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ANIMAL LAW—CULTIVATING COMPASSIONATE LAW: UNLOCKING THE LABORATORY DOOR AND SHINING LIGHT ON THE INADEQUACIES & CONTRADICTIONS OF THE ANIMAL WELFARE ACT

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ANIMAL LAW—CULTIVATING COMPASSIONATE LAW: UNLOCKING THE LABORATORY DOOR AND SHINING LIGHT ON THE INADEQUACIES & CONTRADICTIONS OF THE ANIMAL WELFARE ACT

“Universally, humans exploit and kill other animals because legally they can.”¹

INTRODUCTION

The United States Department of Agriculture (USDA) reported that there were 124,385 nonhuman primates confined in laboratories in 2009.² Of those confined, 70,444 primates were used in laboratory research.³ Of those used in research, 1,711 primates were used in painful procedures, but their pain *was not* alleviated because pain-relieving drugs would have interfered with or compromised the research.⁴

1. Joan Dunayer, *From Vivisection to Animal Rights*, 13 *ORG. & ENV'T* 429, 430 (2000).

2. ANIMAL & PLANT HEALTH INSPECTION SERV., U. S. DEP'T OF AGRIC., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, PAIN TYPE: TOTAL 2 (2011) [hereinafter PAIN TYPE: TOTAL 2009], *available at* http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf; ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, PAIN TYPE: ANIMAL NOT YET USED 2 (2011) [hereinafter PAIN TYPE: ANIMALS NOT YET USED 2009], *available at* http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf. The USDA reported that in 2009 a total of 1,131,206 nonhuman animals were confined in laboratories; 979,772 were used in laboratory research. PAIN TYPE: TOTAL, *supra*, at 2; PAIN TYPE: ANIMALS NOT YET USED 2009, *supra*, at 2.

3. PAIN TYPE: TOTAL 2009, *supra* note 2, at 1-2.

4. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, PAIN TYPE: WITH PAIN, NO DRUGS 2 (2011) [hereinafter PAIN TYPE: WITH PAIN, NO DRUGS 2009], *available at* http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf. This is an increase from 2008, when 1,037 primates were used in painful procedures, but their pain *was not* alleviated. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, PAIN TYPE: TOTAL 2 (2011), *available at* http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2008_Animals_Used_In_Research.pdf. In 2009, of the approximate one million animals used in research, 76,441 were used in painful procedures, but their pain *was not* alleviated because pain relieving drugs would have interfered with or compromised the research. PAIN TYPE: WITH PAIN, NO DRUGS 2009, *supra*. In 2009, there were 26,758 primates that were used in painful procedures and received pain relieving drugs; a total of 354,853 animals were used in painful procedures and received pain relieving drugs. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANNUAL RE-

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The use of primates in laboratory research⁵ is supported by historical and legal precedent. The purpose of the Laboratory Animal Welfare Act (LAWA), the first federal law protecting animals used in laboratory research, was, in relevant part, “to insure that *certain animals intended for use in research facilities* are provided humane care and treatment.”⁶ Designated as property, animals are perceived, by some, as voiceless “things.”⁷ Primates, however, have emotional, social, and intellectual lives: they think, communicate, learn, have memories, grieve, empathize, and suffer.⁸ And despite widespread agreement that some primates are intelligent, emotional, social beings that deserve some level of protection,⁹ there is

PORT ANIMAL USAGE BY FISCAL YEAR, PAIN TYPE: WITH PAIN, WITH DRUGS 2 (2011), available at http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf.

5. Although this Note is primarily focused on primates in laboratories, primates are also confined and used in zoos, for exhibition in circuses, and for entertainment in television, commercials, and movies. The film *Any Which Way You Can*, for example, “led to the death of Clyde, the orangutan who was [Clint] Eastwood’s sidekick.” Lorraine L. Fischer, Note, “*No Animals Were Harmed . . .*”: *Protecting Chimpanzees From Cruelty Behind the Curtain*, 27 HASTINGS COMM. & ENT. L.J. 405, 416 (2005) (“Clyde was essentially beaten to death by his trainer for not paying attention.”).

6. Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 1, 80 Stat. 350, 350 (1966) (current version at 7 U.S.C. §§ 2131-2159 (2006)) (emphasis added); see also Animal Welfare Act, 7 U.S.C. § 2131.

7. See, e.g., GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 166 (2005); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 4 (2000) [hereinafter RATTLING THE CAGE]; Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996) [hereinafter *The Legal Thinghood of Nonhuman Animals*] (tracing the historical origins of animals’ legal status as things).

