert & Martha C. Nussbaum, *Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission*, 18 J. HUM. DEVELOPMENT & CAPABILITIES 356, 365–66 (2017).

65. For example, Steven Wise, founder of the Nonhuman Rights Project, has created a sophisticated, multi-decade litigation strategy arguing that animals have constitutional rights. James C. McKinley, Jr., *Arguing in Court Whether 2 Chimps Have the Right to 'Bodily Liberty'*, N.Y. TIMES (May 28, 2015), https://www.nytimes.com/2015/05/28/nyregion/arguing-in-court-whether-2-chimps-have-the-right-to-bodily-liberty.html [https://perma.cc/QWT2-PW6G].

66. Posner, *supra* note 6, at 533.

67. One could note that critical habitat designations, required under the Endangered Species Act accomplish this goal, but numerous scholars have shown that this statutory provision has under-delivered due to political factors. William H. Allen, *Reintroduction of Endangered Plants*, 44 BIOSCIENCE 65, 68 (1994) (noting that the political economy surrounding pushing species off economically valuable land to permit development is "90% politics and 10% biology . . . [a]nd biology is usually the easy part"); Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It*

higher on the so-called tree of life: creatures that are relatively human-like.[68]

Some find this human-centric basis for protection problematic. It overlooks creatures, like ants and bees, which maintain remarkably sophisticated social systems, but fail to evidence the demonstrations of intelligence used to justify improved treatment of elephants, whales, and chimpanzees. And, although ecosystems theory has permeated virtually every other realm of public consciousness—we generally understand that every creature in a system is dependent upon other creatures in the shared natural environment—animal rights theory largely fails to grapple with this point, focusing instead on the plight of individual species or animals.[69]

Meanwhile, the limitations of focusing more on animals than their habitat is producing perverse results.[70] Consider a few examples. Some animals "saved" from extinction exist only in captivity, in zoos, their natural habitat permanently destroyed.[71] There is literally no place in the wild to which they can return.[72] Some lions are bred and kept in captivity in Africa, released only for safari hunters to kill them.[73] Similarly,

(Still) Matters, 14 DUKE ENVTL. L. & POL'Y F. 441, 445 (2004) (arguing that rhetoric about the harms of the Endangered Species Act "has steered the U.S. Fish and Wildlife Service . . . toward compromise and to a kind of enforcement scheme that disregards the Service's obligations under the Endangered Species Act"); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 62 (2001) (noting that agencies "seek out any flexibility the statute allows, and exploit it to deflect controversy"); Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U. J.L. & POL'Y 175, 230 (2010) (noting that implementation of the Endangered Species Act "has been a story of political compromise and accommodation of development interests, with only scattered sightings of an administrative spine").

68. For a fascinating exploration of animal capacities, see FRANS DE WAAL, ARE WE SMART ENOUGH TO KNOW HOW SMART ANIMALS ARE? (2016).

69. For a discussion of biocentricity, a worldview in which humans are part of, but not the focus of, the natural environment, see PAUL W. TAYLOR: RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986).

70. Notably, the Center for Biological Diversity, a nongovernmental organization devoted to promoting animal rights, regularly litigates to enforce the Endangered Species Act. *Our Story*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/about/story/index.html (last visited Nov. 21, 2017) [https://perma.cc/BTJ6-69RV].

71. BRAVERMAN, *supra* note 11, at 62.

72. *Id*.

73. Patrick Barkham, *'Canned Hunting': The Lions Bred for Slaughter*, GUARDIAN (June 3, 2013, 2:00 PM), https://www.theguardian.com/environment/2013/jun/03/canned-hunting-lions-bred-slaughter [https://perma.cc/9KA3-YBQB].

trophy hunting for African animals living in captivity in Texas is now a billion-dollar industry, justified as a conservation effort.[74]

Subdivision developers contracted with the government to move desert tortoises from their habitat to a conservation center to allow for a subdivision development.[75] When the real estate market crashed, developers defaulted on their promise to provide funding, and the center shut down.[76] Government biologists euthanized hundreds of these now-homeless tortoises.[77] Similarly, an advisory board to the Bureau of Land Management proposed killing or selling 45,000 wild horses, which graze on government-owned lands used for cattle ranching.[78] These are but a few stories showing how human-animal competition for property leads to animal deaths and extinction.[79] It is time for new approaches to this problem, particularly ideas that avoid pitting human interests against those of animals.

An animal property rights regime has the potential to save

The article describes that there are more captive lions (5,000) in Africa than wild lions (2,000). The article is an exposé on "canned hunting," described as:

> A fully-grown, captive-bred lion is taken from its pen to an enclosed area where it wanders listlessly for some hours before being shot dead by a man with a shotgun, hand-gun or even a crossbow, standing safely on the back of a truck. He pays anything from £5,000 to £25,000, and it is all completely legal.

Id. Although many animal activists disagree, some argue that safari hunting provides conservation benefits. *See* P.A. Lindsey et al., *Economic and Conservation Significance of the Trophy Hunting Industry in Sub-Saharan Africa*, 134 BIOLOGICAL CONSERVATION 455, 456 (2007) (describing the conservation benefits created by safari hunting).

74. Manny Fernandez, *Blood and Beauty on a Texas Exotic Game Ranch*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/us/exotic-hunting-texas-ranch.html [https://perma.cc/H8A3-RFT8]. For a discussion of the distinctions between wild and captive species, see IRUS BRAVERMAN, WILDLIFE, THE INSTITUTION OF NATURE (2015).

75. Hannah Dreier, *Desert Tortoise Faces Threat from Its Own Refuge*, YAHOO! FIN. (Aug. 26, 2013), https://finance.yahoo.com/news/desert-tortoise-faces-threat-own-105104423.html [https://perma.cc/FQ7C-QSDP]; Karen Bradshaw, *Expropriating Habitat*, 43 HARV. ENVTL. L. REV. (forthcoming 2019).

76. Dreier, *supra* note 75.

77. *Id.*

78. Niraj Chokshi, *No, the Federal Government Will Not Kill 45,000 Horses*, N.Y. TIMES (Sept. 15, 2016), https://www.nytimes.com/2016/09/16/us/no-the-federal-government-will-not-kill-45000-horses.html [https://perma.cc/C4T5-LEEQ].

79. For a discussion of human-animal conflict for land and natural resources, see Bradshaw, *supra* note 23.

animal habitat and, by extension, generations of animals that live on the land. This approach is complementary to existing approaches to animal law; it provides a new tool in the toolkit of legal interventions to increase the wellbeing of animals.

II. GRANTING ANIMALS PROPERTY RIGHTS

What would happen if legislatures vested nonhuman animals with property rights? The answer is somewhat surprising—they already have. Synthesizing constitutional provisions, statutes, and common law doctrines reveals a previously unrecognized body of law granting animals' property interests. These interests are not presently envisioned as property rights, but the only distinction between existing animal property claims and formal property rights is the identity of the claim-holders as nonhuman.

A pluralistic view of history and religion shows a legacy of animal property rights across time and place.[80] Some Native American tribes recognized animal rights to land and resources as equivalent to humans.[81] In Medieval France, Italy, and Switzerland, local officials brought class action lawsuits against insects and rodents who occupied land.[82] Courts held elaborate trials against animals, in which the animals appeared in court and were represented by skilled lawyers.[83]

Animals have held implicit property interests in the United States since its founding. Colonial courts adopted the British common law doctrine of *fera naturae*, which grants wildlife rights of passage over private lands.[84] In 1868, President Ulysses S. Grant set aside the Pribilof Islands in Alaska to provide a protected home for the northern fur seal,

80. Although some have claimed that the notion of animal rights violates religious principles, a pluralistic view of history and religion shows substantial variation across place and time.

81. Tribal formulations of property rights likely vary. One articulation of the relationship between humans and animals as shared users of common lands grouped resource users as including "children, beasts, birds, fish, and all men." Another describes animals and humans having lived in "equality and mutual helpfulness." *See* discussion *infra* note 181.

82. Peter T. Leeson, *Vermin Trials*, 56 J. L. & ECON. 811 (2013). This historical practice raises questions of modern relevance about the range of claims that adjacent landowners could bring under an animal rights regime.

83. WISE, *supra* note 37, at 35–36; Siebert, *supra* note 10.

84. Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 626 (1995).

restricting human land uses in deference to an animal user.[85] In 1903, Theodore Roosevelt issued an executive order establishing the Pelican Island Migratory Bird Reservation.[86] Establishing animal reserves did more than create sanctuaries where animals could not be hunted; it created a permanent habitat where they could live, creating an implicit property interest for animals in the land. By restricting the ability of people to act in certain ways, the laws essentially grant protections to animals that parallel how property rules function for human rights holders.

Early legislatures and courts also granted animals rights to chattel and natural resources. In 1904, the New York legislature passed a law prohibiting people from disturbing "the dams, houses, homes, or abiding places" of wild beaver.[87] In *Barrett v. State*,[88] a New York court interpreting this law noted that legislatures could protect animals, which could then take property from individual persons, noting: "Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries."[89] The court went on to hold that property owners could not recover against the state for the value of trees felled by protected beavers.[90] Similarly, today, the government does not reimburse ranchers for livestock killed by endangered species,[91] and landowners may not cut down a tree in which a bald eagle has nested.[92]

Congress has granted animals property-right-like interests in land, both public and private, for over one hundred years. Below, I review a variety of statutes that grant animals such

85. *How Long Has the Federal Government Been Setting Aside Lands for Wildlife?*, U.S. FISH AND WILDLIFE SERVICE, https://www.fws.gov/refuges/about/acquisition.html (last visited Nov. 5, 2017) [https://perma.cc/5Z8Z-VTT8].

86. *Id.*

87. 1904 N.Y. Laws 1672.

88. 220 N.Y. 423 (N.Y. 1917).

89. *Id*. at 426.

90. *Id*.

91. *See* Gibbs v. Babbitt, 214 F.3d 483, 496–98 (4th Cir. 2000) (noting that farmers and ranchers take wolves primarily to protect economic assets in the form of livestock and crops). In practice, livestock losses caused by endangered species are often compensated by nongovernmental organizations. Kate Yoshida, *A Symbol of the Range Returns Home*, N.Y. TIMES (Jan. 6, 2014), http://www.nytimes.com/2014/01/07/science/earth/a-symbol-of-the-range-returns-home.html [https://perma.cc/AZE3-4K6Z].

92. The Migratory Bird Treaty Act prohibits humans from taking the nests of all species native to the United States, but only if they are occupied. *See* 16 U.S.C. § 703 (2012).

interests. But first, note that the outer limits of Congress's constitutional authority to extend animals property rights remain untested. The Supreme Court has never ruled that a Congressional grant of rights to animals violated either the Property Clause or Commerce Clause.

Indeed, the Supreme Court has repeatedly held that the Property Clause[93] affords Congress the authority to govern wildlife on federal lands.[94] In *Kleppe v. New Mexico*,[95] Thurgood Marshall, writing for the unanimous Court, noted that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[96]

Congress has vested wildlife with rights to public land that would comprise legally cognizable property rights if afforded to humans.[97] For example, the National Wildlife Refuge System, which includes over 150 million acres of public land, manages land to serve as habitat for fish and wildlife, albeit for the benefit of people: "The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."[98] More broadly, the Organic Act for eighty-four million acres of National Parks includes a directive to preserve wildlife on the land.[99] Similarly, preserving wildlife habitat is one of five

93. U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

94. Kleppe v. New Mexico*,* 426 U.S. 529 (1976).

95. *Id.*

96. *Id*. at 533.

97. Although some might suggest that animals merely have possessory rights on public lands, that is clearly not the case with, for example, Wildlife Refuges, which are managed specifically for wildlife. Although one may argue that this interest is analogous to a revocable license, then so too is any right to use public land, as Congress may eliminate that right either directly, or by divesting the land in question.

98. The National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd(a)(2) (2012).

99. The National Park Service and Related Programs Act, 54 U.S.C. § 100101(a) (2012) (describing the National Park Service purpose as to: "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the

objectives for the Multiple Use Sustained Yield Act, which covers millions of acres of public timberland and lands managed by the Bureau of Land Management.[100] Congress has also afforded land to individual species as with granting a herd of wild horses 31,000 acres in the Pryor Mountains of Montana.[101]

Congress has wielded its Commerce Clause[102] authority to enact a number of statutes allowing agencies to purchase and manage land on behalf of animals. For example, the Endangered Species Act authorizes the Secretaries of the Department of Interior and Department of Agriculture to acquire land and water necessary for fish, wildlife, or plant conservation[103] "by purchase, donation, or otherwise."[104]

The Act references previous acts in which Congress authorized agencies to buy land to promote the protection of fish and wildlife resources, including the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, and the Migratory Bird Conservation Act.[105] Each of these statutes allows government agencies to purchase land, water, and other property rights with the sole purpose of benefitting fish, wildlife, and plants.[106] Collectively, these statutes demonstrate

enjoyment of future generations"). *Frequently Asked Questions*, NAT'L PARK SERV., https://www.nps.gov/aboutus/faqs.htm (last visited Dec. 26, 2017) [https://perma.cc/25GF-6H2C] ("The system includes 417 areas covering more than 84 million acres.").

100. Federal Land Policy and Management Act of 1976, Pub. L. 94-579 (extending multiple use sustained yield laws to Bureau of Land Management lands); Multiple Use Sustained Yield Act of 1960, Pub. L. 86-517 (repealed 2014); George C. Coggins & Parthenia B. Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411 (1982).

101. *Pryor Mountain Wild Horse Range*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., https://www.blm.gov/programs/wild-horse-and-burro/herd-management/herd-management-area/montana-dakotas/pryor (last updated Aug. 20, 2015) [https://perma.cc/V95P-PVKH].

102. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

103. The Endangered Species Act, 16 U.S.C. § 1531(5) (2012).

104. § 1534(a)(2).

105. § 1534(a)(1) ("[T]he appropriate Secretary . . . shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate.").

106. Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742a–742j (2012); The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667e (2012); The Migratory Bird Conservation Act 16 U.S.C. §§ 715-715d, 715e, 715f–715k (2012).

Congress using its authority under the Commerce Clause to purchase and manage land for animals.

Similarly, Congress has used its Commerce Clause authority to create easements for some animal species on private land. Under the Migratory Bird Treaty Act, a human may not disturb a tree on land she owns if it contains a Bald Eagle or Golden Eagle nest, regardless of whether the nest is occupied.[107] When the Eagle invests the labor to build a nest in the tree, it creates a de facto property right superior to the de jure right of the human landowner.[108] The Endangered Species Act also permits agencies to designate private lands as critical habitat for endangered species, which requires landowners to evaluate the effect of their land uses on the endangered species and, sometimes, curb activity in the interest of animals.[109]

Congress has also authorized agencies to pursue tort claims for damage to animals and animal habitats under the public trust doctrine. Specifically, natural resource damages provisions contained in six statutes require the government to assert tort claims on behalf of the public for animals whose habitats are damaged by certain environmental harms, such as chemical spills on public lands.[110] These provisions require the tortfeasor to pay tort damages based on the perceived value of such claims; collected funds may only be used to directly benefit the injured species through programs such as habitat improvement.[111]

States have also afforded wildlife expansive property-right-like interests.[112] Wildlife continues to have unrestricted access

107. Migratory Bird Treaty Act prohibits humans from taking the nests of all species native to the United States, but only if they are occupied. 50 CFR § 10.13.

108. Wildlife are not thought to trespass on land under the doctrine of *fera naturae*, which allows them to roam freely. An interesting question is whether Congress abolishing the eagle's right would constitute a taking.

109. Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 310 (1997) (noting that "[a]lmost 80 percent of all ESA protected species had some or all of their habitat on privately owned land. More than a third of the protected species did not inhabit any federal land, making it impossible to ensure their recovery through federal land management, and less than a quarter had habitats located primarily on federal land"); David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 307–09 (1995).

110. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211 (2016).

111. *Id*. at 231.

112. One could even argue that there exists an approximation of a takings

across private property in every state grounded in *fera naturae*.[113] This doctrine affords animals greater rights than humans to cross private land.[114] States have also granted animals property rights to water use, sometimes above preexisting human uses. For example, California courts have held that the fish and wildlife protection scheme forms a "reasonable and beneficial" use of water under the terms of the state constitution.[115] In 2009, California passed a package of legislative reforms requiring water flow criteria to protect the resources of the delta ecosystem—essentially granting fish and wildlife water rights.[116]

On a different front, legal thinkers changed the Uniform Trust Code in 1990 to provide that domestic animals—pets—can inherit from their human owners.[117] A majority of states have since enacted pet trust statutes, allowing pets to inherit money and property from humans.[118] The result is that pets

regime for wildlife-owned property. Conversely, animals that take the chattel of human property owners—most often, livestock—are forced to pay for livestock takings through relocation or sometimes death.

113. Lueck, *supra* note 84.

114. The United States criminalizes human trespass on private property, unlike a handful of European nations in which people may access, walk, cycle, ride, ski, and camp on private land that they do not own. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2016); *see* United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 201–02 (Cal. Ct. App. 1986).

115. *See State Water Res. Control Bd.*, 227 Cal. Rptr. at 201–02.

116. CAL. WATER CODE § 85086.

117. UNIF. TRUST CODE § 408 (2000) ("A trust may be created to provide for the care of an animal.").

118. ALA. CODE § 19-3B-408 (2017); ALASKA STAT. § 13.12.907 (2017); ARIZ. REV. STAT. § 14-10408 (2017), § 14-2907 (2017); ARK. CODE. ANN. § 28-73-408 (2017); CAL. PROB CODE § 15212 (2017); COLO. REV. STAT. § 15-11-901 (2017); CONN. GEN. STAT. § 45A-489A (2017); DEL. CODE ANN. tit. 12, § 3555 (2017); FLA. STAT. § 736.0408 (2017); GA. CODE ANN. § 53-12-28 (2017); HAW. REV. STAT. § 560:7-501 (2017); IDAHO CODE § 15-7-601 (2017); 760 ILL. COMP. STAT. 5/15.2 (2017); IND. CODE ANN. § 30-4-2-18 (2017); IOWA CODE § 633A.2105 (2017); KAN. STAT. ANN. § 58A-408 (2017); KY. REV. STAT. ANN. § 386B.4-080 (2017); LA. STAT. ANN. § 9:2263 (2017); ME. STAT. tit. 18-B, § 408 (2017); MICH. COMP. LAWS § 700.2722 (2017); MISS. CODE ANN. § 91-8-408 (2017); MO. REV. STAT. § 456.4-408 (2017); MONT. CODE ANN. § 72-2-1017 (2017); NEB. REV. STAT. § 30-3834 (2017); NEV. REV. STAT. § 163.0075 (2017); N.H. REV. STAT. ANN. § 564-B:4-408 (2017); N.M. STAT. ANN. § 46A-4-408 (2017); NY EST. POWERS & TRUSTS LAW § 7-8.1 (2017); N.C. GEN. STAT. § 36C-4-408 (2017); N.D. CENT. CODE, § 59-12-08 (2017); OHIO REV. CODE ANN. § 5804.08 (West 2017); OKLA. STAT. tit. 60, § 199 (2017); OR. REV. STAT. § 130.185 (2017); 20 PA. CONS. STAT. § 7738 (2017); tit. 4 R.I. GEN. LAWS § 4-23-1 (2017); S.C. CODE ANN. § 62-7-408 (2017); S.D. CODIFIED LAWS § 55-1-21 (2018), § 55-1-22 (2018); TENN. CODE ANN. § 35-15-408 (2017); TEX. PROP.

have an implicit legal right to own property. One German Shepherd owns over $100 million in assets.[119] Billionaire Leona Helmsley bequeathed $12 million to her Maltese named Trouble, which a district court judge reduced to $2 million on the objections of Helmsley's children.[120] States have adopted laws explicitly authorizing animal trusts within the past twenty years, presumably a reflection of increased public support for statutes expanding animal property rights.

Humans tend to have strong personal attachments to animals, both wild and domesticated. Consequently, animals have long been the beneficiaries of property through individuals. In many instances, landowners implicitly or explicitly manage their property for the benefit of wildlife.[121] For example, government efforts have spurred timberland owners to manage their lands to promote wildlife habitat.[122] Several nonprofit organizations hold land for conservation purposes, including an estimated forty million acres under conservation easements that contain provisions concerning wildlife and wildlife habitat.[123]

An emerging issue in animal property law is whether copyright law grants animals rights. *Naruto v. Slater*,[124] a case appealed to the Ninth Circuit, explores who is the rightful

CODE ANN. § 112.037 (West 2017); UTAH CODE ANN. § 75-2-1001 (West 2017); VT. STAT. ANN. tit. 14A, § 408 (2017); VA. CODE ANN. § 55-544.08 (2017); WASH. REV. CODE § 11.118.005–110 (2017); W. VA. CODE § 44D-4-408 (2017); WYO. STAT. ANN. § 4-10-409 (2017). The District of Columbia also has a pet trust law. D.C. CODE § 19-1304.08 (2018).

119. Brad Tuttle, *The 10 Richest Pets of All Time*, TIME (Oct. 5, 2015), http://time.com/money/4054366/richest-pets-all-time/ [https://perma.cc/SP3C-DTLP] (listing a German Shepherd who inherited $80 million from Countess Karlotta Libenstein of Germany when she died in 1991 and $12 million left to a Maltese Terrier named Trouble, which a New York judge reduced to $2 million).

120. Cara Buckley, *Cossetted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES (June 9, 2011), http://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html [https://perma.cc/NPN9-QHZ2].

121. *See, e.g.*, Vernon C. Bleich et al., *Managing Rangelands for Wildlife*, *in* TECHNIQUES FOR WILDLIFE INVESTIGATIONS & MANAGEMENT, 873–897 (Clait E. Braun ed., 6th ed. 2005) (discussing managing wildlife on rangeland, particularly for public lands, as required by the Multiple Use mandate).

122. Bill Buffum et al., *Encouraging Family Forest Owners to Create Early Successional Wildlife Habitat in Southern New England*, PLOS (Feb. 26, 2014), https://doi.org/10.1371/journal.pone.0089972 [https://perma.cc/N6GR-TB3X].

123. Madeline Bodin, *Easements 101*, NATURE CONSERVANCY MAG., Oct–Nov. 2014, at 42.

124. Naruto v. Slater, No. 15-cv-04324, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016), *appeal docketed*, No. 16–15469 (9th Cir. July 28, 2016).

owner of a copyright to a selfie[125] taken by Naruto, a macaque, who used a camera left unattended on a tripod to take several pictures of himself.[126] The camera owner, photographer David Slater, claimed ownership to the copyright of the image.[127] People for the Ethical Treatment of Animals claimed that Naruto was the rightful owner of the copyright.[128]

U.S. District Judge William Orrick, who presided over the so-called "monkey selfie" case, said from the bench, "[t]his is an issue for Congress and the [P]resident . . . [i]f they think animals should have the right of copyright they're free, I think, under the Constitution to do that."[129] This analysis mirrors general agreement among courts and scholars that Congress has substantial untapped authority to formalize and expand the legal status of animals.[130] Although *Naruto* ultimately settled,[131] it is indicative of a broader approach to creatively expanding recognition of animal property rights.

III. IMPLEMENTING AN ANIMAL PROPERTY RIGHTS REGIME

This Part sketches a rough outline of an animal property rights regime, in which animals have property rights equivalent to those of humans and the legal standing to enforce those rights. This approach grants animals the right to own land and chattel, but does not extend other human rights to animals.[132] I envision land held in trust or by a corporation, managed by humans acting with a fiduciary duty to animals.

125. MONKEY SELFIE, https://media.npr.org/assets/img/2017/09/12/macaca_nigra_self-portrait3e0070aa19a7fe36e802253048411a38f14a79f8-s900-c85.jpg (last visited Nov. 21, 2017) [https://perma.cc/EGV3-PHNT].

126. *Naruto*, 2016 WL 362231.

127. *Id.*

128. *Id.*

129. Camila Domonoske, *Monkey Can't Own Copyright to His Selfie, Federal Judge Says,* NAT'L PUB. RADIO (Jan. 7, 2017), http://www.npr.org/sections/thetwo-way/2016/01/07/462245189/federal-judge-says-monkey-cant-own-copyright-to-his-selfie [https://perma.cc/9SAK-FARE].

130. Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).

131. *Naruto*, 2016 WL 362231.

132. More moderate alternatives including recognizing animals as holding occupancy rights to land, or granting a blanket prescriptive easement for wildlife on both public and private lands. The merits of such approaches might pass judicial muster.

The strongest approach would be that animals are displaced property owners, due reparations for unconstitutional takings of their property by early American settlers.

All animal trusts would be subject to a single private governance organization dictating best practices for trust and land management, based upon the recommendation of scientists.[133] Presumably, federal, state, and municipal governments may designate some portion of public land to animals. Internationally, nations might consider titling the currently unowned high seas to marine animal interests. Individual people could also grant property to animals, whether devoting a ranch to wildlife or a home to a beloved dog. Below, I outline the statutory and litigation approaches to implementing this regime, then I consider the potential benefits and harms of this approach.

A. Statutory Approach

Imagine that tomorrow Congress passes the Animal Property Rights Act, a law granting animals the right to own property. Congress transfers the title of 150 million acres of National Wildlife Refuges to private wildlife trusts, which are managed by human fiduciaries at an ecosystem level, subject to ongoing monitoring and evolving standards created by the private Animal Trust Organization. Moreover, the Act explicitly authorizes animals to hold title to real property received from human owners and hold intellectual property in animal creations (such as the monkey selfie). Finally, the Act affords animals standing to pursue their legal rights. Assume for now that the Act is constitutional.[134] This Section details how such a regime might operate and considers the practical dimensions of ownership, including how animals would hold and manage property.

1. Ownership Structures

How, precisely, would animals own land? Drawing upon

133. The certification regime is roughly similar to zoos operating under an umbrella private governance body that uses biological information to establish appropriate living conditions for animals. A single certifier is of vital importance here; the potential for diluted look-alike certifications competing for shared governing space can undermine otherwise valuable certification regimes. Karen Bradshaw, *Information Flooding*, 48 IND. L. REV. 755 (2015); Karen Bradshaw, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515 (2013).

134. Earlier analyses of the Property Clause, Commerce Clause, and trust law suggest that Congress likely has the power to enact such a law. *See supra* Part II.

analogies in human land ownership, one could imagine a variety of structures. Under one regime, each individual animal on a landscape might receive a share in a broader land holding. Problems abound with such a granular system, beginning with a requirement to establish and maintain a census of animals. Such a census would prove absurdly expensive and burdensome due to animals' incapacity to gather coupled with their near-constant movements and, potentially, seasonal migration. Small and highly mobile creatures would likely be underrepresented.

Further, individual vests would lead to inevitable conflict between species regarding land management. Various species have overlapping—sometimes competing—prey and habitat needs.[135] Maximizing landholding to benefit one species may harm or extirpate another. If a non-native invasive fish, for example, received property rights to water in a lake, its representatives might leverage those rights in a manner that would eliminate native fish populations. The diverse and competing land management goals for individual species would lead to burdensome conflict.

Additionally, it is difficult to constrain wildlife. If rights were granted to a species that subsequently moved due to climate change effects or prey loss, how would the species sell or barter its existing entitlement for land and resources elsewhere? Animals, lacking cognition of their ownership interests, would regularly create territories outside the strict boundaries of their individual landholdings in response to changed conditions.

One can, however, imagine limited situations in which vesting a particular species with rights makes sense. For example, Congress might convert existing lands held for mustangs to mustang-only title. Under such a grant, the land would be managed by human representatives for mustang land users. If a competing species entered the landscape—say, bison grazing on the same grassland—human land managers would exercise the right to exclude the bison on behalf of the wild horses. Such vesting may be crucial for saving imperiled species with limited wild habitat, such as captive breeding populations released into the wild.

Hesitancy arises, however, over Congress's ability to pick

135. *See* Bradshaw, *supra* note 23, at 7 nn.26–27.

"winners" and "losers" among animals. Human efforts to intervene with wildlife have a poor track record. Moreover, if the potential conditions of a land-owning species changes—say, the mustangs become so abundant that they spread into other lands—flexibility must be built into the property rights as well to accommodate competition between species. Public land, the uses of which can change at the whims of Congress, provides such flexibility. Additionally, it seems likely that congressional action would tilt towards granting land to charismatic megafauna, such that inequalities among species would abound.[136] Mammals would likely hold vast tracts of land whereas less popular species may hold little. Scientific observation suggests that such preferences are unwise, however, because the popular large species depend upon the less popular species lower in the food chain. The survival of the former depends upon the existence of the latter, making preferential policies damaging to both. For these reasons, I generally set aside the possibility of individual fish and wildlife owning land either directly or through a shared system.

Instead, the most sensible allocation strategy would vest animals with common property rights operating at the ecosystem level.[137] Each animal would retain a loose ownership interest in a trust managed for the benefit of all animals on a shared landscape. Enrollment into the trust would be unofficial and loosely defined based on mere possession of territory—a physical presence in the defined area. Wildlife biologists expert in animal surveys could affordably gather data about animal populations at the behest of animal land managers. With proper surveying techniques, seasonally or even more temporally disparate animals would nonetheless remain members. The increased popularity of voluntary human participation in scientific data gathering—crowdsourced data,

136. Pandas, whales, and polar bears are examples of charismatic megafauna that receive widespread support. David W. Cash, *Beyond Cute and Fuzzy: Science and Politics in the Endangered Species Act*, *in* PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES 106, 107 (Jason F. Shogren & John Tschirhart eds., Cambridge 2001) (noting that "40 percent of total recovery spending on vertebrate species from 1989 to 1993 was allocated to only 12 out of 236 species"); Andrew Metrick & Martin L. Weitzman, *Patterns of Behavior in Endangered Species Preservation*, 72 LAND ECON. 1, 10 n.10 (1996).

137. Charles Perrings et al., *The Biodiversity and Ecosystem Services Science-Policy Interface*, 331 SCIENCE 1139 (2011).

as with Christmas Day bird counts—may make this option both affordable and provide an opportunity to link humans with other animal users on a landscape.

This example prompts a yet-unanswered question: would human animals retain a right among other creatures within the landscape? Could we use land for recreational purposes, say hiking or hunting in animal-owned lands? It is hard to find a philosophically valid reason for excluding humans; as explained earlier, our system of property is inexorably linked to other animals.[138] Thus, the answer generally seems to be that humans would function as one of many animal owners in the landscape.

Allow me to pause here to note what has thus far been implicit: this proposal stops at property ownership and does not afford the full suite of human rights to animals. Accordingly, animals could still be shot, trapped, and exterminated under an expanded property rights regime. This reality highlights the need for additional laws to prevent property-hungry humans from eliminating broad swaths of the animal kingdom on desirable land. Existing laws about hunting limits would remain, as would the protections of the Endangered Species Act. Indeed, the threat of species becoming listed as threatened or endangered would chill extermination, as the level of protection then afforded the remaining animals would be much higher.

Still, one must be mindful of the propensity of Congress to change laws—if an animal property rights regime were enacted and then the Endangered Species Act repealed, animals would be dependent upon state hunting regulations to preserve their populations. If states strategically repealed hunting regulations, property-rich animals might be the target of widespread elimination at human hands. In this way, humans would act as an invasive species, taking over the property.

Importantly, however, the human representatives managing the property on behalf of the animals could impose private rules to halt the human invasion, just as they might with an invasive species on the land. Anglo-Saxon legal tradition allows private landowners to limit and license use of their property and independently determine the appropriate uses of that land. Consequently, animal land managers might

138. *See* Bradshaw, *supra* note 23.

impose strict limitations on hunting, employ game wardens to enforce the limitations, and use trespass or tort law to recover from offending humans. In this sense, property rights would vest in animals a right to self-preservation on their land independent from the whims of congressional or state protection. The concern, of course, rests in the ability of land managers to discern animal desires coupled with isolation from capture of human interests.

2. Management

The most difficult aspect of this thought experiment is how animals would handle the legal and practical functions of property ownership. Purists might suggest that animals should self-manage property, both on the ground and with respect to legal interests. Even small creatures like prairie dogs and blackbirds have successfully excluded humans from their territories. In a natural environment, apex predators like bears and wolves might be enough to successfully exclude or control human domination of the land. But such exclusion would rely upon enforcing animal rules and norms to humans on animal-owned land, such as not allowing guns. Then, the problem becomes one of interspecies communication.

Animals are incapable of communicating such detailed rules to humans and of enforcing those rules. The fields of property law and ethology—the scientific study of animal behavior—reveal, however, surprising parallels between human and animal systems of property.[139] Some animal behavior reflects what we think of, among humans, as property ownership.[140] Various species acquire territory through discovery, occupation, conquest, and labor.[141] Animals exclude other members of their species from their territory.[142] They establish and carefully mark boundaries using sophisticated visual, olfactory, and audio markers.[143] Animals resolve property disputes through ritualized aggression designed to

139. *Id*.
140. *Id.*
141. *See* William Henry Burt, *Territoriality and Home Range Concepts as Applied to Mammals*, 24 J. MAMMALOGY 346, 346 (1943) (noting that property ownership "is not peculiar to man, but is a fundamental characteristic of animals in general, [and] has been shown for diverse animal groups").
142. *See id*.
143. *See* Bradshaw, *supra* note 23.

intimidate rather than cause physical harm.[144] Some species also share, take, and transfer property; intergenerational transfer can follow default rules according to the gender of the offspring.[145]

Thus, behavior establishing property long described as innately human may instead be animal in nature.[146] Perhaps most notably for this discussion, animals can create, follow, and enforce property rules among members of conspecies[147] and even among some interspecies disputes. Natural hierarchy, for example, alerts lower-level animals to the need to avoid higher-level animals, reducing the incidence of forceful exclusion through killing, as with prey observing the boundary markers of predators. Such communication can be bidirectional, but it is rough and based primarily upon avoidance.

Humans and other animals have been sharing property in the wild for the whole of human existence, and continue to do so. Modern hikers watch for signs of bears—looking for prints, scrapes, or scat—to avoid them; they sing or wear bells in the woods to avoid interactions.[148] Campers and backpackers take care to keep food that might attract bears in impenetrable smell-proof containers to lessen the incentive for bears to enter the campsite.[149] However, new technologies and superior human force have lessened our sensitivity to such signals. Bears who venture into suburbs are trapped and released in more wild areas.[150] Humans venturing into nature may take guns or bear spray to ward off attack. Although technological

144. *See* J. Maynard Smith & G.R. Price, *The Logic of Animal Conflict*, 246 NATURE 15, 15–18 (1973) (noting that conflicts between animals of the same species often do not result in serious injury).

145. DAVID E. BROWN & CARLOS A. LOPEZ GONZÁLEZ, BORDERLAND JAGUARS: TIGRES DE LA FRONTERA (2001) (noting that jaguars follow a matrilineal system of inheritance; mothers transfer territory to their female offspring).

146. Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT'L L.J. 507, 515 (2013) (noting that the custom of deferring to the possessors of property is "very widespread" including "all of society or close to it" and "might even be hardwired"); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (noting that various restrictions on property use are universal, "true under any system of law").

147. *See supra* Part II.

148. Malia Wollan, *How to Survive a Bear Encounter*, N.Y. TIMES (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/magazine/how-to-survive-a-bear-encounter.html?_r=0 [https://perma.cc/PB38-C3PL].

149. *Id.*

150. *Id.*

innovation has granted our species the upper hand through armed confrontation, hikers still sing.

An extreme approach to resolving human-animal conflict on animal-owned lands might require humans to engage in resolution on the terms of the animal it challenges. Imagine humans wearing prosthetic antlers when they want to turn a meadow into a campground, challenging the deer who might object to the proposal using deer dispute resolution techniques. Although totally outlandish, this example highlights a largely unstudied question in ethology of how interspecies animal disputes over territory are resolved. Absent biological information that serves as a template, two options emerge: either humans must engage animals on the animals'—currently unknown—terms, or animals must engage humans on humans' terms.

The difference, essentially, between animal and human approaches rests on institutions and force: law, markets, and guns.[151] Either humans must agree to live absent law and markets on animal-owned land—taking no more than they can individually consume and resolving disputes without courts—or they must force animals to resolve conflict on human terms—in courtrooms and through market solutions.[152]

For centuries, humans have insisted on our collective superiority over animals.[153] This is unlikely to change with a mere grant of property rights. Accordingly, it seems likely that humans would force animals to participate in our institutions under a property rights regime: defending interests in courts and through lobbying, selling the resources on land at market, and enforcing rules through weaponry. Appointing human trustees to serve animal interests could take a variety of forms, depending upon the legal structure of animal interests. There could, for example, be animal corporations, animal real estate investment trusts, or trusts established on behalf of animals.

Animal participation in the legal system necessitates

151. Karen Bradshaw & Bryan Leonard, *Virtual Parceling* (N.Y.U. Classical Liberal Inst., Working Paper No. 1, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885102 [https://perma.cc/BY44-M76Y].

152. The option of resolving conflicts on animal terms is, to my knowledge, an unexplored topic worthy of at least theoretical consideration. A thought experiment in how a regime grounded in animal conflict resolution could provide insights into the moral and philosophical aspects of humans insisting that animals operate on our terms.

153. *See supra* Part I.

human representatives to represent animals' interests. Legally, humans already can and do represent animal interests under certain conditions. As Laurence Tribe has pointed out, we allow similar representation for the mentally incapable, children, corporations, and even ships.[154] Existing legal institutions can accommodate human representation of independent animal rights.[155] The source of concern, then, arises from a mix of practical, moral, and scientific issues.

Should land managers employ these techniques to maximize some element of animal wellbeing, along some dimension? Who among competing fields should represent animals? Practically, granting property rights to animals would require articulating who may serve as a legal representative and what duties they owe to animal clients. This is relatively straightforward given the many existing analogies in law, along with existing animal trusts. One would also need to secure enough qualified representatives to appropriately satisfy fiduciary duties to animal clients—problems with this model abound. Regardless, universities across the country teach land management skills to generations of foresters and farmers and rangeland managers. Wildlife and conservation biologists have similar expertise in how to shape a habitat to maximize animal interests. Once these threshold issues are addressed, the true practical issues emerge. First, animal representatives might be captured by outside interests. Second, they might impute human wants and values to animals.

Capture derives from the public choice observation that public officials are subject to interest group pressures, causing ostensibly neutral figures to privilege a particular group.[156] Human representatives of animal landowners could be captured by a variety of interest groups: a particular species with a strong public following that advocates strongly on its behalf, for example, or humans with interest in animal-owned land, such as neighboring landowners. Human representatives of animal landowners would be particularly vulnerable to capture because their clients have zero capacity to monitor their behavior. Ants cannot, for example, file suit against a land manager for improperly managing their interests.

154. *See* Tribe, *supra* note 8, at 4.
155. *See supra* Section III.A.1.
156. ANTHONY DOWNS, INSIDE BUREAUCRACY 421 (1967).

Blackbirds cannot organize to ask for a new, more trustworthy trustee.

Moreover, protections against capture are scant. Human interest groups that might form to protect animal interests would likely be nongovernmental organizations, whose fundraising dollars disproportionately depend upon charismatic species. Accordingly, the usual antidote to agency capture—outside litigation or lobbying—does not exist in this context. Seemingly, the only protection would be whistle-blowing by insiders at the organization, a tenuous strategy worsened by the need for tremendous discretion to human representatives. Lest I overstate the risk of malfeasance, however, remember that the current system of public lands management is already subject to capture. It is not clear that animals would be worse off in a system in which their representatives were directly implicated in these decisions.

There is a real potential for humans to use animal property owners for their own financial advantage. One can imagine adjacent landowners bribing human representatives of animal landowners to manage the land in a way advantageous to human interests: selling mineral rights, for example, or harvesting timber to reduce fuel loads and mitigate wildfire risk that might spread to nearby properties. Trust or fiduciary obligations—available under existing law, depending upon the ownership model employed—would largely serve to mitigate such mismanagement.

Given the relative newness of formalized animal rights-holders, prophylactic legislation preventing abuse would be guesswork. Instead, the role of policing human representatives behavior would fall largely to courts. In some ways, this is ideal: judges have experience applying trust law, assessing fiduciary duties, and policing the rights of those mentally incapable of legally representing themselves. Judges are not, however, experts in wildlife or land management—yet, they have made determinations on these issues for decades in the absence of statutory guidance.[157] To be sure, a lack of topic-specific expertise is not dispositive in finding courts ill-suited to making determinations; specialized courts and a system of

157. Jedediah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619, 1635–36 (2016) (reviewing JONATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE (2015)).

special masters might emerge if necessary. Regardless, it seems inevitable that courts would play an active role in determining the fate of animal land ownership.

Ultimately, there is reason for cautious optimism for existing legal institutions to accommodate animal landowners. Such institutions have long navigated property rights afforded to a variety of persons unable to represent their own interests, such as minors or the incapacitated. Moreover, existing institutions are already experts in handling the property rights of nonhumans, most notably corporations and other business structures.

The truly difficult task is determining *how* humans would determine animal interests.[158] Corporate forms are human creations, designed to serve shareholders, operating under the long-agreed-to standard of maximizing shareholder value within legal limits. Animals, by contrast, are independent creatures—not human creations, and not necessarily designed to serve human interests. There is no agreed-to metric by which their best interests are served. Articulating such a metric, even upon the advice of biologists, necessarily imputes human values into the unknowable mindset of animals. Imputing human values to animals, known as anthropomorphism, is anathema to the biological community, which maintains that animals are distinct creatures that cannot and should not be understood in relation to humans.[159] Yet, discerning animal interests in land necessitates precisely such an undertaking.

To address this concern, I suggest that all animal trusts should be subject to a single certification regime comprised of a predetermined group of animal experts, such as conservation biologists. To maintain trustee status, all animal trusts would be required to operate in compliance with the certification standards. The certifying body would be a standing, collaborative group that could create rules for all animal trusts in response to unpredictable and unknown social, economic,

158. For an interdisciplinary discussion of human and nonhuman legal interests, see ANIMALS, BIOPOLITICS, LAW: LIVELY LEGALITIES (Irus Bracerman ed., 2016).

159. WILLIAM JORDAN, DIVORCE AMONG THE GULLS: AN UNCOMMON LOOK AT HUMAN NATURE (1991) (noting that among scholars, anthropomorphism "meant blasphemy: Read not the motives of Man into the dimwitted brains of vermin"); s*ee also* Thomas Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 453 (1974) (considering humans imputations of mental states on to animals).

and biological changes. This approach creates several benefits. First, it creates a single, transparent set of guidelines that trustees, the public, and courts could review. Second, it provides a threat of trustee transfer under conditions of improper management. Third, the existence of a standing group avoids issues of statutory ossification and allows flexible rules responsive to changes over time. Still, the problem of how the group would discern animal interests at the ecosystem level persists.[160] To some degree, this problem is mitigated by relative consensus among evolutionary biologists that animals exist to survive as a species across generations.[161] Perhaps, this could become the standard duty of human trustees. But prioritizing the survival of various species or ecosystems requires thousands of nested decisions (or, at times, non-decisions), each of which must be determined on the guesses and priorities of human actors.

Ultimately, mismanagement of animal lands is a serious concern. Existing corporate, trust, and fiduciary standards would govern the various forms of ownership. A legal standard would eventually emerge for how human custodians would promote the best interests of rights holders, potentially drawing upon analogies of the corporate form or custodians for children or the differently abled. Inevitably, some animal lands would be mismanaged. For example, property rights could be bartered and sold. If animals were granted property rights, their claims would be subject to growing pressure to sell amidst human population growth.

The coexistence of publicly managed and privately held animal lands provides a mix of benefits and harms. Redundancy is valuable in high-stakes systems to protect against a failure within one system. As applied to animal-owned land, public lands could backstop management mistakes on private lands, and vice versa. For example, if a future Congress uniformly divested animals from formerly public property—which seemingly would run afoul of takings law, but

160. Should the land be managed to maximize the survival of frogs or of flies? Is the extinction of one species permissible if it facilitates the survival of others? Although humans could undoubtedly make well-reasoned and scientifically backed decisions on such points, they would inescapably be human decisions.