8. See, e.g., Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U. L. REV. 219, 227 (2007) [hereinafter *The Entitlement of Chimpanzees*]; Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 171-74 (2001); The Gorilla Foundation, *Koko’s Mourning for Michael*, KOKO.ORG (Aug. 2, 2002), http://www.koko.org/world/mourning_koko.html. A discussion of the intellectual, emotional, and social lives of other animals is beyond the scope of this Note.

9. Congress has found that “[g]reat apes are highly intelligent and social animals and research laboratory environments involving invasive research cannot meet their complex social and psychological needs.” Great Ape Protection Act, S. 3694, 111th Cong. (2010); Great Ape Protection Act, H.R. 1326, 111th Cong. (2009). According to a 2005 public opinion poll, “4 out of 5 (83 percent) of the U.S. public recognize chimpanzees as highly intelligent, social individuals who have an extensive capacity to communicate.” U.S. SENATE, DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES APPROPRIATIONS FOR FISCAL YEAR 2007: WRITTEN TESTIMONY OF NONDEPARTMENTAL WITNESSES BEFORE THE SENATE SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS (2006) (statement of Project R&R), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg59104229/pdf/CHRG-109shrg59104229.pdf>. According to a 2001 poll, eighty-five percent of Americans “be-

inadequate protective legislation.¹⁰ Thus, every day in the United States, nonhuman primates suffer physical and mental anguish that human primates witness, are complicit in, or declare necessary to advance the quality of human life.

A common justification cited for using animals in research is that it is necessary to advance scientific knowledge, which will ensure human health and safety.¹¹ This argument rests on the belief that harm to animals must be balanced against human benefit. This Note rejects that perspective because speciesism¹² tips the scale in favor of human interests at the expense of animal welfare. As this Note will illustrate through its examination of the Animal Welfare Act,¹³ this balancing results in some animals being subjected to painful and distressing procedures.

One justification cited for using primates in laboratory research is their genetic likeness to humans.¹⁴ Primates, however, share more than genetics with humans. In the 1970s, a pioneering group of primates learned American Sign Language from primateologist Roger Fouts.¹⁵ Some of these chimpanzees, among

lieve . . . that chimpanzees have ‘complex social, intellectual, and emotional lives.’ Most (fifty-one percent) believe chimpanzees should be ‘treated similar to children, with a guardian to look after their interests,’ as opposed to being treated either as human adults (nine percent) or as property (twenty-three percent).” *The Legal Thinghood of Nonhuman Animals*, *supra* note 7, at 239 (citations omitted). *See infra* Part I (chimpanzees and gorillas demonstrate they have the capacity to learn sign language); Part I (gorillas grieve the loss of their companions); Part I (rhesus monkeys recall memory).

10. *See* Animal Welfare Act, 7 U.S.C. §§ 2131-2159.

11. *See, e.g.*, David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 755-60 (1995). *Contra* C. RAY GREEK & JEAN SWINGLE GREEK, SACRED COWS AND GOLDEN GEESSE: THE HUMAN COST OF EXPERIMENTS ON ANIMALS (2000) (challenging the belief that animal research is necessary and beneficial to humans, and illuminating the disadvantages and dangers).

12. Speciesism is “discrimination based on species” that relies on the assumption that humans are superior to nonhuman animals. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1198 (11th ed. 2003) [hereinafter MERRIAM-WEBSTER’S].

13. Animal Welfare Act, 7 U.S.C. §§ 2131-2159.

14. For a discussion of chimpanzee and human genome comparison see, for example, The Chimpanzee Sequencing and Analysis Consortium, *Initial Sequence of the Chimpanzee Genome and Comparison with the Human Genome*, 437 NATURE 69 (Sept. 1, 2005), available at http://www.humanesociety.org/assets/pdfs/animals_laboratories/chimpanzee_research/human_chimpanzee_genome.pdf; *see also* Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) (“Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically.”).