161. For an introduction into, and overview of, this scientific literature, see DOUGLAS J. FUTUYMA, EVOLUTION (3d ed. 2013).

has happened in the past to some groups[162]—the remaining privately titled land would provide a backstop for animal interests. Moreover, private animal landholding groups would not be subject to congressional budget variations and the limitations of public finances, a very real concern associated with agency management of animal lands. A uniform public-private regime would produce economies of scale that would serve to reduce administrative costs by providing one overarching body to oversee all animal-owned lands. Information costs and coordinated national strategies might also be easier to form under a purely public format.

An animal property rights regime would initially increase the burden on courts to accommodate the new idea of animals as property owners. Property scholars would likely be interested in how courts would resolve competing doctrines that would emerge with animals as property owners. To consider one example, landowners have long sold hunting rights for third party hunters to shoot game on their property.[163] Yet a distinct property doctrine prohibits humans from selling their bodies in part or whole; in most jurisdictions, one may not sell cells, organs, sex, or children.[164]

Could animal property owners sell hunting rights for humans to kill some members of their species in exchange for money? Does the calculus change if animals themselves were the beneficiaries of the monies generated? Would it be ethical to allow animal trusts to generate funds by allowing some degree of hunting on trust lands? Under existing societal norms, this would likely be acceptable—shifting mores over time might alter this approach and require updating the approach.

162. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 (2000) (discussing the "American tradition of expropriation" of property) [hereinafter Rose, *Property and Expropriation*].

163. Presently, the sale of hunting rights for endangered species is a source of considerable controversy. Editorial, *The Death of Cecil the Lion*, N.Y. TIMES (July 31, 2015), https://www.nytimes.com/2015/07/31/opinion/the-death-of-cecil-the-lion.html [https://perma.cc/6D66-TB2U] (describing widespread public outcry in response to a dentist from Minnesota killing a black-maned lion in Africa). Hunting is widely allowed, however, for non-endangered animals.

164. *E.g.*, Moore v. Regents of the Univ. of Cal., 51 Cal.3d 120, 142, 146 (Cal. 1990) (holding that individuals do not have the right to share in the profits of commercial products derived from their cells); *see also* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 61 (1987) (describing the backlash against his earlier paper considering a market for selling babies).

The above set of questions provides a few examples of several unresolved legal questions that would likely emerge from an animal property rights regime.[165] This observation is in no way dispositive in suggesting, for example, that the cost to courts would exceed the societal benefits of an animal property rights regime. Instead, it highlights the issue as one of many to be considered.

It is not obvious that animal lands would necessarily need to be managed as public lands currently are. One approach to animal-owned land would be to allow them to revert to a "state of nature" with minimal human influence.[166] Under such a regime, fires would be allowed to burn without human-directed replanting. Trees would not be harvested.

Although such a return to nature sounds somewhat idyllic, one must recognize that a no-intervention policy would, at times, produce unpalatable results: some species would go extinct; others would burn to death in fires. Nature has a long time horizon on land management. Further, animal-owned property would be subject to existing statutes; managers would need to follow Endangered Species Act protections and other statutory provisions. Moreover, an inactive management strategy might produce tort liability. Sovereign immunity protects government land managers from tort liability for management decisions that disfavor neighboring landowners. Sovereign immunity would not protect animal property owners, who would be subject to tort liability for mismanaged lands.

Having outlined how an animal property rights regime might operate in practice, I outline below the legal arguments that might bring this idea from the realm of a theoretical exercise to reality.

3. Likelihood of Implementation

Animal welfare and species conservation are bipartisan issues.[167] Congress has demonstrated surprising, consistent

165. For another example, see the discussion of takings compensation for the kill of domestic livestock, *infra* Section IV.B.

166. In this era of the Anthropocene, in which human influence has touched every piece of nature in some way, this would be an unusual strategy. Purdy, *supra* note 157, at 1637 (describing the Anthroprocene as a period in which "human activity has become a force, arguably *the* force, in the development of the planet").

167. Posner, *supra* note 6, at 536 ("[A]nimal rights have no intrinsic political

levels of support for wildlife over time and in eras reflecting varying degrees of political gridlock. Implementing an animal property regime may be the most politically viable path forward to improve the treatment of animals.

Republicans and Libertarians would likely appreciate the extent to which a property rights regime displaces potential statutory approaches to animal law, shifting from agency regulation to free market environmentalism, characterized by nuisance-based claims.[168] This approach shifts a portion of the foci of animal law from agencies to courts. Moreover, the regime could be structured to generate revenue in a way that would appeal to fiscal conservatives. Land, for example, might be sold to fund animal conservation efforts, which would diminish reliance on public funds to support conservation. Further, to the extent that animal property rights increased the habitat or availability of game populations, it might enjoy considerable support among hunters.[169] Finally, this approach does not require redistribution of property or call for weaker property rights; indeed, it might strengthen existing property rights by reducing the need for environmental laws that diminish them.

Democrats would likely respond well to animal protections that would accrue from ownership. An animal property rights approach expands the category of potential litigants with standing to bring nuisance lawsuits against polluters and government agencies.[170] Democrats, beyond the core animal rights and conservation constituencies, might object that this approach is a diversion from other, more pressing social justice issues, like the issues of reparations for African Americans or tribal sovereignty and expropriation for Native Americans.

Ranchers and mineral developers would likely be key opponents to this proposal. Wildlife land uses conflict with grazing because of the direct competition for grass. Ranchers have long received massive federal subsidies in the form of grazing permits on federal land that are underpriced relative to private and state permits.[171] Attempts to limit the availability

valence. They are as compatible with right-wing as with left-wing views.").

168. *See infra* Section IV.B.

169. This could occur through habitat preservation or the sale of hunting rights to generate revenue on animal-owned land.

170. *See infra* Section IV.B.

171. *This Is Why Most Western Ranchers Won't Support States Seizing U.S.*

of such permits can cause tremendous backlash from farmers, as illustrated through the controversies with the Bundys and Hammonds where armed militiamen faced off with federal land managers to protest grazing limitations.[172] In these cases, ranchers physically protect what they believe to be incursions on their property rights. The law currently forces ranchers to internalize the costs of predatory animals near their lands, which breeds frustration. Transferring the admittedly imperfect present system to a market-based approach with compensation for animal takings of ranchers' chattel would benefit both ranchers and predatory species, and may allow more natural management of prey species, like deer.

Having sketched an overview of the essential legislative proponents and opponents, I explore an alternative, common law approach below.

B. The Litigation Approach

Animal advocates could seek to expand the body of precedent explicitly recognizing expansive property rights for animals in courts. This rights expansion could range from the protection of an individual animal—as with a domestic cat or dog—to a wildlife species, or even ecosystems in a collective rights regime. The litigation model would involve nongovernmental animal-rights or conservation organizations challenging uses of public lands contrary to animal interests. One benefit of a litigation model is the relative ease with which it could be implemented. Several existing nongovernmental organizations—including the Center for Biological Diversity and the Nonhuman Rights Project—are already expert at carrying out incremental, multi-year litigation to advance

Public Lands: Grazing Fees Could Go Up by Orders of Magnitude, CTR. FOR WESTERN PRIORITIES (Feb. 11, 2016), http://westernpriorities.org/2016/02/11/this-is-why-most-western-ranchers-wont-support-states-seizing-u-s-public-lands/ [https://perma.cc/N5LS-CPWW] (showing public grazing fees as "$2.11 per animal unit month (AUM, equivalent to the amount of food a cow and a calf eat in a month)" with state and private grazing fees much higher).

172. Jamie Fuller, *The Long Fight Between the Bundys and the Federal Government, from 1989 to Today*, WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/?utm_term=.93a5343100cd [https://perma.cc/SC65-B8QD].

larger objectives benefitting nonhuman animals.[173]

A litigation-based approach would, however, lead to slow progress. Richard Posner has laid out a roadmap for the nonhuman rights approach to animal welfare, noting that it relies on "show[ing] how courts can proceed incrementally, building on existing cases and legal concepts, towards [the] goal of radically enhanced legal protections for animals."[174]

Litigants could advance a customary rights argument for animal property rights. Custom is a longstanding, although relatively rarely invoked,[175] legal doctrine that allows local custom to supersede the common law if the customary right "existed without dispute for a time that supposedly ran beyond memory, and it had to be well-defined and 'reasonable.'"[176] The most technical definition of "immemorial" uses requires that the customary practice predate the reign of Richard I, which began in 1189.[177]

Early American courts were hesitant to adopt customary practices, noting there was no local law preceding the common law that British settlers imported with them.[178] That reasoning, of course, utterly overlooked the existence of a robust set of Native American customs, which not only predated settlement but also likely developed prior to the 12th Century reign of Richard I.[179] One can imagine two customary approaches that would vest wildlife with property rights, the first of which reflects the Native American custom of land ownership and the second of which acknowledges animals as having their own customs worthy of legal protection.

A customary approach relying upon Native American traditions would likely suggest that American wildlife have

173. Seibert, *supra* note 10.

174. Posner, *supra* note 6, at 528.

175. Smith, *supra* note 146, at 507–09.

176. Carol M. Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 740 (1986) [hereinafter Rose, *Comedy of the Commons*]; *see also* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRES L. 5, 8 (2010) (summarizing William Blackstone's test for whether custom was a good candidate for incorporation into the common law based on "antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency").

177. Rose, *Comedy of the Commons*, *supra* note 176, at n.145.

178. *Id*.

179. *Id*. (describing British courts privileging claims of custom to hold cricket matches).

sweeping property rights.[180] (In the alternative, a radical formulation would suggest that wildlife rights are at least equivalent to those of humans, but are considerably weaker than those imported through British law, primarily because they are subject to an implicit trust obligation for future generations.) Although it is vital to note that there are significant variations among tribes with respect to property rights, one tribal conception of customary understandings of property is illustrative:

> What is this you call property? It cannot be the earth. For the land is our mother, nourishing all her children, beasts, birds, fish and all men. The woods, the streams, everything on it belongs to everybody and is for the use of all. How can one man say it belongs only to him?[181]

Johnson v. M'Intosh[182] reminds us that the Supreme Court has, virtually since its inception, trounced on Native American custom; much of American land was expropriated from Native Americans.[183] The Court privileged acquisition by discovery, a positive legal approach showing that property rights are established through government and the power of law.[184] This contrasts with a natural law approach, which would hold that legal rights arise as a matter of fundamental justice.[185] This Article merely flags the existence of such an argument; I do not attempt to suggest that it would prove ultimately successful.

A more aggressive form of the customary argument would seek to establish that animal behavior itself forms a basis for a customary rule of animal behavior. This represents a massive leap from existing legal doctrine. It would shift judicial consideration of natural systems as preexisting, and perhaps being superior to, human-created law.[186]

180. For a brief discussion of tribal management of wildlife, see Lueck, *supra* note 84, at 630 n.11.

181. JAMES WILLIAM GIBSON, A REENCHANTED WORLD: THE QUEST FOR A NEW KINSHIP WITH NATURE 31 (2009) (attributing the quote to Massasoit).

182. 21 U.S. (8 Wheat.) 543 (1823).

183. SINGER, *supra* note 7, at 4–5.

184. *Johnson*, 21 U.S. (8 Wheat.) at 573–74.

185. *Id.*

186. Indeed, the most extreme form of this approach might displace law altogether as secondary to natural order. I suspect property represents one of several respects in which animal behavior shows surprising parallels to human

C. Benefits of Animal Property Rights

The property rights approach achieves partial gains associated with a human-rights approach, while avoiding some of its practical difficulties. First, a property rights approach is not premised on an argument that animals are morally or intellectually equivalent to humans. In this sense, it sidesteps the burden of convincing judges, and society, that humans and animals are the same. Degrees of similarity between humans and animals matter greatly for issues of extending human rights. One must delve into deep and unknowable questions about what makes us human. Such inquiries matter relatively little for property ownership.

Second, ample precedent exists supporting animals as property owners. Nonhumans have long been legally able to own property.[187] Indeed, animals already have a limited capacity to own property.[188] Below, I consider formalizing and expanding existing rights. Property rights have been expanded several times to accommodate increased definitions of who "counts" as a property owner. Society has survived each shift.

Third, this approach does not require redistribution of existing property. Under a regime extending human rights to animals, people would presumably lose the right to own animals at some point. In this sense, humans would be worse off to benefit animals. A property rights approach does not diminish the existing rights of humans to own pets or livestock, hunt animals on their land, or eat meat. Instead, it increases the capacity of animals without reducing the existing property allocations among humans. Humans who like animals are empowered to allocate property to animals—the number of choices increases. Admittedly, the approach may lead to retitling some public lands already devoted to wildlife purposes to animal ownership, representing a loss in the total amount of lands held by the American public.[189] But, this would be subject to democratic processes, and thus reflect the political will of elected officials who would, presumably, weigh the

law, suggesting the possibility of animal governance, if not government. Law has yet to theoretically or practically reckon with the notion of parallel systems of law among other species.

187. *See* Tribe *supra* note 8, at 2–3.

188. *See supra* Part II.

189. *See infra* Section IV.C.

public good of wildlife against other interests.[190]

Fourth, a property rights approach targets more and different animals than existing approaches. The human-rights approach is primarily confined to human-like primates or sea mammals.[191] Welfare or anti-cruelty laws tend to focus on livestock and domestic pets.[192] Sea creatures and wildlife—a broad group of species ranging from ants to bees to lions, whales to oysters—are the key beneficiaries of the property rights approach. Domestic pets benefit too, aided by inheritance laws that allow them to maintain their standard of living upon the death of their owners.

This point highlights a vital aspect of my argument. The property rights approach should not be understood as an alternative to either welfare or human rights, but instead as a complementary legal strategy with related objectives. Similarly, this approach reflects a middle ground towards the treatment of animals. It reflects society's high regard for animals better than existing welfare law. However, it avoids the somewhat radical endgame of extending human rights to animals. When commentators consider the long-term implications of the human-rights approach, it is easy to dismiss it as too extreme.[193] The result would be a massive change in social norms relating to animals; consequently, many have an instinct to quash the first steps down a path with an extreme end. The property rights approach, on the other hand, avoids this slippery slope.

One can imagine critiques from both animal welfare and animal rights advocates. Why waste resources to give animals property if what we really care about is avoiding cruel treatment? Property rights do not help chimpanzees locked in undersized cages or livestock inhumanely killed. My approach dramatically extends the number and species of animals available for protection and offers a pragmatic approach that does not preclude other rights expansions. Animal law presently focuses on the treatment of caged primates, farm animals, and domestic pets.[194] Consensus has seemingly

190. *See infra* Section IV.C.

191. Seibert, *supra* note 10.

192. *See, e.g.*, SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 3–34 (5th ed. 2014) (surveying legal definitions of animal).

193. *See, e.g.*, Posner, *supra* note 6.

194. *See, e.g.*, REGAN, *supra* note 54, at 79.

formed around "animals deserving of rights" as being limited to "normal mammals above one year in age."[195] Large categories of important animals are excluded, ranging from kittens to condors, baby seals to insects, upon which whole ecosystems rely.[196] My approach includes animals all along the so-called tree of life.

Further, affording property rights to animals has both dignity and practical benefits. Theorists have long recognized the need for an incremental approach—coming in from the side instead of moving forward against great resistance may be a better form of rights expansion. Although the property rights approach does not radically change the status or treatment of animals beyond formally granting them the right to hold property, it may produce subtle long-term gains over time.

Australian philosopher Jonathan Hadley has considered the normative rationale underlying animal property rights. Hadley argues for a basic needs justification for the extension of property rights to animals.[197] He points out that "if an individual has an interest that crosses a threshold level of moral importance, then this means they have a right to the goods concerned," and a right to use these goods logically leads to a property right.[198] Because humans are given property rights for non-critical interests, Hadley argues that the animals' interest in natural goods in order to satisfy their basic needs must at least be sufficient to cross this moral threshold.[199] Under Hadley's rationale, extending property rights to animals would satisfy at least some of the interests of animal rights advocates and environmentalists, as the ultimate result would be the prevention (or at least the reduction) of habitat modification and destruction by humans.[200]

The mere creation of animal property rights does not achieve the full suite of aims advanced by the animal rights movements. It primarily benefits wildlife; it does not serve to free chimpanzees from cages or forestall the plight of cattle destined for slaughter. It does not even suggest that wildlife

195. *Id.*
196. HADLEY, *supra* note 32.
197. *Id.*
198. *Id.* at 54.
199. *Id*. at 55 (noting that the protection of animals in public policies and in welfare legislation demonstrates that animals have at least some moral significance in our society).
200. *Id*. at 122.

would become substantial, let alone equal, property owners.[201] Nevertheless, widespread property ownership would fundamentally shift the lot of animals. Expanding the property rights of animals represents a major advancement in their social status. Legally, it radically expands the rights afforded to animals currently excluded from protection under existing welfare and conservation statutes. But, rather than pushing the law ahead of social progress, this shift will also bring law into alignment with existing social mores regarding the treatment of animals.

IV. EFFECTS AND IMPLICATIONS

This Part considers the likely effects of an animal property rights regime on animal law, species conservation, and property law.

A. Animal Law

Animal law is at an inflection point. Much like the conditions at the precipice of other watershed social changes, public sentiment with respect to the treatment of animals is out-of-step with law on the books. Litigation movements, such as Steven Wise's Nonhuman Rights Movement, represent the front lines of the animal welfare movement in the courts.[202] The human-rights model for which he advocates represents a novel alternative to the options of animals-as-property or criminalization of animal cruelty. Yet, this approach has been criticized as having no broadly socially acceptable end.[203] As a result, a promising campaign that may someday succeed has thus far experienced limited success.

The administrative state is also in a state of flux. Changed ideologies at the executive level may lead to different agency approaches to animal rights and welfare. Formalizing or privatizing the rights of animals may increase well-being by insulating vital habitat and property choices from political

201. We can observe through the continuing struggle for equality among African Americans and women that the mere legal ability to own property does not ensure parity, perhaps partially because of the stickiness of initial entitlements.

202. Siebert, *supra* note 10.

203. Posner, *supra* note 6, at 539–40.

whim. Those with optimism about market-based approaches should celebrate the ability of individuals to determine animal well-being.[204] My approach captures the benefits of private governance to avoid investing our collective concern for the well-being of animals to the benevolence of a few private individuals. Further, those skeptical of limiting government involvement should view this proposal as a supplement to existing public law interventions on behalf of animal rights and welfare—not a replacement for other avenues of advancement.

No single approach to improving the treatment of animals can achieve every reasonable aim, but varying approaches are not mutually exclusive. Just as the human rights approach functionally excludes ants, a property rights approach would privilege wildlife over livestock or captive animals used for medical testing. It benefits mustangs and prairie dogs while doing little to change the status of abandoned pets. This suggests the importance of others joining Wise's crusade, albeit with potentially different approaches. For example, woefully inadequate state animal cruelty statutes present a fertile opportunity for advocacy that would garner immediate results. So too do public education programs about appropriate pet care and adoption programs. This area of law needs creative, multi-faceted strategies; there are many reasons to believe that this may soon happen.[205]

B. Species Conservation

The Endangered Species Act, a forty-year-old statute, provides the primary vehicle for species conservation in the United States.[206] The Act has largely succeeded in keeping species from extinction, but it has failed to fully address habitat loss.

Lessons learned from the problems administering the Act are integrated into the property rights regime, which addresses the following: landowner opposition; state versus federal control; the mismatch between conserving individual species and whole ecosystems; and the distinction between

204. Interestingly, some conservation scientists have pragmatically suggested market approaches to conservation. Christopher Costello et al., *Conservation Science: A Market Approach to Saving the Whales*, 481 NATURE 139 (2012).

205. *See supra* text accompanying note 2 discussing the growth of animal law.

206. The Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

endangered, threatened, and non-protected species.[207] Admittedly, there is potential for perverse outcomes, such as humans intentionally driving a species to extinction to retain land.

The animal property rights approach highlights the value of vesting animals with property. To avoid widespread extinction over time, either a high degree of land must remain public and managed for wildlife uses, or private property rights—including the right to develop and exclude—must be reduced to provide habitat. Given the relative political infeasibility of the latter option, the former seems preferable. It is also more administrable as lands and land management systems are well established. Yet, the very proponents of strong property rights are presently arguing for dismantling the system of public lands. Such proposals underestimate the degree of public support of wildlife—there is simply a level of diminishment to wildlife that the public will not allow. Private conservation efforts alone cannot fill this void.

Many endangered species rely on habitat located on private land.[208] To protect species, federal agencies must conserve their habitat. Agencies do so by exerting control over state and private landowners through critical habitat designations under the Endangered Species Act.[209] Landowners fear that such designation will reduce property values and restrict future development on their property.[210] As a result, landowner opposition has formed the primary barrier to species conservation, creating well-documented public choice effects through which agency officials avoid designating valuable private land as critical habitat.[211] Congressional control of agency budgets creates further incentives for the

207. For a discussion of some of the problems that have arisen from the administration of the Act, see Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence,* 37 ENVIRONS: ENVTL. L. & POL'Y J. 105 (2014).

208. Thompson, *supra* note 109, at 310 ("As of 1993, almost 80 percent of all ESA protected species had some or all of their habitat on privately owned land. More than a third of the protected species did not inhabit any federal land, making it impossible to ensure their recovery through federal land management, and less than a quarter had habitats located primarily on federal land.").

209. Martin B. Main et al., *Evaluating Costs of Conservation*, 13 CONSERVATION BIOLOGY 1263, 1265 (1999).

210. *Id.* (noting that "[l]andowners fear a decline in the value of their properties because the ESA restricts future land-use options").

211. *See supra* text accompanying note 67.

agency to avoid listing species or designating habitat in the regions represented by key congressmen.[212] Property owners even destroy habitat or kill soon-to-be-listed wildlife to avoid federal control over their land.[213]

Habitat loss has long been recognized as a leading cause of species extinction. When land is developed—for example, timberland becoming a subdivision—it no longer serves as suitable habitat for some animal species. Population growth leading to urban sprawl couples with industrial land uses to make much of American land unsuitable as wildlife habitat. Indeed, the legislative history of the Endangered Species Act suggests that the sweeping wildlife conservation statute was largely animated by concerns of habitat loss.[214]

Vesting animals with property rights reduces the potential for habitat loss on retitled lands. Although lands could be bartered or sold, animal trustees would likely only do so for welfare-maximizing exchanges that would ultimately benefit animals, such as trading a small piece of land near an industrial core for an expansive landscape in a rural area. Of course, there is a concern that captured trustees might

212. R. Patrick Rawls & David N. Laband, *A Public Choice Analysis of Endangered Species Listings*, 121 PUB. CHOICE 263 (2004) (describing a species as less likely to be listed if its habitat overlaps with the district of a member of the U.S. House of Representative budget subcommittee, which provides oversight for the funding of the Fish and Wildlife Service); *cf.* Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, 30 (1999) (noting that the timing of listing decisions correlates to interest group pressure).

213. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 506 (2008) (suggesting that "[t]here is considerable anecdotal and empirical evidence that private landowners preemptively destroy the habitat of imperiled species"); Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of the Red-Cockaded Woodpeckers*, 42 ECON. INQUIRY 150, 162–63 (2004) (reporting results of an empirical study showing that landowners reduce endangered species habitat, and encourage their neighbors to do the same, before critical habitat designation to protect and enhance their property values).

214. 119 CONG. REC. 19,138 (1973) (statement of Sen. Williams); 119 CONG. REC. 30,528 (1973); *see also* 119 CONG. REC. 25,676 (1973) (Statement of Sen. Stevens) ("One of the major causes of the decline in wildlife populations is the destruction of their habitat."); 119 CONG. REC. 30,162 (1973) (Statement of Rep. Sullivan) ("For the most part, the principal threat to animals stems from the destruction of their habitat."); Thomas F. Darin, Comment, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 213 (2000) (noting that destruction of natural habitats caused by land destruction was a motivator for passage of the Endangered Species Act).

inappropriately divest animals of their land in exchange for money, which is why the administration concerns of appropriate trustees operating against the legal backstop of judicial review of action in accordance with trust doctrine is important.[215]

A property rights approach would not eliminate other protections for animals, such as easements or the Endangered Species Act. Instead, it would equalize the playing field by allowing animal agents to respond directly to localized species concerns. Unlike Medieval English trials against animals, in which the animals appeared in court and were represented by skilled lawyers,[216] the courtroom circus would be avoided under my model, through the use of human representatives for animal owners. Over time, a compensation system would likely develop, whereby animal property owners would use land in revenue-generating ways compatible with wildlife uses or in isolated, high-value purposes. The revenue could be used to develop a fund with fixed compensation for livestock.

A property rights approach also provides an opportunity to update our approach to species conservation. We have had forty years of learning about the benefits and detriments of the Endangered Species Act; the rights-based approach provides the opportunity to incorporate these lessons. For example, this approach sidesteps the binary distinction between protected (threatened/endangered/critical candidate) species and unprotected species and allows for the potential of conservation at an ecosystem level. Careful management of animal-owned lands is, of course, fundamental to the potential of an animal property rights regime to encourage species conservation. Exploitation and poor management could also leave animals worse off.[217] Again, this proposal considers the basic idea and its implementation. Best practices for on-the-ground management, compliance systems, and accountability measures would be vital, but fall outside the scope of this exercise.

215. *See supra* Section III.A.2.

216. Siebert, *supra* note 10.

217. For a discussion of a small island nation entirely depleting its natural resources in response to pressure to realize the asset potential of resources, see *The Middle of Nowhere*, THIS AMERICAN LIFE (Dec. 5, 2003), http://www.thisamericanlife.org/radio-archives/episode/253/the-middle-of-nowhere [https://perma.cc/3WHP-WS2S].

At a general level, the idea of animal property rights certainly holds potential for improving species conservation by explicitly acknowledging human and animal competition for natural resources on the same plot of land. This regime offers an opportunity to explicitly acknowledge that initial entitlements excluded customary animal interests, which inadvertently created human-wildlife conflicts.[218] It provides the potential for mitigating these conflicts. But, naturally, it is ultimately the administration of the regime that would determine whether rights expansion would improve the plight of animals.[219]

Vesting widespread property rights in animals would likely shift the locus of action from federal agencies to animal landowners. This approach revitalizes nuisance suits to address environmental harms. Historically, some forms of water and air pollution were governed through a nuisance regime, in which aggrieved landowners brought suit against offending neighbors.[220] In the 1970s, Congress enacted sweeping environmental legislation, which largely displaced common law approaches to pollution control.[221] Over time, however, federal environmental legislation stalled. Congress has not passed major environmental legislation since the 1990s. Agencies attempting to regulate emerging issues—such as fracking and emissions causing climate change—must do so by promulgating regulations under outdated statutes.[222]

Agencies seemingly focus on complying with federal environmental statutes, not on adjudicating nuisance claims by nearby landowners. In contrast, animal landowners might more proactively seek nuisance relief from adjacent landowners that pollute air or streams. As property owners, animals would be entitled to the use and enjoyment of their land free from the

218. Bradshaw, *supra* note 23.

219. In this sense, this Article might serve as an invitation to discuss "Animals in Law" as opposed to "Animal Law." Property is a natural fit with animal concerns, given shared reliance on natural resources such as land and water. So too might environmental law and natural resources benefit from the explicit inclusion of animal considerations, and even rights, in ongoing conversations on topics such as climate change adaptation.

220. Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915); Missouri v. Illinois, 200 U.S. 496 (1906).

221. Clean Air Act, 42 U.S.C. § 7401–7617 (1970); Clean Water Act, 33 U.S.C. § 1251–1388 (1972).

222. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

disturbance of neighbors. With strong property rights, animal trustees would be incentivized to sue polluting neighbors, both public and private. Threat of nuisance lawsuits brought by animal property owners may spur neighboring landowners to invest in pollution-reducing activities. This might displace the recent primacy of statutory law to addressing environmental issues. It could function to restore a common law nuisance approach—sometimes titled free market environmentalism—to correcting environmental ills, not as an alternative to existing statutes, but rather as a supplemental gap-filler.

C. Property Law

Vesting animals with widespread property rights would revolutionize property law.[223] Below, I outline the likely effects on rights expansion, distributional concerns, and property theory.

1. The Slippery Slope of Rights Expansion

Should property rights be extended to all living things, including plants and trees? To all natural things, such as rivers and mountains? What about computers?[224] Microbiomes, which also organize and collaborate? Perhaps the definition presented in this paper is already overly broad. One can imagine distinctions between wildlife and domestic animals, which the law already recognizes. A philosophical approach might distinguish different "levels" of animals marked through capacity for pain or intelligence, with primates, but not insects, receiving property rights.[225] This discussion in some ways mirrors questions of standing, in which courts have considered the idea that trees, rivers, or wind may have ability to bring a legal claim.[226]

223. Carol Rose titles such dramatic shifts in property rights regimes "Type II" disruptions, a term to reflect their large effects. Rose*, Property and Expropriation, supra* note 162, at 6.

224. Posner, *supra* note 6, at 531 (noting, as a critique to extending human rights to animals, that computers think similarly to humans, and thus might also be eligible for rights under such a regime).

225. Epstein, *supra* note 6, at 21, 25–26 (advocating for greater protection being afforded to animals "higher on the tree of life").

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

Articulating a "correct" limiting principle for distinctions between animals and other things worthy of property rights upon philosophical grounds is beyond the scope of this project. I ultimately draw the line using property theory and law. For over one hundred years, Congress has afforded special attention to wildlife, embedding quasi-property rights to wildlife through the Organic Act of National Parks, the creation of national monuments and wildlife refuges, and in affording wildlife, but not plants, what essentially serve as easements under critical habitat designations under the Endangered Species Act. Similarly, at least one articulation of Native American conceptions of property distinguishes "children, beasts, birds, fish and all men" as the owners and users of "woods, the streams, everything on it."[227] In truth, my proposal is not so much forging new ground as unifying existing laws and public preferences.

Should governmental action and human preference coalesce in the future—or, if someone can convincingly argue that it already has—around plants or mountains or computers, I see no reason that the property rights approach could not extend to these things as well. Property rights have expanded numerous times in the past; there is nothing to suggest they cannot continue to expand or contract over time.[228]

In this sense, the property rights approach to animal welfare sidesteps the difficult question Richard Posner raises of where animal rights end under the human rights approach, namely where the revolution ends.[229] Americans lost the argument that property is inherently human when we afforded it to inanimate forms, such as corporations and trusts. Although one can argue such instruments indirectly serve human purposes, there exists no bright line between human and nonhuman with regard to property rights. This is one sense in which the property rights approach to welfare is an easier path than the human rights approach; we are dealing with a line that has already been redrawn for a more expansive

227. Anti-Defamation League, *Lewis and Clark: The Unheard Voices*, CURRICULUM CONNECTIONS, Fall 2004, at 1, 46, https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/curriculum-connections-fall-2004.pdf [https://perma.cc/SPS5-BBV7] (quote attributed to Massasoit).

228. Indeed, my conception of property as a natural system suggests that law is dynamic, constantly expanding and contracting. *See* Bradshaw, *supra* note 23.

229. Posner, *supra* note 6, at 532–33 (describing the problem of an animal rights activist "asking judges to set sail on an uncharted sea without a compass").

approach. Extending it a bit further to formally include animals in an expanded manner is not much of a leap.

2. Distributional Effects

The distributional effects of an animal property regime are initially small but may grow over time. Jeremy Bentham argued that even terribly unequal property distributions should not be disturbed to avoid reducing the general welfare-producing effects of stable property regimes on society.[230] This thought experiment operates around voluntary transfers to animals, not a system of redistribution through which property is forcibly taken.

The more troubling effects center on non-property owners. One can imagine an argument that transferring property rights to animals disadvantages lower socioeconomic status Americans by reducing the potential wealth of land held by the American public, which might translate into public benefits. This is a real concern. Historically, the federal government made payments in lieu of taxes to state and county governments to provide income streams from federal public lands.[231] As federal land management policies have shifted towards conservation and away from timber harvest, some of these revenues have decreased. Under an animal rights model, however, it may be sensible to incorporate local and state taxes on revenue generated from natural resources extracted from the land. This would counter a frequent complaint about federal land ownership in Western states, and may even make animals more desirable neighbors than, for example, the Bureau of Land Management or Forest Service.

The broader social justice question is why animals, instead of other groups excluded from initial land allocations, should receive land. First, it is worth observing that this Article is devoted merely to the question of capacity to own land, which other groups, widely recognized as the product of historic discrimination, have.[232] Second, this Article is agnostic on the

230. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 119–20 (C.K. Ogden ed., Richard Hildreth trans., 1908).

231. GEORGE CAMERON COGGNIS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 159 (Robert C. Clark et al., eds., Foundation Press, 6th ed. 2007).

232. U.S. CONST. amend. XIX; U.S. CONST. amend. XIV.

appropriate amount of land that should be granted to animals. Its focus is instead on exploring the idea and its effects, not on a proposal for designating a set number of acres as animal-owned. Animal rights advocates, naturalists, and conservationists would also likely suggest that the benefits realized through animal ownership—particularly with regard to preservation of undeveloped land and preservation of biodiversity—are a public good that benefits all humans.

3. Land Use Patterns

Animal property ownership would also likely shift land ownership patterns in sweeping ways. At present, the American West is largely reflective of the grid surveying system, which broke extensive landscapes—including mountains and forests—into squares for the sake of easy administration. Superimposing a grid onto a landscape without regard to the scale at which the natural resources therein must be managed created a strange mismatch between the size of property parcels (small) versus the economically and practically efficient scale of management for resources ranging from forests to wildfires (large).[233] A key disadvantage to the present land distribution pattern is that it interposes preservation lands with private, sometimes fenced or developed, land. As a result, species that depend upon seasonal migration may find their access to northern or southern lands blocked or eliminated.

Animal owners could act collectively to barter and sell disparate landholdings in exchange for collective blocks of uninterrupted range. In a series of Coasian transfers, high value human land uses—such as subdivisions—could occur in areas near cities, allowing animal owners to increase their acreage in rural, remote lands with limited human usage. This idea would obviously require careful consideration of biologists, who would inform the trustees of wildlife habitat needs.

This consideration highlights a key aspect of wildlife land ownership. If described at an appropriate state or regional level, animal owners would command economies of scale that would largely serve to correct the problem of parcels versus

233. Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015).

landscapes created by historic land disposition policies, which predated (and thus failed to incorporate) modern scientific understanding of ecosystems. Similarly, land uses that restricted access of animal landowners to their property—as with the construction of dams blocking fish access to native streams—would be governed through property law rather than environmental statute.[234]

CONCLUSION

Granting animal property rights is a radical proposition. At first glance, it seems outlandish. Further examination of the idea, however, suggests a preexisting legal foundation for such a rights expansion. Exploring animal rights expansion highlights the potential of the field to improve the plight of animals in a politically feasible way. Spurred by this observation, the Article charts two legal paths advocates could take to implement an animal property rights regime. This adds a new approach to the currently bifurcated field of animal law, one which invites scholars and advocates alike to reimagine differing approaches, new and old, as both complementary and pluralistic.

234. For a discussion of fish in a stream suing water polluters, see DANIEL H. COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION (2002).

NOTES

Standing Upright: The Moral and Legal Standing of Humans and Other Apes

Adam Kolber*

INTRODUCTION

In *The Common Law*, Oliver Wendell Holmes wrote that "even a dog distinguishes between being stumbled over and being kicked."[1] Holmes suggested that even dogs can tell the difference between intentional aggression and benign mistake, and his observation is often cited to show how a vague legal standard can still have clear applications.[2] Far less often is the quote considered as an empirical statement about the abilities of dogs. In that light, the quote suggests that dogs can understand humans well enough to discern the motivation (or lack thereof) behind some physical interaction between them. If dogs can understand the ways we treat them, we may think it matters more whether we treat them compassionately or cruelly.[3] And if dogs can make such distinctions, we may wonder how much more fine-grained and sensitive are the perceptions of smarter animals like chimpanzees and gorillas.

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe, ed., Little, Brown and Co. 1963) (1881).

2. For example, Justice Stevens noted Holmes' observation during oral arguments in *Bush v. Gore* regarding the standard of voter intent under Florida election law. Transcript of Oral Argument at 49, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) (comments by Justice Stevens).

3. Arguably, even if a dog's suffering should be minimized, it does not matter whether the dog thinks a human intentionally or accidentally caused it pain. Nevertheless, perhaps because people do not want to be thought cruel and mean, even by a dog, human behavior is likely to be influenced by our assumptions about canine perceptiveness.

Calling the effort the Great Ape Project ("Project"), a number of scholars, scientists, and activists have organized to demand recognition of moral and legal rights for great apes. In the category of great apes, the Project includes chimpanzees, bonobos, orangutans, gorillas, and, surprisingly or not, humans. Supporters of the Project would like to see radical changes in the ways we treat great apes. These changes, if enforced globally, would mean an end to most biomedical experimentation on great apes; would largely eliminate the potential use of great apes for organ donations;[4] would prohibit, or at least require dramatic improvements, in the keeping of great apes in zoos; and would eliminate the use of great apes as a source of food.[5] Perhaps more radical sounding are the Project's claims that great apes should be considered equals with humans in the sense that the rights of apes should be respected no less than those of humans and that court-appointed guardians or other organizations should be enabled to protect the legal rights of great apes by bringing suit on their behalf. The Great Ape Project seeks nothing less than full moral and legal "personhood" for great apes.

Legal academia is awakening to the growing interest in the legal protection of apes and other animals. In 1999, Harvard Law School and Georgetown Law School announced that they would offer their first classes ever in animal law.[6] Less than a year later, Harvard's animal law instructor, Steven Wise, published a book demanding legal rights for chimpanzees and bonobos.[7] In what may be the clearest sign that discussion of great ape legal rights has entered mainstream legal discourse, Judge Richard Posner reviewed Wise's book in the *Yale Law Journal*.[8] Although Posner does criticize Wise's approach, he is surprisingly uncritical of Wise's aims and faults Wise principally on methodological grounds.[9]

4. For views on transplanting animal organs into humans, known as xenotransplantation, see Arthur L. Caplan, *Is Xenografting Morally Wrong?*, *in* THE ETHICS OF ORGAN TRANSPLANTS 121, 123 (Arthur L. Caplan & Daniel H. Coelho eds., 1998); Traci J. Hoffman, *Organ Donor Laws in the U.S. and U.K.: The Need for Reform and the Promise of Xenotransplantation*, 10 IND. INT'L & COMP. L. REV. 339, 371-72 (2000). Xenotransplantations are controversial from the standpoint of animal advocates, since they usually require the killing of otherwise healthy animals.

5. Expressed more dramatically, apes are killed to feed "the growing fad for 'bush meat' on the tables of the elite in Cameroon, Gabon, the Congo, the Central African Republic, and other countries." Donald G. McNeil Jr., *The Great Ape Massacre*, N.Y. TIMES, May 9, 1999, § 6 (Magazine), at 54-55. Apes are also killed "so that their hands, feet, and skulls can be displayed as trophies." STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 5 (2000).

6. William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1.

7. WISE, *supra* note 5.

8. Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527 (2000) (reviewing WISE, *supra* note 5).

9. *Id.* at 539 ("There is a sad poverty of imagination in an approach to animal protection that can think of it only on the model of the civil rights movement. It is a poverty that reflects the blinkered approach of the traditional lawyer, afraid to acknowledge novelty

In Martha Nussbaum's review of Wise's book in the *Harvard Law Review*, Nussbaum reveals a basic sympathy for Wise's project:

> We live, many of us, in affectionate relationships with dogs and cats and horses. And yet a large population of us not only eat meat and eggs and wear leather, but we also collaborate in the appallingly cruel conditions under which those goods are produced these days, involving the torture of calves, chickens, and pigs. . . . [W]e have not defined very clearly the conceptual framework we should use to articulate philosophically what sympathy tells us in our lives. . . . Meanwhile, however, there are animals like [the apes that Wise describes] leading lives of agony, and there are activists, like Steven Wise, ready to move ahead with practical legal recommendations, even in the absence of conceptual and theoretical consensus.[10]

No country has granted great apes anything near the kinds of rights sought by Steven Wise or the Great Ape Project. However, some countries have enacted significant protections for great apes. In 1996, biomedical research on great apes was banned in Britain.[11] According to New Zealand's Animal Welfare Act of 1999,[12] "research, testing, or teaching" great apes requires approval from New Zealand's government official in charge of animal welfare.[13] The official can only give approval when satisfied that the activity in question benefits the individual ape or that it benefits the ape's species and "the benefits [of the activity] are not outweighed by the likely harm[s]."[14] Thus, the changes in New Zealand law mean that experimentation on great apes must, first and foremost, benefit great apes. The enactment of these protections can largely be traced to efforts by the Great Ape Project and its New Zealand affiliate.[15] Whether one likes or dislikes the efforts made by the

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and therefore unable to think clearly about the reasons pro or con a departure from the legal status quo.").

10. Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1509-12 (2001) (offering a philosophically-oriented discussion of WISE, *supra* note 5). Even more dramatically in the *California Law Review*, Robert Verchick writes that Wise's book "marks what could become one of the groundbreaking civil rights battles of the next generation." Robert R.M. Verchick, *A New Species of Rights*, 89 CAL. L. REV. 207 (2001) (reviewing WISE, *supra* note 5).

11. WISE, *supra* note 5, at 75 (indicating the British government's belief that the cognitive and behavioral capacities of great apes make it unethical to "treat them as expendable in research").

12. Animal Welfare Act (1999) (N.Z.), *available at* http://www.maf.govt.nz/biosecurity/legislation/animal-welfare-act/index.htm (last visited Sept. 7, 2001).

13. *Id.* at § 85(1)

14. *Id.* at § 85(5).

15. Paula Brosnahan, *New Zealand's Animal Welfare Act: What Is Its Value Regarding Non-Human Hominids?*, 6 ANIMAL L. 185, 187-90 (2000). The changes enacted fell far short of the changes sought by the Great Ape Project New Zealand. *Id.* Also, their impact on great apes is likely to be limited as New Zealand has few great apes, *id.* at 191, and no biomedical experimentation on great apes. *See* Seth Mydans, *He's Not Hairy, He's My Brother*, N.Y. TIMES, Aug. 12, 2001, § 4, at 5.

Great Ape Project, they are having an effect on the laws governing animal protection and experimentation.

Furthermore, moral and legal issues raised by the Great Ape Project have implications beyond the treatment of great apes. Researchers in Portland, Oregon recently reported success in inserting genes from a jellyfish into a rhesus monkey. The senior researcher said that "his ultimate goal was to create colonies of monkeys that had been genetically modified to develop a human disease."[16] At the same time that colonies of monkeys are being created to lose their lives to benefit humans, humans are risking their lives to save animals.[17] In Colorado, an eleven-year, seven billion dollar project is underway to clean up nuclear waste in order to create a wildlife preserve. At least ten workers on the project were exposed to radiation during this dangerous work.[18] We are frequently, though usually subconsciously, making tradeoffs between the interests of humans and the interests of nonhuman animals. How we decide to treat animals can affect our legal regimes related to the environment, animal welfare, endangered species, agribusiness, the consumption and production of food, animal testing, veterinary malpractice, and more.

More broadly still, our treatment of great apes raises questions about the principles which underlie human equality. We usually hold that human beings should have equal rights, regardless of their cognitive abilities. Yet, we deny great apes basic protections afforded to humans, often citing the lower intelligence of great apes as a factor. However, the cognitive capacities of great apes can rival or surpass those of very young children and humans with severe cognitive deficits.[19] Some commentators, including members of the Great Ape Project, compare great apes to these humans in order to argue, as a matter of equality, that great apes deserve the same moral and legal protections afforded to young children and humans with severe cognitive deficits. This move is certainly controversial, and Judge Posner has described it as "monstrous."[20] At a minimum, however, it has forced us to consider a new

16. Gina Kolata, *Monkey Born With Genetically Engineered Cells*, N.Y. TIMES, July 9, 1999, at A1. On the plus side, of course, the research is designed to someday help treat diseases in humans. It is also possible that such research could reduce the number of primates used in biological research by making more efficient use of primate subjects. Nevertheless, there is certainly something grim about designing monkeys to develop fatal diseases.