15. *See generally* ROGER FOUTS & STEPHEN TUKEL MILLS, NEXT OF KIN (1997) (describing his personal and professional experience with Washoe, the first chimpanzee to communicate with humans using American Sign Language, and other chimpanzees;

them Booe and Bruno, were sold in the 1980s to a biomedical research facility, the New York Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), for hepatitis research.¹⁶ At LEMSIP,

each chimp was locked in a solitary cage that was five by five by six feet—the size of a coat closet. The steel-bar-bottom box hung from the ceiling, like a birdcage, dangling above the floor so that the chimp’s feces could drop through the cage onto plastic sheets below. There were two rows of these hanging cages, facing each other across a walkway. The chimps could see one another and call—or sign—to their friends, but there was no group contact or access to the outdoors The entire facility was designed to make it easier for the workers to have access to the chimps’ blood.¹⁷

Visitors reported that the chimpanzees continued to sign and asked the laboratory technicians “for food, drinks, cigarettes, and the keys to their cages.”¹⁸ When a student of Fouts visited, Bruno signed “KEY OUT.”¹⁹ He clearly communicated that he wanted out of the cage he was confined in.²⁰ Bruno, unfortunately, died at LEMSIP.²¹

Booe was spared the same fate. Thirteen years after Booe and Fouts were separated, ABC News 20/20 aired a program called The Great Ape Project, which was about the ethics of using chimpanzees in biomedical research.²² “Millions of viewers watch[ed],

detailing chimpanzees’ intellectual and emotional capacity; and drawing attention to the cruel imprisonment they face in laboratories).

16. *Id.* at 283-84; *The Legal Thinghood of Nonhuman Animals*, *supra* note 7, at 280; see also NEW ENGLAND ANTI-VIVISECTION SOC’Y, *LEMSIP*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, www.releasechimps.org/labs/labs-closed/lemsip/ (last visited June 11, 2011).

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17. FOUTS & MILLS, *supra* note 15, at 283-84.

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18. *Id.* at 284.

19. *Id.* at 354.

20. *The Legal Thinghood of Nonhuman Animals*, *supra* note 7, at 280. Feminist theorists Catharine A. MacKinnon and Josephine Donovan are among those who have noted that animals are clearly communicating their dissent to human exploitation. Josephine Donovan, *Animal Rights and Feminist Theory*, 15 *SIGNS* 350, 375 (1990) (“We should not kill, eat, torture, and exploit animals because they do not want to be so treated, and we know that. If we listen we can hear them.”); Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS* 270 (Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (“[A]nimals dissent from human hegemony They vote with their feet by running away. They bite back, scream in alarm, withhold affection, approach warily, fly and swim off.”).

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21. FOUTS & MILLS, *supra* note 15, at 358.

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22. *Id.* at 353. *The Great Ape Project* aired on May 5, 1995. *Id.* at 356.

overwhelmed, as Booe recognize[d] and ecstatically greet[ed] Dr. Fouts.”²³ After the show aired, donations from viewers flooded into ABC to fund Booe’s retirement.²⁴ Reflecting on the 20/20 show, Fouts stated, “For most people it was their very first glimpse into this secretive world, and they were outraged to see a thinking, loving, signing chimpanzee dangling in a cage without companionship or comfort.”²⁵ Five months later, as a result of massive public outcry, Booe and eight other chimpanzees were released to a non-profit wildlife sanctuary in California.²⁶ In contrast to their living quarters at LEMSIP, Booe and the eight other chimpanzees’ new home had “large, airy, and sunlit rooms with sagebrush views. There [we]re climbing ropes, and enrichment activities, including music, books, television, magazines, and toys.”²⁷ These chimpanzees were retired to a sanctuary because the public demanded it.

Public awareness about the treatment of animals used in research facilities is a powerful source of change. The passage of the LAWA,²⁸ the predecessor of the Animal Welfare Act (AWA), for example, was largely influenced by the public’s response to media about the horrific conditions dogs were kept in before being sold to research facilities and laboratories.²⁹ Subsequent amendments to the AWA were similarly driven by public pressure.³⁰ As public awareness has increased about the treatment of animals in research facilities, the public has demanded legislative change. Congress, however, has responded by passing legislation that while accounting for competing goals only “symbolic[ally]”³¹ protects animals’ welfare.

23. New England Anti-Vivisection Soc’y, *A Chronology of Key Events in the Scientific Use of Chimpanzees in the U.S.*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/pdfs/chronology-of-key-events.pdf> (last visited June 11, 2011); see also FOUTS & MILLS, *supra* note 15, at 356. Fouts, reflecting on the reunion, stated, “*Thirteen years in a hellhole and he’s still forgiving, still guileless.* Booe still loved me, in spite of everything that humans had done to him.” *Id.*

24. FOUTS & MILLS, *supra* note 15, at 356.

25. *Id.*

26. *Id.* at 356-57.

27. *Id.* at 357.

28. Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (current version at 7 U.S.C. §§ 2131-2159 (2006)).