17. When I refer to "animals," I usually drop the implied qualification that I am referring to "nonhuman animals."

18. Michael Janofsky, *Workers Cleaning Nuclear Arms Site for Wildlife Preserve Test Positive for Radiation*, N.Y. TIMES, Dec. 8, 2000, at A19. Of course, it could be argued that wildlife preserves are intended solely for the benefit of humans who enjoy nature. I think it is hard to understand, however, how a person could care about nature without thinking that the well-being of its members is a good in its own right.

19. *See* Caplan, *supra* note 4, at 128.

20. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 49 (1999) ("Yet it would be monstrous in our culture to deduce that severely retarded human beings are entitled to no more consideration than animals or even that they are entitled to less

perspective on the principles underlying our concept of human equality and the boundaries that we give to morally- and legally-protected forms of life.

This Note explores some of the moral and legal arguments made for the protection of great apes and other animals. Part I provides basic information about great apes and their abilities and the laws protecting them in the United States. It also discusses the kinds of legal protections sought by the Great Ape Project. While the Great Ape Project and Steven Wise seek similar protections for great apes, I focus on the Great Ape Project since it has demonstrated its ability to influence legislation and its philosophical foundations lie at the heart of much of the "animal liberation" movement. This movement, as sparked in large measure by Peter Singer's 1975 book, *Animal Liberation*,[21] holds that the interests of all animals, human and otherwise, should be given equal moral consideration. A critical analysis of Singer's position forms the focus of Part II and sets the stage for a discussion of a particular policy proposal. This policy proposal, discussed in Part III, vastly restricts the discussion of great ape personhood to a much less ambitious legal issue in the law of standing. More specifically, I explore the argument that great apes (and perhaps other animals) should be granted standing to bring lawsuits, through a human guardian, under the Animal Welfare Act (AWA).[22] The law of standing currently prevents humans from suing on behalf of animals that suffer injuries under the AWA. I explore the idea that Congress could further the substantive goals of the AWA by granting standing to apes and other animals without upsetting constitutional standing requirements. Granting standing to great apes does not require us to accept arguments about ape personhood but merely requires recognition of certain obligations to protect animal interests. I argue that the standing proposal is far less radical than it might sound at first and that it is at least worthy of further consideration.

consideration than the smartest animals, who are smarter than the dumbest people; just to refer to people as 'dumb' grates on our sensibilities."). For an in-depth discussion of the argument Posner addresses, sometimes called the "argument from marginal cases," see DANIEL A. DOMBROWSKI, BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES (1997). Such comparisons deeply touch the public conscience. In a recent discussion on parenting on Bill Maher's show "Politically Incorrect," Maher compared his dogs to "retarded children," saying "They're sweet. They're loving. They're kind. But they don't mentally advance at all." Lynda Van Kuren, spokeswoman for a group which advocates for children with disabilities said, "Those types of statements simply perpetuate the types of misconceptions that exist that are just wrong." Maher apologized profusely for the comment. *TV Host's Words Draw Criticism and Apology*, N.Y. TIMES, Jan. 18, 2001, at A20.

21. PETER SINGER, ANIMAL LIBERATION (1st ed. 1975).

22. 7 U.S.C §§ 2131-2159 (2001).

I. GREAT APES AND THE GREAT APE PROJECT

A. *Great Ape Biology and Ecology*

Most great apes are native to Africa, with the exception of orangutans which are native to the islands of Borneo and Sumatra in Asia. If we were focusing on the preservation of great apes as a species, our most important issues would be wildlife preservation in countries with native populations of great apes and the local and international laws protecting endangered species.[23] The focus of the Great Ape Project, however, is largely on individual great apes as potential rights-bearers. To that end, we will focus on great apes in the United States and the laws which protect (or fail to protect) them. An informal census of great apes living in the United States counted as follows:

> A few thousand great apes currently live in the United States. Some 2,000 chimpanzees are in laboratories, 800-900 in zoos, and a few in entertainment. Ten to twenty orang-utans are used for entertainment, fifteen to twenty in laboratories, and several hundred are kept in zoos. Almost 300 gorillas are in zoos, ten to fifteen in laboratories, and currently none are known to be used for entertainment, though one is kept on display in a shopping centre in Tacoma, Washington.[24]

Traditionally, taxonomists use the term ape (or "hominoid") to apply to certain primates, including humans, that split off from other primates approximately 20 millions years ago.[25] Apes differ notably from other primates because they have no tail and they habitually sit and sometimes stand upright.[26] Included in the ape superfamily are the "great apes" (the family *Pongidae*)[27] and the family which includes humans and some of our recently extinct ancestors (the family *Hominidae*).[28] To put it another way, humans have traditionally been considered apes but not "great apes."

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23. *See, e.g.,* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2001); *see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 8, 1973, 27 U.S.T. 1087; The African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1976 U.N.T.S. 4.

24. David Cantor, *Items of Property*, *in* THE GREAT APE PROJECT 280, 280 (Paola Cavalieri & Peter Singer eds., 1993).

25. FRANS DE WAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 4 (1996).

26. ENCYCLOPEDIA OF MAMMALS 120 (Erwin Gould & George McKay eds., 2d ed. 1998); *see also* DARIS R. SWINDLER, INTRODUCTION TO THE PRIMATES 56 (1998) ("In contrast to most prosimians and all but two species of monkeys, apes lack tails.").

27. *See* SWINDLER, *supra* note 26, at 56; B.E. Schwimmer, *Pongids* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/121/primatology/pongid.html (last visited Sept. 9, 2001).

28. B.E. Schwimmer, *Hominids* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/121/primatology/hominid.html (last visited Sept. 9, 2001). Also included in the superfamily "hominids" are the Hylobatidae which include gibbons. B.E. Schwimmer, *Hylobatidae* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/

The placement of humans and great apes into different biological families is a source of some disagreement. Gorillas and chimpanzees, for example, are great apes, while, traditionally, humans are not. Yet, according to most analyses, whether biochemical, morphological, or genomic, chimpanzees have a closer relationship to humans than they do to gorillas.[29] Furthermore, because humans are, in evolutionary terms, more closely related to chimpanzees and gorillas than either of those species is to orangutans (which are also "great apes"), some claim it is incorrect to separate the family containing great apes from the family containing humans.[30] Evolutionary biologist Richard Dawkins indicates that "[t]here is no natural category that includes chimpanzees, gorillas and orang-utans but excludes humans."[31] For such reasons, proponents of the Great Ape Project treat humans, along with chimpanzees, bonobos, gorillas, and orangutans as great apes.

Primate evolutionary history is certainly very interesting to consider. But clearly its implications for the moral and legal treatment of our closely related kin is limited. Perhaps this history only demonstrates that the uniquely important features of human beings evolved in, say, the last million years. If taxonomists chose to classify animals based on their intelligence, it is rather clear that humans would be substantially distanced from the other apes.

A similar skepticism might surround the oft-cited finding that human and chimpanzee DNA are more than 98% identical.[32] Does this information show that humans and apes are extraordinarily similar in biological terms? Or, does it show that a 2% difference in a DNA sequence is awfully significant? After all, genetically, humans are 99.99% identical to each other,[33] yet differences among humans are far from trivial. Similarly, recent findings by the Human Genome Project show that the number of distinct human genes is far closer to

121/primatology/hylobatid.html (last visited Sept. 9, 2001).

29. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 128.

30. For example, evolutionary biologist Richard Dawkins writes that "[o]ur common ancestor with the chimpanzees and gorillas is much more recent than their common ancestor with the Asian apes–the gibbons and the orang-utans." Richard Dawkins, *Gaps in the Mind, in* THE GREAT APE PROJECT, *supra* note 24, at 80, 82.

31. *Id.*

32. *See, e.g.*, WISE, *supra* note 5, at 132 ("Our DNA and that of chimpanzees is more than 98.3 percent identical. Of the DNA that actually does something, humans and chimpanzees share, on average, more than . . . 99.5 percent [of that DNA]."). Wise is alluding to the difference between coding and non-coding regions of DNA. Coding regions of DNA tell cells what proteins to produce but represent only a small portion of total DNA. Non-coding regions contain both "junk" DNA and DNA that switches coding regions on and off. Thus, saying that we share a certain percentage of DNA with another species could more accurately be rephrased as "We share X% of our coding regions, Y% of our non-coding junk regions, and Z% of our non-coding regulatory regions." Email from Robert Sapolsky, Professor of Biological Sciences and of Neurology and Neurological Sciences, Stanford University (July 10, 2001, 10:41:54 PDT) (on file with author).

33. Thomas Hayden, *Quantifiably Normal*, N.Y. TIMES, Mar. 3, 2001, § 6 (Magazine), at 98.

the number of distinct genes in other species than was commonly thought.[34] While an important discovery, such findings cannot place a value on the differences that are actually observed. At best, DNA evidence and evolutionary history can help remind us of our place in the universe. They remind us that nature does not carve a sharp dividing line between humans and the rest of the animal kingdom.

B. *Great Ape Cognitive Abilities*

In this brief section, I can only offer a small flavor of the skills and abilities of great apes. These stories are undeniably anecdotal, as is much of the literature on the subject. There are a few reasons for this. First, those who study great ape cognition are inclined to do so because they perceive the depth and breadth of great ape abilities. These same people are also unlikely to subject great apes to the more scientifically rigorous, though often less humane, kinds of experiments which would give us more confidence in our understanding. Nevertheless, when it comes to assessing the abilities of some being and what is at stake is the kind of treatment the being should receive, I believe it is appropriate to be somewhat charitable in our interpretations. The price of overstating the abilities of great apes is that they receive more protection than is minimally required. The price of understating their abilities may be to subject them to cruel and painful treatment which they recognize as such and perceive in ways that are not radically different than we would perceive the same treatment.

The biblical notion that humans and animals are radically different beings was modified dramatically by the Darwinian revolution nearly a century and a half ago. Darwin declared that any differences between the minds of humans and the minds of higher animals were "certainly one of degree and not kind."[35] We now know that all of the great apes can communicate symbolically with humans and sometimes with each other.[36] Great apes can recognize their own images in mirrors, which has led some to claim that they are uniquely self-reflective.[37] There is recent evidence that dolphins can also pass a mirror self-recognition test,[38] but other intelligent animals like monkeys, gibbons, and elephants "have the intelligence to use a mirror's reflection to find hidden food, and can recognize other individuals reflected in it, but never themselves."[39]

34. Tom Abate, *Genome Discovery Shocks Scientists,* S.F. CHRON., Feb. 11, 2001, at A1.

35. CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 105 (John Tyler Bonner & Robert M. May eds., Princeton Univ. Press, 1981) (1871).

36. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 130.

37. *See id.*

38. Mark Derr, *Brainy Dolphins Pass the Human 'Mirror' Test*, N.Y. TIMES, May 1, 2001, at D3.

39. ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 130.

1. *Language and lust—the orangutan Rinnie.*

Birute Galdikas, a former student of famed paleontologist Louis Leakey, has been studying orangutans for nearly thirty years, mostly on the island of Borneo. In an interview with the New York Times, Galdikas was asked whether orangutans can learn language. She replied:

> I think orangutans can learn how to use language at the level of a 3-year-old child. I had a student in 1978, Gary Shapiro, who came to Camp Leakey and he taught an adult female, Rinnie, sign language. He could not believe how fast she learned it. Rinnie took the tutoring personally. One day, Rinnie took Gary by the hand and tried to seduce him. Gary pushed her away. She thereafter lost all interest in signing.[40]

The story suggests that orangutans can, to some extent, learn to communicate through sign language and can develop interpersonal connections with humans. A generous interpretation of the story would take it to show that orangutans can engage in long-term planning (for example, perhaps Rinnie had been waiting to make her move until the right time) and that orangutans have long-term memories (such that Gary's refusal to accept Rinnie's offer led to an ongoing grudge in which Rinnie refused to communicate further in sign language). A more skeptical conception of orangutan abilities might take the story to illustrate that orangutans do not so much learn language as engage in behaviors for which they perceive rewards (for example, sexual gratification) and that they cease those behaviors when perceived rewards disappear.[41] Let us remember though that the dangers of anthropomorphism work in two directions. We must also be careful not to create artificial differences between humans and apes where none actually exists.[42]

2. *Long term memory—the chimpanzee Washoe.*

Chimpanzees are usually considered our closest kin among nonhuman animals. Chimpanzees "regularly walk bipedally in the wild" and they "use

40. Claudia Dreifus, *Scientist at Work/Birute Galdikas: Saving the Orangutan, Preserving Paradise*, N.Y. TIMES, Mar. 21, 2000, at F3. Famed paleontologist Louis Leakey recruited three young women in the 1960's to study great apes, including Dr. Galdikas. The other two were Dr. Jane Goodall, who discovered that chimpanzees made and used tools, and Dr. Dian Fossey, who lived and died among the gorillas of Rwanda and was played by Sigourney Weaver in the film Gorillas in the Mist. *Id.*

41. Or, such a view might challenge the accuracy of the anecdote, suggesting that that those who spend their lives studying animals are prone to anthropomorphize their research subjects.

42. Frans de Waal, an expert in primate behavior, has collected evidence indicating that apes can transmit cultural knowledge. *See* FRANS DE WAAL, THE APE AND THE SUSHI MASTER 28 (2001) ("The standard notion of humanity as the only form of life to have made the step from the natural to the cultural realm—as if one day we opened a door to a brand-new life—is in urgent need of correction.").

tools for various purposes."[43] Washoe was the first chimpanzee to communicate with humans in sign language.[44] She has also provided remarkable evidence of the ability of chimpanzees to retain long-term memories. Washoe was raised by Allen and Beatrice Gardner who began teaching her American Sign Language.[45] At five-years-old, Washoe left the care of the Gardners in order to be transferred to a primate institute. There was an eleven-year period in which she was separated from the Gardners.[46] When the Gardners made a surprise visit to Washoe after the eleven-year hiatus, Washoe remembered and spontaneously "signed their name signs."[47] Then, "Washoe signed 'COME MRS G'" to Beatrice Gardner "and led her into an adjoining room and began to play a game with her that she had not been observed to play since she was a five-year-old . . . ."[48] That chimpanzees can have such long-term memories suggests the possibility that they can have a fairly broad conception of a life. It certainly doesn't follow automatically that they do, but it gives us reason to think that they do not live merely from day-to-day but can reflect on events of the past and probably of the future.

3. *Human-like qualities—the bonobo Kanzi*

Closely related to chimpanzees are bonobos, formerly known as "pygmy chimpanzees." Harvard biology professor Edward Wilson tells the story of his first meeting with Kanzi, a young bonobo at the Language Research Center at Georgia State University. When the two first met, Wilson writes, "Kanzi reached out and touched my hand, nervously but gently, and stepped back a short distance to study me again."[49] Wilson was then given a cup of grape juice and continues, "I flourished a cup as if offering a toast and took a sip, whereupon Kanzi climbed into my lap, took the cup, and drank most of the juice. . . . Afterward everyone in the group had a good time playing ball and a game of chase with Kanzi."[50] On the surface, nothing about the story is so remarkable. What is remarkable, however, is the impression Kanzi made on Wilson:

> The episode was unnerving. It wasn't the same as making friends with the neighbor's dog. I had to ask myself: was this really an animal? As Kanzi was led away (no farewells), I realized that I had responded to him almost exactly

43. Adriaan Kortlandt, *Spirits Dressed in Furs?*, *in* THE GREAT APE PROJECT, *supra* note 24, at 137, 142 .

44. Roger S. Fouts & Deborah H. Fouts, *Chimpanzees' Use of Sign Language*, *in* THE GREAT APE PROJECT, *supra* note 24, at 28, 28.

45. WISE, *supra* note 5, at 219.

46. Fouts & Fouts, *supra* note 44, at 37.

47. *Id.*

48. *Id.* at 38.

49. EDWARD O. WILSON, BIOPHILIA 129 (1984).

50. *Id.*

> as I would to a two-year old child—same initial anxieties, same urge to communicate and please, same gestures and food-sharing ritual. . . . I was pleased that I had been accepted, that I had proved adequately human (was that the word?) and sensitive enough to get along with Kanzi.[51]

Once again, this story could be interpreted merely to show that Wilson overly anthropomorphizes bonobos. Such first hand accounts are naturally limited in their ability to convince skeptics. Yet, his almost indescribable feeling was that he was interacting more with a child than with a pet. Such stories are not uncommon.[52] Given that most of us will not have the opportunity to have such interactions with great apes, we should give some weight to these stories barring evidence to the contrary.

4. *Language and mourning—the gorilla Koko.*

Koko is a gorilla who learned elements of sign language at Stanford University as part of Francine Patterson's psychology dissertation in the early 1970's.[53] Today, Koko is said to have advanced further with language than any nonhuman.[54] Koko has a working vocabulary of over 1000 signs and understands approximately 2000 words of spoken English.[55] Koko "laughs at her own jokes and those of others. She cries when hurt or left alone. . . . [She] talks about her feelings, using words like 'happy', 'sad', 'afraid', 'enjoy', 'eager', 'frustrate', 'mad' and, quite frequently, 'love'."[56] While most of us will not interact directly with great apes, we *can* watch them on videotape. Many of these behaviors have been documented on the *Nature* program, "A Conversation with Koko."[57]

Francine Patterson, still Koko's trainer, has helped to make Koko the most famous great ape of all, becoming the first gorilla to participate in an online chat session.[58] Koko has also appeared on the cover of *Life* magazine, where

51. *Id.*

52. *See, e.g.*, Douglas Adams & Mark Carwardine, *Meeting a Gorilla*, *in* THE GREAT APE PROJECT, *supra* note 24, at 19-23; Adriaan Kortlandt, *supra* note 43, at 137-44; Geza Teleki, *They Are Us*, *in* THE GREAT APE PROJECT, *supra* note 24, at 296-302.

53. *Nature: A Conversation with Koko* (PBS), *available at* http://www.koko.org (last visited Sept. 9, 2001).

54. The Gorilla Foundation, *Koko's World* (2000), *at* http://www.koko.org/world (last visited Sept. 9, 2001).

55. Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas*, *in* THE GREAT APE PROJECT, *supra* note 24, at 58.

56. *Id.* at 59.

57. *Conversation with Koko*, *supra* note 53. Once again, of course, the criticism is open to us that the video does not show all of the times that Koko makes unintelligible remarks or behaves in otherwise unremarkable ways.

58. Press Release, America Online, Business Wire (Nov. 27, 2000). For better or worse, the press release also indicates that Koko is participating in a webcast to "children and netizens about her plans to celebrate" the holiday season and that Koko "has recently joined the e-commerce revolution by shopping online with her caregiver." *Id.*

she is pictured cuddling with a pet cat that she named "All-Ball."[59] All-Ball was hit by a car and killed, and Koko is reported to have grieved when told of the accident.[60] More recently, a gorilla named Michael, who had been Koko's companion for 24 years died of natural causes. In the weeks after Michael died, Koko "uttered frequent, mournful cries, particularly at night."[61] She purportedly did not want to be left alone and "indicated with sign language that she wanted a light left on at night when she went to bed."[62]

C. *Laws Protecting Great Apes*

As indicated above, some countries, including Great Britain and New Zealand have already enacted strong protections for great apes that are geared toward apes as individuals.[63] Laws in the United States are significantly less protective, particularly in the area of biomedical research, in part because, as we shall see later, the laws are underenforced. In this section, I describe some of the state, federal, and international protections that apply to great apes.

Legal protection for animals is largely based on the idea that they are the property of humans, and they are protected in much the same way and for many of the same reasons that inanimate property is protected.[64] Regardless of the purposes of the laws protecting animals, it would seem, at least from the legal language protecting animals, that the law does provide some significant protections. Most states have common law or statutory protections against animal cruelty that apply to great apes as they do to other animals.[65] Many states prohibit depriving an animal in one's care of "food, water, and shelter" or of "necessary sustenance." For example, New York law considers it cruelty to animals to deprive "any animal of necessary sustenance, food or drink, or [to] neglect to furnish it such sustenance or drink."[66] It also provides that an impounded or confined animal must be provided with "wholesome air, food, shelter, and water."[67] Many states also have provisions against abandonment[68]

59. *Conversation with Koko*, *supra* note 53.

60. *See id*.; Patterson & Gordon, *supra* note 55, at 59.

61. The Gorilla Foundation, *Koko's Mourning for Michael* (Aug. 2, 2000), *at* http://www.koko.org/world/mourning_koko.html (last visited Sept. 9, 2001).

62. *Id.*

63. *See supra* text accompanying notes 11-15.

64. *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 3-14 (1995). It has also been pointed out that the notion of animals as property may offer the most promising means of maintaining and expanding animal protections. *See* Posner, *supra* note 8, at 539.

65. The following state law citations and many others are well-documented in FRANCIONE, *supra* note 64, at 121.

66. N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1991).

67. *Id.* at § 356.

68. *See, e.g.*, MONT. CODE ANN. §45-8-211(1)(d)(1993).

and poisoning.[69] South Dakota, as an example, requires provisions for sanitary living conditions,[70] and Vermont mandates that animals be transported humanely.[71] California is said to have some of the toughest laws against cruelty to animals.[72] Aside from provisions prohibiting intentional maiming, torturing, wounding, and killing of animals, it imposes liability on those who negligently or without culpable state of mind, overwork, overload, torture, or kill animals.[73] Importantly, however, state law protections generally do not apply to the use of animals for food and food production or the use of animals for medical or scientific purposes.[74]

There are a number of major federal statutes that protect animals.[75] The one most concerned with animal welfare and animal cruelty is the federal Animal Welfare Act (AWA).[76] The AWA provides federal protections for animals from some forms of cruelty and mistreatment.[77] By statute, the Secretary of Agriculture is required to issue "standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."[78] These standards are supposed to include "minimum requirements" governing the "handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, [and] adequate veterinary care"[79] of animals. Importantly for the law governing great apes, a provision mandates minimum requirements "for a physical environment adequate to promote the psychological well-being of primates."[80] There are no psychological well-being provisions for dogs, cats, or horses.[81]

69. *See, e.g.*, HAW. REV. STAT. §711-1109(1)(b)(1988).

70. S.D. CODIFIED LAWS ANN. §40-1-2.3 (Mitchie 1991).

71. 13 VT. STAT. ANN. tit. 13, § 352(a)(4), (10) (Supp. 1992).

72. FRANCIONE, *supra* note 64, at 119.

73. CAL. PENAL CODE §597(b) (West Supp. 1993).

74. *See, e.g.*, LA. REV. STAT. ANN. § 14:102.1(C) (West 1986) (stating that certain Louisiana animal cruelty statutes do not apply to "activities carried on for scientific or medical research governed by accepted standards").

75. *See, e.g.*, Humane Slaughter Act, 7 U.S.C. §§ 1901-1906 (2001); Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2001); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668-668d (2001); Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (2001); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (2001); Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2001); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2001).

76. Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2001).

77. *Id.*

78. *Id.* § 2143(a)(1).

79. *Id.* § 2143(a)(2)(A).

80. *Id.* § 2143(a)(2)(B); *see also* Animal Legal Def. Fund, Inc. v. Sec'y of Agric., 813 F. Supp. 882, 886 (D.D.C. 1993), *vacated,* 29 F.3d 720 (D.C. Cir. 1994).

81. *See* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1342 (2000).

Under the psychological well-being provisions, the Secretary of Agriculture has promulgated regulations to require "dealers, exhibitors, and research facilities" to "develop, document, and follow" a plan to promote the psychological well-being of primates.[82] These plans must address primate "social grouping"[83] and opportunities for "environmental enrichment" including, for example, opportunities to use "perches, swings, mirrors, and other increased cage complexities."[84] For great apes weighing over 110 lbs. (50 kg), regulations rather vaguely require "additional opportunities to express species-typical behavior."[85] Details of what plans should contain are virtually absent, except to say that the plan should accord with "professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian."[86] Many critics have argued that the regulations are inadequate because they delegate responsibility for promoting primate well-being to those being regulated and to the veterinarians in their employ.[87] In Part III, we will return to this provision in the context of *Animal Legal Defense Fund, Inc. v. Glickman*,[88] a groundbreaking case in animal law and an important case in its own right for the doctrine of standing.

Aside from weaknesses in the substantive provisions of the AWA, it has typically been underenforced.[89] This may have something to do with the fact that, before the U.S. Department of Agriculture (USDA) was assigned responsibility for enforcing the AWA, the department "dealt primarily with the production, treatment, and slaughter of food animals."[90] To the dismay of many animal activists, the AWA does not regulate animals used for food or clothing.[91] Also, although the AWA may apply to animals used for experimental purposes before or after the conduct of experiments, the AWA states that "nothing in this chapter shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility."[92]

82. 9 C.F.R. § 3.81 (2000).

83. *Id.*. § 3.81(a).

84. *Id.* § 3.81(b).

85. *Id.* § 3.81(c)(5).

86. *Id.* § 3.81.

87. *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 439 (D.C. Cir. 1998) (finding that "placing such broad and unguarded discretion in the hands of the veterinarian in the exhibitor's own employ is an insufficient safeguard to protect primate well-being").

88. 154 F.3d 426 (D.C. Cir. 1998).

89. *See* notes 157-158 *infra* and accompanying text.

90. FRANCIONE, *supra* note 64, at 211.

91. "In fact, no federal statute regulates the treatment of animals used for food or food production on farms . . . ." Sunstein, *supra* note 81, at 1342.

92. 7 U.S.C. § 2143(a)(6)(A)(i) (2001). Section 2143(a)(6)(ii) applies this same prohibition to rules, regulations, or orders "with regard to the performance of actual research

State and federal laws on animal welfare are supposed to reflect both direct and indirect duties to animals. A direct duty to an animal is one we have because the animal itself has some interest, for example, to be nourished and avoid torture. An indirect duty to an animal is one we have by virtue of our relationship to other humans. For example, if we ban animal torture because animal torture encourages perverse human sentiments and thereby increases human suffering, then we have an indirect duty to protect animals by virtue of our relationship to other humans. Elements of both kinds of duties can be seen in our legal regime, though they may be hard to distinguish when a law's purpose is not clearly stated.

As long ago as 1892 in *Hunt v. State*,[93] an animal protection statute was said to protect animals by helping to develop "a humane regard for the *rights* and feelings of the brute creation by reproving evil and indifferent tendencies in human nature in its intercourse with animals."[94] The quote reflects direct duties to animals (their "rights") as well as indirect duties that stem from a desire to reduce cruel tendencies in people.[95] In contrast, the protection of endangered species as such does not provide for direct duties to animals. For example, the Endangered Species Act declares that threatened and endangered species are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[96] Distinctly lacking from direct consideration, however, are the animals themselves. At best, the Endangered Species Act provides for direct duties to animal *species*.

Nevertheless, because human activities have made all of the great apes endangered,[97] it happens that some of the strongest great ape protections come from the Endangered Species Act and related protections. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) oversees a large multinational treaty, to which the U.S. is a signatory, that has "drastically diminished the export of many species—including great apes—from their native habitats, though illegal shipments occur."[98] Endangered species protections mean that great apes are generally not used in dangerous experiments in the United States, although captive-bred chimpanzees may be used under some circumstances.[99]

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or experimentation." *Id.* at § 2143(a)(6)(ii).

93. 29 N.E. 933 (Ind. App. 1892) (emphasis added).

94. *Id.* at 933.

95. For evidence that anticruelty laws do not, in fact, reflect direct duties to animals, see FRANCIONE, *supra* note 64, at 4, 17-33.

96. Endangered Species Act of 1973, § (2)(a)(3) (1973).

97. Species considered threatened and endangered can be found at: http://endangered.fws.gov (last visited Sept. 9, 2001). All of the nonhuman great apes, including gorillas, orangutans, bonobos, and chimpanzees are considered endangered in their natural habitats. Chimpanzees, however, are in the less protected category of "threatened species" when held in captivity outside of their natural range. *Id.*

98. Cantor, *supra* note 24, at 280.

99. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 131.

D. *The Great Ape Project*

In 1993, a book called *The Great Ape Project* was published. Edited by Paola Cavalieri and Peter Singer, the book begins with "A Declaration on Great Apes" (the "Declaration") that describes the principle goal of the editors and contributors to the book—namely, to establish certain basic moral and legal rights for great apes.[100] Thirty-six people contributed to the book including philosopher Peter Singer, primatologist Jane Goodall, evolutionary biologist Richard Dawkins, and novelist Douglas Adams. The book, *The Great Ape Project*, led to the creation of an international organization with the same name "founded to work for the removal of the nonhuman great apes from the category of property, and for their immediate inclusion within the category of *persons*."[101]

The Great Ape Project's Declaration begins by identifying a class of beings said to be in "the community of equals." It asserts that the community of equals should, at a minimum, include all great apes: humans, chimpanzees, bonobos, gorillas, and orangutans.[102] According to the Declaration, the community of equals "is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law."[103] By its terms, the Declaration is intended to promote both a moral and a legal position that is not intended to be merely a statement of theoretical moral philosophy.[104]

100. The Great Ape Project, *A Declaration on Great Apes*, *in* The Great Ape Project, *supra* note 24, at 4-7 [hereinafter *Declaration*].

101. The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html.#Section1_1 (last visited Sept. 9, 2001). The Great Ape Legal Project is a joint effort between the Great Ape Project International and the Animal Legal Defense Fund. Animal Legal Defense Fund, *Great Ape Legal Project*, *at* http://www.aldf.org/chimp.htm (last visited Sept. 9, 2001).

102. *Declaration*, *supra* note 100, at 4. Bonobos were originally thought to be "pygmy chimpanzees." Primatologists recently recognized them as a distinct species, and the Great Ape Project subsequently recognized them as an independent kind of great ape meant to be incorporated into the "community of equals." *See* The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html#Section5_1 (last visited Sept. 9, 2001).

103. *Declaration*, *supra* note 100, at 4. Notice too that the Declaration speaks in terms of "principles or rights." This is probably a compromise among those writers who would speak in terms of great ape rights and those utilitarians, like Peter Singer, who prefer to speak in terms of more flexible principles. For conciseness, I will call them principles. Singer writes, "The language of rights is a convenient political shorthand. It is even more valuable in the era of thirty-second TV news clips than it was in Bentham's day; but in the argument for a radical change in our attitude to animals, it is in no way necessary." PETER SINGER, ANIMAL LIBERATION 8 (2d ed. 1990).

104. In fact, Peter Singer, a leader in the efforts of the Great Ape Project, is often cited by Richard Posner as one of few academic moral philosophers who emphasizes creative "moral entrepreneurship" over the sometimes cold and calculating moral theorizing of which Posner is quite critical. *See* POSNER, *supra* note 20, at 43 n.67, 84 (1999) (discussing academic moralism).

The Declaration highlights three principles to protect great apes. They include a right to life, a right to be free from unlawful confinement, and a general prohibition on torture. The Project's right to life provides: "The lives of members of the community of equals are to be protected. Members of the community of equals may not be killed except in very strictly defined circumstances, for example, self-defence."[105] Euthanasia is probably also an excusing circumstance for taking a great apes' life, at least for many members of the Project, and it would be interesting to know what else would qualify. For example, the Project is silent about capital punishment; undoubtedly, it would oppose capital punishment of nonhuman apes, since nonhuman apes are not sufficiently responsible for their actions to have any sort of criminal liability.[106]

Attributions of criminal liability to animals, however, were once rather widespread. From the Ninth Century to as recently as the Nineteenth Century, animals throughout Europe and elsewhere were put on trial and held responsible for a variety of crimes,[107] sometimes punishable by death. E. P. Evans' classic book on the subject, *The Criminal Prosecution and Capital Punishment of Animals*, recounts the following story:

> On the 5th of September, 1379, as two herds of swine, one belonging to the commune and the other to the priory of Saint-Marcel-le-Jeussey were feeding together near that town, three sows of the communal herd, excited and enraged by the squealing of one of the porklings, rushed upon Perrinot Muet, the son of the swinekeeper, and before his father could come to his rescue, threw him to the ground and so severely injured him that he died soon afterwards. The three sows, after due process of law, were condemned to death; and as both the herds had hastened to the scene of the murder and by their cries and aggressive actions showed that they approved of the assault, and were ready and even eager to become *participes criminis*, they were arrested as accomplices and sentenced by the court to suffer the same penalty.[108]

Cases like this were featured in a 1993 Miramax film, The Advocate, which portrays a country lawyer in Fifteenth Century Europe who has a substantial practice defending animals charged with crimes.[109] As ludicrous as these stories sound to our modern sensibilities, they remind us of the dangers of anthropomorphizing animals by attributing thoughts and motivations which are

105. *Declaration*, *supra* note 100, at 4.

106. *See, e.g.*, Gary L. Francione, *Personhood, Property, and Legal Competence*, *in* THE GREAT APE PROJECT, *supra* note 24, at 256. Also, it is clear that a very "strictly defined" research protocol calling for the killing and dissection of a laboratory chimpanzee would not qualify as an excusing circumstance in the minds of many Project proponents.

107. *See* Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 289*; see also* E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (Faber & Faber 1988) (1906).

108. EVANS, supra note 107, at 144.

109. THE ADVOCATE (Miramax, 1993).

beyond their capabilities. Great Ape Project proponents, however, would remind us that animals are helpless victims of whatever policies and practices humans have toward them. In any event, our history of animal trials at least reminds us that our understanding of animal capacities affects the ways that we treat them. It also reminds us, as will be relevant in Part III, that the notion that a particular nonhuman animal can have its day in court is not quite so foreign as it now seems—in fact, it was once rather commonplace.[110]

The second principle of the Great Ape Project is the protection of individual liberty, meant to keep great apes out of laboratory cages and most zoo environments:

> Members of the community of equals are not to be arbitrarily deprived of their liberty; if they should be imprisoned without due legal process, they have the right to immediate release. The detention of those who have not been convicted of any crime, or of those who are not criminally liable, should be allowed only where it can be shown to be for their own good, or necessary to protect the public from a member of the community who would clearly be a danger to others if at liberty. In such cases, members of the community of equals must have the right to appeal, either directly or, if they lack the relevant capacity, through an advocate, to a judicial tribunal.[111]

As it is worded, this principle would seem to apply more to humans than to other great apes. After all, what legal process would be engaged in to determine if a nonhuman ape should be imprisoned? With respect to nonhuman animals, and that is certainly its implicit focus, the principle is designed to preclude keeping great apes in small cages in research laboratories and zoos. With respect to zoos, the Project:

> oppose[s] the keeping of apes in situations designed primarily for the benefit of human beings who observe them (zoos). Wherever possible, great apes should be released from captivity into a habitat where they can live freely. When this is not possible, we accept as an interim measure the provision of sanctuaries for great apes who cannot be returned to natural conditions. Individuals living provisionally in these sanctuaries must have the opportunity to remove themselves from humans as they please, and humans visiting them should be educated in the right of apes to live their own lives.[112]

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110. This is not meant to downplay the very important distinction between trying an animal for a criminal offense and giving an animal standing to sue, by way of a human guardian, under an existing animal protection statute.

111. *Declaration*, *supra* note 100, at 4.

112. The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html#Section3_3 (last visited Sept. 9, 2001). It goes on to say:

> We accept that, for reasons given above, or because they have been infected with a contagious disease, there may be some individuals who will never be able to live freely or in a group. In such cases, they should be provided with the space, facilities and opportunities for non-tactile interaction with others of their kind, or with humans, that best corresponds to their individual needs and interests.
>
> A guardian or guardians should be appointed to represent the interests of nonhuman apes living in sanctuaries or other human-controlled environments. In particular cases, guardians

The protection of individual liberty is also meant to preclude keeping great apes in laboratory cages. The Great Ape Project is replete with stories of apes that are caged in areas which are too small and poorly kept with fecal material caked on to bars and sides of cages.[113] Current law provides that primates should be kept under humane conditions but keeps the standard for humane treatment far below that sought by the Project.[114]

The third and final explicitly stated "right or principle" in the Declaration is a prohibition on torture: "The deliberate infliction of severe pain on a member of the community of equals, either wantonly or for an alleged benefit to others, is regarded as torture, and is wrong."[115] Much like the second principle which applies to animal liberties, this principle is designed to protect animals from suffering. In all likelihood, this principle is somewhat more focused on the conduct of biomedical experimentation on great apes. It suggests that pain cannot be inflicted on great apes for what is merely an "alleged benefit." Yet, the benefits from animal experimentation would seem to be more than just "alleged." Perhaps the benefits from great ape experimentation, when involving significant pain to great apes, are presumed to be merely "alleged." Biomedical experimentation may be an area where Project contributors had some disagreement. Adrian Kortlandt, a professor of animal psychology and ethology offered the following ambivalent discussion of experimentation on apes:

> I am aware, of course, that living and sometimes non-anesthetized subjects are needed in certain biomedical experimentation aiming to alleviate the suffering of humans. Those who have seen what is going on inside a hospital, and those who have lost a loved one owing to the impotence of medical science, will understand what I mean. I myself have seen some heart-breaking research in primate centres, particularly in the psychological and psychiatric field. However, as a student of psychology I have also seen enough in mental wards to appreciate the value of such research. On the other hand, how can we justify such research with our innocent ape cousins, while doing so is not allowed even with those humans who are guilty of the most horrifying crimes against humanity?[116]

> may approve limitation of their fertility, so that apes will not have to live in unacceptable conditions indefinitely.
>
> It must be decided in each case whether it is best for individual great apes to be brought to sanctuaries or to remain where they are. Considerations such as available housing, stress created by the presence of humans, and existing bonds with caretakers will affect this decision.
>
> In the rare cases that they do remain in the zoo, because it is in their own best interests, the priority in the power relationship should be given to the interests of the nonhuman apes. If they can voluntarily place themselves in view of the public, there should be a sign clearly saying that these are the last generation of great apes in zoo captivity.

Id.

113. Cantor, *supra* note 24, at 283.

114. *See supra* text accompanying notes 64-80.

115. *Declaration*, *supra* note 100, at 4.

116. Kortlandt, *supra* note 43, at 142.

In any event, the principle prohibiting torture would, at least, go well beyond our current protections for animals involved in lab experiments who, as discussed, currently have very few protections.[117]

Lastly, to avoid the criticism that the Great Ape Project draws an arbitrary cutoff line around great apes that leaves the rest of the primate and animal kingdom to the ravages of mankind, the Declaration remains agnostic as to whether or not other animals deserve the same protections that are demanded for great apes. The Declaration, reflecting the diversity of opinions among its contributors, says:

> No doubt some of us, speaking individually, would want to extend the community of equals to many other animals as well; others may consider that extending the community to include all great apes is as far as we should go at present. We leave the consideration of that question for another occasion.[118]

In Part II, we will explore the philosophical foundations of the Great Ape Project to help understand whether the interests of all animals should be treated equally or if those of human and nonhuman apes may be entitled to greater consideration.

II. PHILOSOPHICAL PERSPECTIVES

The Great Ape Project speaks with many voices in its exposition of the philosophical basis for extending rights to great apes. The explanation which is most widely cited and discussed comes from Peter Singer, currently a professor of bioethics at Princeton University. For Singer, human and nonhuman animals have interests if they have the ability to experience pains or pleasures. Singer cites an oft-quoted passage from Jeremy Bentham indicating that, when it comes to animals, "[t]he question is not, Can they *reason*? nor Can they *talk*? but, *Can they suffer*?"[119] Singer calls beings with the capacity to experience pleasures and pains "sentient," though he acknowledges that this is a special, narrow use of the term. The class of sentient beings includes humans, apes, monkeys, dogs, pigs, horses, rabbits, chickens, and more. Excluded from this category are non-sentient entities like rocks, trees, and computers as well as lower organisms like insects and bacteria.[120] While Justice Douglas suggested, in the context of environmental law, that legal standing might profitably be

117. *See supra* text accompanying note 92.

118. *Declaration*, *supra* note 100, at 5.

119. SINGER, ANIMAL LIBERATION, *supra* note 103, at 7 (quoting Jeremy Bentham). Bentham's articulation of utilitarianism locates moral value, ultimately, in the mental states of sentient beings. As such, it is subject to Robert Nozick's critique of mental state theories of the good. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42-45 (1974); *see also* J.J.C. Smart, *An Outline of a System of Utilitarian Ethics,* in UTILITARIANISM: FOR AND AGAINST 19-22 (1973). For reasons to question the force of Nozick's critique, see Adam Kolber, *Mental Statism and the Experience Machine*, 3 BARD J. OF SOC. SCI. 10 (1994/1995).

120. Singer can confidently respond in the negative to Richard Epstein's slippery slope challenge, "Would even bacteria have rights?" Glaberson, *supra* note 6.

granted to "the inanimate object about to be despoiled, defaced, or invaded,"[121] Singer need take no such view on the matter, as rivers, streams, and canyons are not sentient beings.

Singer rightly observes that most animals are capable of feeling pain. Although only humans and some nonhuman apes are capable of telling us that they are in pain, "[n]early all the external signs that lead us to infer pain in other humans can be seen in other species . . . ."[122] Singer notes that although pain "can never [directly] be observed,"[123] its "behavioral signs include writhing, facial contortions, moaning, yelping or other forms of calling, attempts to avoid the source of pain, appearance of fear at the prospect of its repetition, and so on."[124] And though we cannot have absolute certainty that even our human friends feel pain, "none of us has the slightest real doubt that our close friends feel pain just as we do."[125]

Importantly for Singer, the capacity to experience pleasure and pain "is not just another characteristic like the capacity for language, or for higher mathematics,"[126] which might arbitrarily determine whether a being's interests should count. Rather, the "capacity for suffering and enjoying things is a prerequisite for having interests at all, a condition that must be satisfied before we can speak of interests in any meaningful way."[127] Once we understand Singer's requirement for having an "interest," we can better understand his structure for resolving conflicts among the interests of different beings. Singer's principle of equal consideration of interests ("equal consideration") says that we should "give equal weight in our moral deliberations to the like interests of all those affected by our actions."[128] On this view, because a cow is sentient, its interests in avoiding painful electric shocks during a scientific experiment count as strongly as the interests that a chimpanzee or a human has in avoiding the same amount of pain.

Again, while Singer does not speak for all Project proponents, the language of equal consideration of interests is readily adopted by the Great Ape Project. The Declaration says that "a rational ethic has emerged challenging the moral significance of membership of our own species. This challenge seeks *equal consideration of the interests of all animals*, human and nonhuman."[129] Furthermore, were we to give great ape interests in experiencing pleasure and

121. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); *see also* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

122. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11.

123. *Id.* at 10.

124. *Id.* at 11.

125. *Id.* at 10.

126. *Id.* at 7.

127. *Id.* at 7.

128. PETER SINGER, PRACTICAL ETHICS 21 (2d ed. 1993).

129. *Declaration*, *supra* note 100, at 5 (emphasis added).

avoiding pain equal consideration to those interests held by humans, we would likely come to a proposal very much like the Great Ape Project's Declaration on Great Apes. We would, at a minimum, protect great apes from torture and unlawful captivity and would, perhaps, allow these protections to be enforced by guardians acting on behalf of apes.

The Declaration also provides for a right to life. Since a being's life can (we think) be taken painlessly, Project proponents need an explanation for why it harms great apes when their lives are taken quickly and painlessly. Proponents could appeal to the foregone pleasure that the ape would have experienced had it been allowed to live. This might be sufficient, particularly if we believe that the ape would lead a pleasant life if left alone.

Singer's answer goes further than that, asserting that great apes can have interests beyond mere pleasures and pains. A subset of sentient animals, including great apes, have more sophisticated interests, like interests in continuing to live in the future.[130] The discussion in Part I makes plausible the notion that some apes can be self-aware, have expectations about the future, and have memories that extend significantly into the past. When we kill a being that has an interest in continuing to live in the future, we have done something worse, all else being equal, than when we kill a being which is *merely* sentient, like a fish.

Nothing about the principle of equal consideration of interests implies that all humans and all animals have identical interests.[131] Some beings have an interest in life itself and recognizing that only some beings are capable of having that interest does not violate the principle of equal consideration. Equal consideration only tells us how to compare the relevantly similar interests of beings. When beings have different interests, we can compare those interests only by using our intuitions or by finding some other theoretical basis for making the comparison.

A. *Equal Consideration and Human Equality*

Much more needs to be said about how we understand human and nonhuman interests. However, before critically examining the principle of equal consideration in the context of nonhuman animals, it is important to see how the principle can be applied to humans. It is in this context that the principle holds much of its appeal, and most of those who cite Singer on behalf of animal rights are making arguments for animals that derive from intuitions about human equality.

130. SINGER, PRACTICAL ETHICS, *supra* note 128, at 90.

131. Animal liberationists are seeking "equal rights" for animals, not "equal treatment," where equal treatment is understood to mean "identical treatment." *See, e.g.*, S.F. SAPONTZIS, MORALS, REASON, AND ANIMALS 78-79 (1987).

Singer uses the principle of equal consideration to explain remarkably well many of our beliefs about equality among humans. According to Singer, human equality is based not on some factual claim of equality but on equality as an ethical principle.[132] We think that human interests should count equally regardless of an individual's race, sex, strength, or intelligence. It is not the case that humans are actually equal in terms of their attributes, but their attributes are irrelevant to the ways in which their interests should be considered; humans are equal in the sense that they have interests that deserve equal moral consideration. Were we to base our principle of equality among humans on their attributes, we would see that people are plainly not identical in their abilities and attributes:

> Some are tall, some are short; some are good at mathematics, others are poor at it; some can run 100 metres in ten seconds, some take fifteen or twenty; some would never intentionally hurt another being, others would kill a stranger for $100 if they could get away with it. . . . And so we could go on. The plain fact is that humans differ, and the differences apply to so many characteristics that the search for a factual basis on which to erect the principle of equality seems hopeless.[133]

We might admit that not all humans are factually equal but deny that the factual differences among humans correspond with the typical boundaries along which human inequalities have typically been drawn (for example, race, gender, and sexual orientation). So "we can admit that humans differ as individuals, and yet insist that there are no morally significant differences between the races and sexes."[134] Nevertheless, Singer thinks that empirical arguments for equality along gender and racial lines are insufficient to refute the suggestion that, for example, everyone should be given an IQ test and those with the higher scores shall rule over those with the lower scores.[135] This sort of inegalitarianism is not refuted by arguments which say that humans are factually equal since such inegalitarianism is based on genuine (though irrelevant) differences. Singer writes, "We can reject this 'hierarchy of intelligence' and similar fantastic schemes only if we are clear that the claim to equality does not rest on the possession of intelligence, moral personality, rationality, or similar matters of fact."[136]

Singer's rejection of a "hierarchy of intelligence" also serves as a response to what we might call the "super-human hypothetical." Suppose that aliens someday land on Earth, and we come to understand that these aliens are far more intelligent than we are. We are also told that they love the taste of human flesh, and by the way, would we mind preparing ourselves into sandwiches so that the invaders may chew on our live flesh? We would all agree that humans

132. SINGER, PRACTICAL ETHICS, *supra* note 128, at 21.

133. *Id.* at 17-18.

134. *Id.* at 19.

135. *Id.* at 20.

136. *Id.*

should not submit to such treatment merely to satisfy the aliens' gustatory preferences. Equal consideration gets the right results. Under equal consideration, no matter how intelligent or artistic or emotionally astute are these aliens, human interests in avoiding the pain of being eaten alive outweigh the comparatively minor pleasures the aliens receive from eating us.[137]

B. *Equal Consideration and Animal Equality*

It is, therefore, Singer's view that "[t]here is no logically compelling reason for assuming that a difference in ability between two people justifies any difference in the amount of consideration we give to their interests."[138] This seems to jibe with the basic structure of our society in which rights are generally granted to people independently of their abilities. Yet, Singer's principle which embraces equality among all human beings "cannot be limited to humans."[139] Racists, on Singer's view, violate equal consideration by giving more consideration to the interests of members of their own race than to the interests of those of a different race.[140] Sexists violate equal consideration by giving more consideration to the interests of those of a particular gender. And, similarly, those who are speciesist "give greater weight to the interests of members of their own species when there is a clash between their interests and the interests of those of other species."[141] In order to avoid "speciesism,"[142] the prejudicial favoring of one species over another, we must treat the similar interests of all sentient animals equally.

At a time when Africans were enslaved in the British dominions, Jeremy Bentham wrote:

> The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a fullgrown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an

137. Of course, if the aliens had unimaginably strong desires for human flesh or perhaps required it in order to live, the hypothetical becomes more tricky and represents a classic challenge to utilitarianism.

138. *Id.* at 20-21.

139. *Id.* at 55.

140. *Id.* at 58.

141. *Id.*

142. This term is usually credited to Richard Ryder. *See* Richard Ryder, *Sentientism, in* THE GREAT APE PROJECT, *supra* note 24, at 220, 220. However, the term was popularized by Peter Singer. Can animals be speciesist against humans? The idea is parodied in *Animal Farm*'s reference to "Four legs good; two legs bad." *See* GEORGE ORWELL, ANIMAL FARM 40 (1946).

> infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail?[143]

As Singer reads Bentham, there is no "insuperable line" that distinguishes human and nonhuman animals. Singer is concerned with the utility of satisfying interests irrespective of the interest-holder. As long as a being has interests (which it will if it can experience pleasure or pain), the principle of equal consideration says that those interests weigh equally against the same kinds of interests of other beings. For Singer, the relevantly similar interests of humans and livestock animals, for example, are equally considered. When a human interest in tasty food is compared with a cow's interest in avoiding the pain of slaughter, Singer finds that the cow's interest is stronger. Our action, all else being equal, should be guided so as to respect the stronger interest of the cow over the lesser interest of the human.[144]

By demanding equal consideration of the interests of all sentient beings, Singer asks us to act in a way that is divorced from the current sentiments of most people. People often favor the interests of those they know over those they do not and those who remind us of ourselves over those who do not. Such feelings probably do help explain why we, in fact, favor humans over other species. Of course, these are exactly the kinds of provincial sentiments Singer is trying to repudiate.

Still, a potential objection to Singer is that the principle of equal consideration is too divorced from our actual human sentiments to provide meaningful guidance to our actions. Richard Posner has made this sort of challenge,[145] noting that human-centered sentiments may be hardwired into our brains:

> The main "reason" why the "philosophical" idea that . . . talking apes might have more rights than newborn or profoundly retarded children seems outlandish and repulsive may simply be that our genes force us to distinguish between our own and other species and that in this instance disembodied rational reflection will not overcome feelings rooted in our biology.[146]

Furthermore, perhaps if we try to treat the interests of all beings equally, we will so disperse our concern for others that we erode whatever non-self-serving interests human nature has granted us.

Singer, of course, believes that we should not let our current emotions dictate what is right and wrong, especially when these emotions have developed in a

143. SINGER, ANIMAL LIBERATION, *supra* note 103, at 7 (quoting Jeremy Bentham).

144. For criticism of this utilitarian argument when applied in a society-wide context, see TOM REGAN, THE CASE FOR ANIMAL RIGHTS 220 (1983) and MARK ROWLANDS, ANIMAL RIGHTS: A PHILOSOPHICAL DEFENCE 84-86 (1998).

145. Posner and Singer recently engaged in a dialogue on animal rights. Richard Posner & Peter Singer, *Dialogue: Animal Rights*, SLATE, June 12-15, 2001, *available at* http://slate.msn.com/dialogues/01-06-11/dialogues.asp (last visited Sept. 9, 2001).

146. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 347-48 (1990); *see also* Posner, *supra* note 64.

speciesist society. Also, the fact that some people at least try to treat the interests of "talking apes" as equal to those of humans, suggests that our biological wiring is not our destiny. Clearly, however, the divide between our actual sentiments and Singer's theory presents a difficulty for Singer's position.[147]

C. *Proportional Consideration*

A view which more closely matches the views that a lot of people have toward nonhuman animals takes an animal's interests to be somehow related to its cognitive capacities. We might think, for example, that the value of a being's pleasures and pains (and the interests derived from those pleasures and pains) is in some way proportional to the being's cognitive abilities. Call this the principle of proportional consideration of interests ("proportional consideration"). On this view, the value of the experiences of a human and a baboon and a snake are all different because they have different cognitive abilities.

We might be led toward a view of proportional consideration if we understand animal pains and pleasures somewhat differently than does Singer. Certainly, our uncertainty about the nature of nonhuman experiences leaves room for disagreement. Though animals surely do feel pain, our confidence in our abilities to understand and evaluate the experiences of another being drops off as the being becomes more unlike ourselves. The more different a being is, the more limited are our inferences about its experiences. I can make better inferences concerning the experiences of Jimmy Carter than Koko the Gorilla, though I have met neither of them, because I know that one is a human and one is a gorilla. I can also make better inferences about the experiences of Koko than a mouse, because I know that Koko is anatomically more like me than is a mouse, and Koko is capable of communicating basic information about how she feels. My inferences are based on a combination of scientific knowledge (e.g., neuroanatomy and neurochemistry) as well as a perceived recognition of a being's experiences based on its external behavior including, if possible, a being's subjective reports of pleasure and pain.

Still these inferences are limited, even when other beings are quite like us. It is virtually impossible, for example, to know how an opposite-gendered sexual partner experiences sexual stimulation.[148] Even if male and female sexual stimulation creates similar physiological and hormonal responses in both genders, we know that their different sexual organs mean that men and women must be having experiences that differ in significant ways.

147. For a discussion of conflict between moral sentiment and moral theory, see Adam Kolber, The Moral of Moral Luck, 45-66 (1996) (unpublished senior thesis, Princeton University) (on file with author).

148. Perhaps transgendered people have some knowledge of this sort.

Should we think that all animals which experience pain and pleasure, regardless of species, are experiencing the same kind of thing? Different kinds of animals have different brains and their states of pain and pleasure, we might expect, will be different in some ways. The more difficult it is to compare states of pleasure and pain across species lines, the more difficult it is to compare the interests to which these mental states give rise.

Singer is aware of some of the difficulties of making interspecies comparisons of utility. He believes, however, that although it may be difficult to know exactly how to compare states of pain and pleasure across species, the comparison is possible, at least in principle:

> If I give a horse a hard slap across its rump with my open hand, the horse may start, but it presumably feels little pain. Its skin is thick enough to protect it against a mere slap. If I slap a baby in the same way, however, the baby will cry and presumably does feel pain, for the baby's skin is more sensitive. So it is worse to slap a baby than a horse, if both slaps are administered with equal force. But there must be some kind of blow—I don't know exactly what it would be, but perhaps a blow with a heavy stick—that would cause the horse as much pain as we cause a baby by a simple slap.[149]

The problem may be more complicated than Singer's example of horse and baby pain suggests. It may be impossible to compare a baby's pain with a horse's pain, not because the former has soft skin and the latter has tough skin, but because they have different brains, and presumably, different mental states. We may think that pain is a mental state which all animals tend to avoid, and pleasure is a mental state which all animals tend to prefer. However, we do not know that these mental states are equally bad across species, because they may differ not only in duration and intensity but in other hard to define ways.

John Stuart Mill argued there are higher and lower pleasures and nonhumans can only have the latter. According to Mill, "Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification."[150] When it comes to pleasures and pains, Mill emphasized that we must consider quality as well as quantity,[151] and the quality of human experiences is potentially higher than that of animals. As evidence, Mill argued that "[f]ew human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast's pleasures."[152] Or, put more famously, "[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is of a different opinion, it is because they

149. SINGER, PRACTICAL ETHICS, *supra* note 128, at 59.

150. JOHN STUART MILL, *Utilitarianism, in* ON LIBERTY AND UTILITARIANISM 145 (Alan M. Dershowitz ed., Bantam Books 1993) (1871).

151. *Id.* at 145-46.

152. *Id.* at 146-47.

only know their own side of the question. The other party to the comparison knows both."[153]

While I am not so sure that Socrates really knows what it is like to be a pig, it is fair to say that humans can experience depths of pleasure and suffering which nonhuman animals cannot. A chimpanzee cannot experience the pain felt by Hamlet in discovering that his uncle killed his father and married his mother (assuming that there really had been a Hamlet who had such experiences). It may be that chimpanzee pain differs not only in intensity from human pain but also in kind. In the case of interpersonal assessments of suffering among humans, we know that normal humans have brain structures that are, at some level, nearly identical. We can plausibly extrapolate that human states of pain and pleasure are also quite similar in kind. In the case of great apes and other animals, we have overwhelming scientific evidence that these beings experience pleasure and pain. We do not know, however, what their pain feels like from the inside and whether that pain is somehow not as bad in beings with lower cognitive functions.

Singer cites some neuroanatomical and evolutionary evidence indicating that animal pain is similar to human pain. Singer writes:

> Although human beings have a more developed cerebral cortex than other animals, this part of the brain is concerned with thinking functions rather than with basic impulses, emotions, and feelings. These impulses, emotions, and feelings are located in the diencephalon, which is well developed in many other species of animals, especially mammals and birds.[154]

Also, Singer indicates that human and animal nervous systems evolved in the same way and that the "evolutionary history of human beings and other animals, especially mammals, did not diverge until the central features of our nervous systems were already in existence."[155] In summary, then, "it is surely unreasonable to suppose that nervous systems that are virtually identical physiologically, have a common origin and a common evolutionary function, and result in similar forms of behavior in similar circumstances should actually operate in an entirely different manner on the level of subjective feelings."[156]

Even if Singer is right that human and other mammalian brains are substantially similar (certainly a controversial point), they still differ *somewhat*. It is very difficult to tell how important these differences are likely to be. The science of neurophysiology is only partly helpful in telling us about the internal experiences of other organisms. Certainly, neurophysiology alone will not tell us how to value different, if similar, experiences.

153. *Id.* at 148.

154. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11. Singer cites this point to the appropriately-named Lord Brain, Presidential Address, in THE ASSESSMENT OF PAIN IN MEN AND ANIMALS (C.A. Keele & R. Smith, eds., 1962).

155. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11.

156. *Id.*

Furthermore, our higher cognitive functions may interact with our simple experiences of pleasure and pains in nonobvious ways. These higher cognitive functions may play a role in the value of our experiences such that we cannot really separate out simple pleasures and pains from the rest of our cognitive apparatus. It may be that human pain is generally worse than chimpanzee pain which is generally worse than tortoise pain, not because humans are more important than chimps which are more important than tortoises. Instead, it may be that the nature of their experiences, even when they are supposed to be simple experiences of "pain" or "pleasure," are qualitatively different.

The proportional consideration view is an arguably nonspeciesist way to achieve a speciesist result. It may be criticized for exploiting the difficulties in assessing interspecies utility in order to give a somewhat fanciful tale of the nature of experience that retains some level of human dominance. Singer might argue against it by first admitting that we cannot fully understand the nature of the experiences of a nonhuman being. And, in the absence of evidence to think, for example, that cow suffering is not as bad as human suffering, it is speciesist to assume that it is. In fact, it is possible that a cow's pain is somehow worse than a human's pain. When confronted with difficult questions of animal cognition and the philosophy of mind, Singer can respond, quite reasonably, by noting that the assumptions we make in the face of uncertainty often reflect an unjustified speciesist attitude.

Furthermore, the proportional consideration view falls completely flat when we reexamine issues of human equality. Proportional consideration yields the wrong results when applied to humans, since the principle would suggest that the interests of more intelligent humans are entitled to greater consideration than those of less intelligent humans. These views are inegalitarian in result. They provide only stronger moral support to our hypothetical ultraintelligent alien invaders who seek to satisfy their cravings for human flesh. The price of maintaining the dominance of humans over apes over chickens through proportional consideration arguments is that we no longer have principles that can be generalized throughout the animal kingdom, since they fall short as soon as we look to our fellow humans.

III. JURAL STANDING FOR APES AND OTHER ANIMALS

We need not resolve the deep questions raised by Singer and his critics in order to seek certain incremental changes in the law. So far, I have tried to establish two relatively uncontroversial points that will bear on the law of standing. The first point is that sentient animals do have interests and that these interests are recognized, to some degree, in our substantive laws. These interests are not as extensively recognized and protected as some animal liberationists would like them to be, but nevertheless, the law does recognize that we have direct duties to protect animals under certain circumstances.

The second point is that great apes have interests that are at least as substantial as those of other sentient animals and are probably quite a bit stronger. If one is convinced by Singer's principle of equal consideration, then the need to increase protection for great apes is strong because the need to increase protection for all sentient animals is strong. Great apes, perhaps having unique needs for cognitive stimulation and emotional interaction, are a logical starting point to focus protective efforts. If on the other hand, one views animal interests as deserving proportional consideration, one may still recognize that the interests of humans and nonhuman animals are close enough to require increased protections for all animals. Great apes, which can communicate with sign language and are surprisingly close to us in cognitive ability, are in the most urgent need of protective resources because, perhaps, their interests are somehow more intense and more deserving of our consideration than those of the rest of the nonhuman animal kingdom.

We do not need to think that the interests of nonhuman animals are anywhere near as strong as those of humans to recognize that the interests of nonhuman animals can figure into some sort of balancing, however weak, against our own. The discussion of the law of standing which follows will not be limited to concerns about great apes. Whatever protections we believe all animals to deserve (such as those protections provided by the Animal Welfare Act), great apes will deserve protections that are at least as strong.

A. *The Law of Standing*

It is sometimes noted that the biggest impediment to the protection of animal interests is not so much the weakness of substantive animal protections but rather the obstacles to their effective enforcement. With respect to the Animal Welfare Act, the USDA has frequently been accused of inadequate regulatory implementation[157] and insufficient enforcement.[158] Perhaps even more importantly, "[i]n virtually all AWA claims, legal failures result not from any deficiency on the merits of the cases brought before the courts, but rather from jurisdictional challenges to third parties."[159] Since animals cannot enforce their rights directly, they must depend on regulatory and other law enforcement to do the job. When regulators and police are too busy or uninterested to pursue violations of animal cruelty and related laws, private parties may try to step in. While these private parties might be thought ideal to help protect animals (notably because they invest their own resources), they are frequently

157. Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 796 (1997).

158. The Congressional Record indicates, for example, that in the first ten years after the implementation of what is now the Animal Welfare Act, the USDA brought only two enforcement actions. 132 CONG. REC. H1643-03 (statement of Rep. Chandler).

159. Mendelson, *supra* note 157, at 796; *see, e.g.*, Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 498-99 (D.C. Cir. 1994).

limited from bringing suits on behalf of animals due to constitutional and statutory limits on access to federal courts.

Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases" or "controversies."[160] Along with the other doctrines of justiciability, standing requirements "state fundamental limits on federal judicial power."[161] They decide the question of "whether the litigant is entitled to have the court decide the merits of the dispute."[162]

A principal rationale for standing doctrine is to make sure that plaintiffs are sufficiently vested in the outcome of a case so that they seek to vigorously argue their position. As provided in *Baker v. Carr*,[163] litigants must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues."[164] Standing doctrine also helps to preserve separation of powers principles. By limiting courts to the adjudication of cases of actual harm to actual litigants, courts are deterred from stepping on the political branch's role of shaping broad policies for the future.[165]

To meet standing requirements, a plaintiff must demonstrate having suffered 1) an injury-in-fact[166] that was 2) caused by the defendant's action and that 3) a favorable judicial ruling will redress the plaintiff's injury.[167] If a plaintiff had no injury or did not allege that the injury was caused by the party being sued or could not identify some appropriate form of judicial redress, there would not be much point in having a court hear the plaintiff's case. Aside from these requirements purportedly derived from the text of the Constitution, the Supreme Court has added the so-called "prudential requirements" for

160. U.S. CONST. art. III, § 2, cl. 1. The clause states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;— between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

161. Allen v. Wright, 468 U.S. 737, 750 (1984).

162. Warth v. Seldin, 422 U.S. 490, 498 (1975).

163. 369 U.S. 186 (1962).

164. *Id.* at 204; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14 (2d ed. 1988) (noting that "[s]tanding questions arise principally in challenges to government conduct, where litigants often lack the obvious stake normally present in most lawsuits between private parties").

165. Justice Scalia has taken this view in Lewis v. Casey, 518 U.S. 343, 349 (1996).

166. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982).

167. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

standing. Namely, courts will not adjudicate "generalized grievances," and ordinarily, they will not permit plaintiffs to claim the rights of third parties.[168] In the case of the Animal Welfare Act, prudential requirements for bringing suit are imposed by the Administrative Procedure Act (APA),[169] which provides for judicial review to any person "suffering legal wrong because of an agency action, or adversely affected or aggrieved by any agency action within the meaning of the relevant statute."[170] Importantly, the Supreme Court has found "that a plaintiff's injury must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked by the suit."[171] Therefore, in cases brought by plaintiffs under the Animal Welfare Act, the Act must either implicitly or explicitly grant that plaintiff a cause of action.

For an alleged injury to satisfy standing requirements, the injury must invade a legally protected interest which is a) concrete and particularized[172] and b) actual or imminent, not conjectural or hypothetical.[173] Suppose, for example, that I am having lunch with an accountant friend of mine. She tells me that, just a week ago, she was knocked down by a United States Postal Service delivery truck and had to be treated for severe bruises and lacerations at a nearby hospital. Apparently, the truck driver was assigned more hours than regulations permit and fell asleep at the wheel. I suggest that she consider bringing suit against the driver or the postal service. My friend satisfies the injury-in-fact requirement because she has a legally protected interest in her bodily integrity that is particular to her (concrete and particularized) and has already happened (so it is actual and not merely hypothetical). Nevertheless, my friend chooses not to pursue a case because she does not like getting involved in such matters. Despite whatever outrage I feel at the injustice of her situation, it is very unlikely that a federal court would give me standing to bring suit. I have not suffered an injury-in-fact that would establish standing under the Constitution because my generalized feeling of outrage at the action of a government employee is not legally recognized, and it did not affect me in a particular way that differentiates me from anyone else. Furthermore, my

168. Warth v. Seldin, 422 U.S. 490, 499 (1975).

169. 5 U.S.C. § 702 (1994).

170. *Id.*

171. Bennett v. Spear, 520 U.S. at 162.

172. *Defenders of Wildlife*, 504 U.S. at 560 (1992). In *Defenders of Wildlife*, plaintiffs sought to challenge the lack of extraterritorial enforcement of certain provisions of the Endangered Species Act. Although some of the plaintiffs had established themselves as interested in seeing and studying the animals at-risk, plaintiffs were denied standing for failing to demonstrate concrete plans to visit the animals. The Court implied that had the plaintiffs bought a plane ticket to visit the animals, they would have established the injury-in-fact requirement needed for standing. *Id.* at 564. A plurality of the Court, however, felt that even under such circumstances, the plaintiffs would still have failed to establish the redressability requirement. *Id.*at 568.

173. *Id.* at 560.

claims that I fear that I am at risk for being hurt in the future by a mail carrier will probably fail, as the danger is not actual but merely hypothetical.

Often, attempts to bring suit on behalf of animals fail because humans cannot meet the injury-in-fact requirement of standing law. Describing the kind of injury required to obtain standing, Judge Posner has written that the injury "must in short be fairly describable as an injury personal to the plaintiff—a deprivation of *his* right—rather than a concern with another's injury."[174] It is exactly this requirement that an injury be personal to a litigant that makes it hard for humans to obtain standing under the AWA. Since humans are not the principle locus of the inhumane treatment that the AWA was designed to protect, they have difficulty demonstrating injuries resulting from violations of the Act.

If animals were granted standing to sue, they could easily satisfy injury-in-fact requirements when suffering from violations of the AWA. Where an animal has been inhumanely treated in violation of the AWA, the animal has an injury-in-fact that the AWA expressly seeks to prevent. An animal's human representative could then plausibly show that USDA action or inaction in violation of the AWA caused the animal injuries that can be remedied by appropriate USDA action.

Contrary to the aspirations of the Great Ape Project and other animal liberationists, however, animals are not recognized as legal persons who can have independent standing.[175] There are, however, a number of suits in which animals are cited as named plaintiffs.[176] Often, these cases never directly address the animal standing issue. In at least one case, a federal court held that "[a]s an endangered species under the Endangered Species Act, the bird (Loxioides ballieu), 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."[177] Other cases have held that animals do not have independent jural standing,[178] and this is widely taken to be positive law.[179]

174. People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 171 (7th Cir. 1984).

175. *See* Miles v. City Council, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (noting, while poking fun at the case, that a performing cat which could make human speech sounds had no right to free speech since it is not a "person" and is not protected under the Bill of Rights).

176. *See, e.g.*, Am. Bald Eagle v. Bhatti, 9 F.3d. 163 (1st Cir. 1993); Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991); V.I. Tree Boa v. Witt, 918 F. Supp. 879 (D.V.I. 1996); Loggerhead Turtle v. City Council, 896 F. Supp. 1170 (M.D. Fla. 1995); N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991); N. Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

177. Palila v. Haw. Dep't of Land & Natural Res., 853 F.2d 1106 (9th Cir. 1988) (citation omitted).

178. Sunstein, *supra* note 81, at 1359; *see* Citizens to End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993); Hawaiian Crow v. Lujan, 905 F. Supp. 549, 552 (D. Haw. 1991).

179. *See, e.g.*, Sunstein, *supra* note 81, at 1359 ("As a rule, the question is therefore

Granting animals standing to sue under the Animal Welfare Act is very different, however, from granting animals legal personhood. If animals had standing under the AWA, private plaintiffs could represent them to help enforce existing, congressionally-mandated laws protecting animals. For example, an animal advocacy organization *could not* represent a capuchin monkey in a suit against an organ grinder for intentional infliction of emotional distress. No such cause of action exists under current law. The organization might, however, be able to sue the USDA for inappropriately interpreting the AWA in such a way that led to the unlawful sheltering of the capuchin. Granting animals full legal personhood is a much vaguer notion that would require changes to the substantive laws protecting animals, rather than the more procedural laws that affect standing.

Why do animals lack standing under the AWA? Cass Sunstein writes that "[a]nimals lack standing as such, simply because no relevant statute confers a cause of action on animals."[180] Other statutes grant standing to persons who might otherwise not have it,[181] and Sunstein thinks it possible "that before too long, Congress will grant standing to animals to protect their own rights and interests"[182] through counsel with guardian-like obligations, not unlike the ways in which children or corporations are represented.[183] As for the constitutionality of such a legislative action given the "case" or "controversy" requirement, Sunstein sees no significant problem as "[n]othing in the text of the Constitution limits cases to actions brought by persons."[184]

Of course, an originalist interpretation of the Constitution might conclude that the founding generation did not intend to grant standing to anyone who is not a human being.[185] However, as a matter of positive law, standing is given to all sorts of entities, whether human or not. For example, corporations are juridical persons, and "legal rights are also given to trusts, municipalities, partnerships, and even ships."[186] Sunstein also notes that slaves were allowed

quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.").

180. *Id.*

181. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (2001); Marine Mammal Protection Act of 1972, 16 U.S.C. § 1377 (2001); Endangered Species Act of 1973, 16 U.S.C. § 1540 (2001).

182. Sunstein, *supra* note 81, at 1359.

183. *Id.*

184. *Id.* at 1360.

185. *Id.* On this originalist view, Justice Frankfurter argued that Article III means "that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-96 (1988) (describing the historical evolution of standing doctrine).

186. Sunstein, *supra* note 81, at 1360-61; *see also* Christopher D. Stone, *Should Trees*

to bring causes of action, "often through a white guardian or 'next friend,' to challenge unjust servitude,"[187] even though slaves were not considered legal persons.

In *Sierra Club v. Morton*,[188] the United States Forest Service granted Walt Disney Enterprises a permit to construct a ski resort in Mineral King Valley in the Sequoia National Forest. The Sierra Club challenged this decision under the Administrative Procedure Act, which provides for judicial review to a person who suffers "legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute."[189] Though the Sierra Club won a preliminary injunction in federal district court, the Ninth Circuit reversed the district court's decision,[190] finding that the Sierra Club lacked standing. The Sierra Club did not allege that the Forest Service's action, which they claimed violated the law, affected the Sierra Club's membership in its actual use of the forest; rather, the Sierra Club's members merely found the permit grant, in the words of the court, "personally displeasing or distasteful to them."[191] The Supreme Court affirmed the Ninth Circuit decision. In dissent, however, Justice Douglas wrote, "The critical question of 'standing' would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded . . . ."[192] In the same case, Justice Blackmun indicated some support for Justice Douglas' "imaginative expansion" of standing doctrine.[193] If U.S. Supreme Court Justices are willing to consider granting standing to inanimate objects like forests, even in the absence of congressional authority, then it becomes clear that standing requirements permit at least some degree of judicial flexibility.

B. *The Need for Stronger Protection*

The first reason for granting standing to great apes extends from the arguments made in Parts I and II of this Note. Namely, great apes have interests and current law does not adequately protect those interests. Granting standing to great apes, subject to some caveats to be discussed, would help

Have Standing? Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 452 (1972).

187. Sunstein, *supra* note 81, at 1361 (referencing ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 110-53 (1991)). No doubt, the animal rights movement may overstate analogies between animal rights and abolition. The point here is only about the constitutional meaning of "case" or "controversy."

188. 405 U.S. 727 (1972).

189. 5 U.S.C. § 702 (2001).

190. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

191. *Id.* at 33.

192. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); *see also supra* text accompanying note 121.

193. 405 U.S. at 757.

protect their interests. Consider for example the issue of experimentation on great apes and other primates.[194] Even if we believe that human interests in improved medical treatment outweigh the interest of great apes and other primates in continuing to live a natural life, we can still acknowledge that ape experimental subjects should receive humane care including pain relief medication and clean and capacious cages. Nevertheless, if inhumane conditions exist and the USDA does nothing about it, there is virtually no way for an animal advocacy group to gain standing to bring suit in order to gain enforcement of AWA regulations.[195]

Under current law, there are harms to animals for which no human is likely to have an injury-in-fact. Sunstein points to a proposed statutory ban on the importation of goods made from dogs or cats.[196] He notes the difficulties any individual concerned about animal interests would have in obtaining standing to sue an agency for improperly enforcing the ban since it is unlikely that the ban is uniquely injurious to some particular human plaintiff,[197] while it is clearly injurious to a slaughtered dog or cat. Additional reasons given for granting standing to animals are to "make a public statement about whose interests are most directly at stake."[198] Such a public statement has no symbolic meaning for animals, however, it could have a powerful indirect effect in preserving animal legal protections. In addition, granting standing to animals would increase private monitoring of violations.[199] Lastly, granting standing to animals would "bypass complex inquiries into whether prospective human plaintiffs have injuries in fact,"[200] a subject to which we now turn our attention.

C. *Aesthetic Injuries*

The most promising standing case for great apes and other primates is *Animal Legal Defense Fund, Inc. v. Glickman*.[201] In that case, Marc Jurnove claimed injuries associated with his repeated observations of the inhumane treatment of primates at a Long Island zoo. What he observed was isolation

194. I have added the "and other primates" simply because, as discussed, experimentation on great apes is strictly limited, for reasons independent of their individual welfare, by the Endangered Species Act.

195. FRANCIONE, *supra* note 64, at 66.

196. Sunstein, *supra* note 81, at 1360 (referencing Dog and Cat Protection Act of 1999, H.R. 1622, 106th Cong. (1999)).

197. *See id.* Sunstein notes, however, that those placed at a competitive disadvantage by strictly observing the ban might have standing to sue. *Id.* Of course, these competitors may have no interest in animal protection and may still have little incentive to take legal action.

198. *Id.* citing Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044-45 (1996).

199. Sunstein, *supra* note 81, at 1360.

200. *Id.*

201. 154 F.3d 426 (D.C. Cir. 1998) (en banc).

and despondency among apes and other primates whom Jurnove, a lifelong animal lover, understood to be social animals in need of companionship.[202] For example, the zoo housed a large male chimpanzee in a solitary cage "where [h]e could not see or hear any other primate."[203] Perhaps this does not sound so terrible to us, since we have typically only seen chimpanzees in their sometimes depressed captive state. However, as suggested in Part II, chimpanzees and other apes are social by nature and have rather active mental lives. Chimpanzees can have stilted cognitive development if left alone in their cages.[204] While chimpanzees can engage in behavior in front of a mirror which demonstrates self-recognition and arguably self-awareness, they may lose this ability if they are deprived of human and chimpanzee contact.[205] Some psychologists have suggested that chimpanzees may lose their ability to imitate and transmit species-typical behavior in the dull, sterile environments in which some great apes are kept in captivity.[206]

As noted in Part I, the AWA requires the USDA to establish "minimum requirements" to protect primate psychological well-being,[207] and this law was implicated by the treatment at the Long Island zoo. In response to the law, the USDA issued regulations which required regulated entities, in this case the zoo, to set up plans that take care of the needs of primates in accordance with professional standards.[208] Marc Jurnove made repeated attempts to alert the USDA to the conditions of primates at the zoo, which he alleged were in violation of the law. While the USDA made several inspection trips, each time the zoo was found to comply with the law, although a number of primates remained alone in their cages without adequate stimulation, according to Jurnove. Jurnove alleged that the USDA violated the AWA by failing to directly establish minimum requirements for primate psychological well-being. Rather, the agency delegated its responsibility to the regulated entities and thereby failed to set "minimum standards."[209] Jurnove contended that the conditions that caused him injury "complied with current USDA regulations, but that lawful regulations would have prohibited those conditions and protected [him] from the injuries" he experienced.[210]

The key statement of Marc Jurnove's injury comes in the plaintiffs' complaint. It says, "Marc Jurnove experienced and continues to experience physical and mental distress when he realizes that he, by himself, is powerless to help the animals he witnesses suffering when such suffering derives from or

202. *Id.* at 429-30 (summarizing from Jurnove affidavit).
203. *Id*. at 429 (citing Jurnove affidavit).
204. *See* WISE, *supra* note 5, at 166.
205. *See id*. at 167.
206. *Id.*
207. *See supra* text accompanying notes 80-87.
208. 9 C.F.R. § 3.81.
209. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 430 (D.C. Cir. 1998).
210. *Id.*

is traceable to the improper implementation and enforcement of the Animal Welfare Act by [the] USDA."[211] Jurnove was claiming that he was injured by the mistreatment of primates at the zoo. Namely, he claimed to have suffered a kind of aesthetic injury.

Federal courts have repeatedly acknowledged that aesthetic interests are judicially cognizable, and a D.C. district court agreed with Jurnove.[212] In an en banc rehearing of the case that was limited to the issue of standing, the D.C. Circuit Court also agreed that Jurnove had standing and, perhaps in tacit agreement, the Supreme Court refused to grant certiorari.[213] The majority opinion in Glickman noted that the "Supreme Court has repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing."[214] For example, the court cited *Defenders of Wildlife* where the Court indicated that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[215]

So current law does provide some means for humans to bring suit under the AWA. Clearly, however, the law has a strange implication. When it comes to access to courts, the interest that a human has in not seeing cruelty to animals (which can provide an injury-in-fact) counts for more than the interests of the animal in avoiding the cruelty itself (animals have no standing). This is certainly peculiar. Surely the reason why it pains people to see animals suffering is that they take the animal's pain to be significant. Perhaps we think that these people are overreacting to animal suffering, but then it seems odd to make their overreactions judicially cognizable injuries.

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211. 154 F.3d at 430-31 (citing the First Amended Complaint).

212. In U.S. District Court, Judge Charles R. Richey held that plaintiffs had standing to sue and, on the merits of the case, held that the USDA's regulations did violate the Administrative Procedure Act ("APA") by failing

> to set standards, including minimum requirements, as mandated by the AWA; that the USDA's failure to promulgate standards for a physical environment adequate to promote the psychological well-being of primates constitute[d] agency action unlawfully withheld and unreasonably delayed in violation of the APA; and that the USDA's failure to issue a regulation promoting the social grouping of nonhuman primates [was] arbitrary, capricious, and an abuse of discretion in violation of the APA.

Id. at 431 (summarizing the lower court decision). However, on appeal, the decision on the merits was overturned. *See* Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000).

213. Nat'l Ass'n for Biomedical Research v. Animal Legal Def. Fund, Inc., 526 U.S. 1064 (1999).

214. 154 F.3d at 432.

215. 504 U.S. at 562-63. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986) (finding that plaintiffs had "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting" (citation omitted)); *see also* Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) ("*Japan Whaling Association* and *Defenders of Wildlife* clearly recognize people's affirmative aesthetic interest in viewing animals enjoying their natural habitat.").

As mentioned, one of the justifications for standing doctrine is to ensure that parties have a strong enough stake in a case "to assure that concrete adverseness which sharpens the presentation of issues."[216] Yet, if we are interested in sharpening the issues, it would seem that judicial resources should focus on the party which is primarily injured, namely some animal, over a party which has some secondary injury, namely an aesthetic injury from observing the primary injury. "If you become indignant reading about a case of police brutality," Judge Posner notes, "you cannot sue the responsible officers in federal court under 42 U.S.C. § 1983."[217] Yet, what if you observe the brutality and claim an aesthetic injury? By analogy to Jurnove's case, it would seem that an aesthetically-injured observer could have standing to sue. But surely we would prefer, all else being equal, that suit be brought by the direct victim of the brutality since the victim will ordinarily have the most at stake in the litigation. Surely, we would prefer a policy where the direct victim at least had the opportunity to bring suit. Under the AWA, the direct victims of abuse are given no such opportunity. Of course, in animal contexts, there is probably no important difference between the kind of litigation which would be brought by Jurnove as the victim of an aesthetic injury compared to the litigation brought by Jurnove as the guardian of a particular group of primates. However, to the extent that we want standing doctrine to be based on a coherent set of principles, it would seem wise to have policies that prefer suits brought by direct victims of harm over those brought by indirect victims. Standing law under the AWA has the opposite result.

Aesthetic injuries are subjective and, in the animal welfare context, they are derivative of a greater harm. Allowing aesthetic injuries to satisfy injury-in-fact requirements may be a mere rationalization designed to bridge a procedural gap to enabling a plaintiff to argue the merits of her case. This casuistic leap over the injury-in-fact requirement may very well have an animal's best interests at heart; and it may be a better option than giving private plaintiffs no means of asserting animal protections. However, it may also open the door to claims of aesthetic injuries-in-fact where they should not otherwise be granted.

D. *Underrepresentation of Animal Interests*

Even the most ardent animal rights activists admit that equal consideration of the interests of animals does not entail giving them the right to vote. If the right to vote means the right to enter a ballot box and make a selection of candidates, then surely they are right—no animal benefits from such a right. However, if the right to vote is thought of as a proxy for political

216. Baker v. Carr, 369 U.S. 186, 204 (1962).

217. People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 171 (7th Cir. 1984).

representation, then it seems that animals are being shortchanged. If we acknowledge that animals have legitimate moral and legal interests (even if not equal to our own) and we acknowledge that they have no political voice of their own, it is reasonable to think that their interests will be politically underrepresented.[218]

Surely, there are people and organizations who fight on behalf of animals. However, these people have finite resources to expend on political issues. Forcing them to expend their own resources to protect animal interests means that they must sacrifice their personal political interests to some extent. So, we are either underrepresenting the interests of animals or the interests of animal activists or some combination of both.[219] Perhaps this explains why laws like the AWA are more symbolic than forceful. Animal interests are sufficiently represented to enable relatively cost-free legislation to be passed but are not represented sufficiently for the more expensive task of enforcing legislation.

E. *Some Caveats*

My purpose here has *not* been to give an all-things-considered argument for granting standing to great apes. Many questions remain unanswered. To know if granting such standing would be a good idea, we would need to look more carefully at the USDA's enforcement problems. Perhaps it would be more effective to simply push for better USDA enforcement (despite my suggestion that animal interests will be systematically underrepresented in budgetary decisions). Also, were animals granted standing, we would need to be concerned about potential abuse by animal advocacy organizations. Requiring the loser to pay legal costs in such cases might reduce abuse, but the

218. This argument applies, even more forcefully, to children and profoundly retarded people. If their guardians were granted the right to vote on their behalf, it is likely that their interests would be better represented. *See* Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Controversial Understanding of American Democracy*, 94 NW. U. L. REV. 503 (2000); *see also* Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Posner, C.J.) ("It is not as if the proposal were to give extra votes to families with more than the average number of children, a bizarre suggestion in our political culture but one that could be defended with reference to the concept of virtual representation."). Unlike children and the mentally incompetent, animals are not citizens and so perhaps are not entitled to vote (even illegal aliens and permanent residents are not entitled to vote). On a proportional consideration view, however, each sentient animal could be entitled to some fraction of a full vote made by a guardian on its behalf. The practical difficulties of such a program, in the case of animals, are fairly obvious.

219. Again, this is based on the probably accurate assumption that were animal activists no longer required to fight for animal rights, they would use their energies to more forcefully pursue other political issues that concern them. Granted, it may seem odd that animal activist and animal welfare organizations could conserve resources by gaining the right to serve as legal guardians of animals. Certainly, however, to the extent that organizations would choose to pursue this option, they would do so because they can accomplish their goals (mainly deterrence) more cost effectively than by lobbying the government to spend more on enforcement resources.

novelty of animal standing would raise many complications that are difficult to foresee. We would also want to know more about the "guardian-like" arrangements that would be established to protect animals and what would happen when multiple groups sought involvement in the same case. To the extent that Congress made an incremental change in standing requirements, perhaps as a sort of legislative experiment, great apes would be logical starting candidates to qualify for standing since their numbers are relatively few and their needs are greater.

There are other ways to help great apes and other animals that are worthy of consideration. Many environmental statutes have citizen-suit provisions that allow private plaintiffs to bring suit against violators.[220] These provisions have helped Congress to improve enforcement of environmental laws by allowing citizens, in certain cases, to act as "private attorneys general" as an "alternative means of enforc[ing]" a statute.[221] The AWA does not contain such a provision and previous attempts to obtain such legislation have failed.[222] But even with a citizen suit provision, there are still standing requirements imposed by the Constitution, and private citizens would still need to show injuries-in-fact. A citizen suit provision would certainly strengthen protections for animals but would not alleviate the problem that courts countenance the weaker injuries of humans that derive from injuries to animals rather than recognizing those injuries directly.

My point has been to show that granting standing to animals (particularly great apes) is a plausible means of addressing inadequate regulatory enforcement of the AWA. Granting standing provides a means of satisfying reasonable constitutional limitations on federal court access by recognizing animals as injured parties rather than recognizing humans who have suffered simply by witnessing animal suffering. Also, granting standing to great apes, at least as a start, would acknowledge that these beings do have interests that should be respected, even at some cost to humans. In a country that recognizes the lawsuit, *U.S. v. 449 Cases, More or Less, Containing Tomato Paste*,[223] it

220. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (2001); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2001); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (2001); Solid Waste Disposal Act, 42 U.S.C. § 6972 (2001); Clean Air Act, 42 U.S.C. § 7604 (2001); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (2001); *see also* Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After* Animal Legal Defense Fund, Inc. v. Glickman, 29 ENVTL. L. 989 (1999); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

221. Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 136 (1985) (citation omitted).

222. Smith, *supra* note 220, at 1026, n.300.

223. 111 F. Supp. 478 (E.D.N.Y. 1953). Such titles are typical of cases involving civil property forfeiture. *See* Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Action Against Objects*, 11 YALE J.L. & HUMAN. 1 (1999).

should not be such a frightening prospect to allow apes or other animals, under specified conditions, to have their interests represented in court.