29. See Stan Wayman, *Concentration Camps for Dogs*, LIFE, Feb. 4, 1966, at 23-29; see also BERNARD UNTI, *PROTECTING ALL ANIMALS: A FIFTY-YEAR HISTORY OF THE HUMANE SOCIETY OF THE UNITED STATES* 71 (2004).

30. See *infra* notes 121-141 and accompanying text.

31. FRANCIONE, *supra* note 7, at 208-11.

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Historically, the treatment of animals was largely visible “and thus judged by other humans.”³² Today, a huge obstacle that the animal law community faces is that people do not know what goes on behind the closed doors of research facilities. “[H]arm done to animals is rendered invisible for most people . . . by massive ideological screening that shields them from the suffering animal in the laboratory”³³ David Favre, law professor, argues that “[t]he public would never support what happens to animals today, and for that reason, more and more animals are hidden away under conditions of which the public is not aware.”³⁴ Wayne Pacelle, president and CEO of the Humane Society of the United States, commenting on a recent undercover investigation at the New Iberia Research Center of the University of Louisiana at Lafayette, stated,

The only reason that this torment and lifetime captivity of chimps is occurring at this lab is because the public doesn't know. If they could see the behavior of Sturling [a twenty-one year old chimpanzee who has been permanently removed from research because he has stress-induced psychosis] and the emotional trauma that he's gone through, and if they could see what's happening to these other chimps, any decent person would not tolerate it and they would demand an end.³⁵

Public awareness about the treatment of animals in research facilities is essential to ending their confinement. Thus, the areas of inadequate protection and contradictory legislative language must be brought to light.

Whether a particular social movement is embraced or rejected by an individual is, in part, a result of the information available to that individual. An individual's well of knowledge shapes her moral and ethical ideology. The moral and ethical beliefs of a society shape its laws. “[T]he law evolves from the way society thinks

32. David Favre, *Integrating Animal Interests into our Legal System*, 10 *ANIMAL L.* 87, 91 (2004).

33. *THE FEMINIST CARE TRADITION IN ANIMAL ETHICS* 3 (Josephine Donovan & Carol J. Adams, eds. 2007).

34. Favre, *supra* note 32, at 91.

35. *Primate Investigation, Undercover Investigation at Research Lab*, *HUMANE SOCIETY OF THE U.S.*, 6:10-6:32 (2009), http://hsus.feedroom.com/?fr_story=478975d8a33d5737fb8cb89030361b7fda24a9d9&rf=rss (“February 2009: An undercover investigation by the Humane Society of the United States reveals psychological suffering of primates in research laboratories.”). Individuals in the animal welfare, rights, and law community are sometimes witness to disturbing visual and audio evidence of animal suffering on a regular basis. For an analysis of the trauma experienced by those working in the field, see Taimie L. Bryant, *Trauma, Law, and Advocacy For Animals*, 1 *J. ANIMAL L. & ETHICS* 63 (2006).

and behaves. Thus, when public attitudes change so does the law. Nevertheless, this change is often slow because the forces of conservatism are often stronger in the short term than those of reform.”³⁶ When the majority of society recognizes their moral obligation to treat animals with compassion, dignity, and respect, the law will reflect that commitment to protect them.

This Note will discuss the social movement to confer legal protections and rights on animals in an effort to end their suffering in laboratories from invasive research, and will argue that primates,³⁷ in particular, should be retired to sanctuaries where they will be guaranteed a right to dignity and a life free from confinement and torture.³⁸ Part I will reveal a glimpse of the range of research conducted on primates. In addition, Part I will offer examples of primates’ intellectual abilities and emotional capacities. Part II will take account of competing theory—animal welfare theory, animal rights theory, and feminist animal care theory—and will trace the evolution of protective legislation. Part II will also consider the status of animals as property, legal personhood, and legal standing as a means of gaining access to the courts to enforce protective legislation. Part III will compare evolving societal mindsets in the context of the women’s rights movement and the animal welfare and rights movement. In addition, Part III will analyze protective legislation, specifically provisions of the AWA that relate to painful laboratory research. And Part III will conclude that current protective legislation is human-focused, inadequate, and wrought with contradictions.

36. Valdelane Azevedo Clayton, *A Habeas Corpus on Behalf of a Chimpanzee*, ANIMALLAW.INFO (citation omitted), http://www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf (last visited June 11, 2011) (translation of Suiça’s habeas petition) (pages not numbered).

37. The focus of this Note on primates, and great apes in particular, is a recognition by the author of the forces of conservatism. In light of this, primates are most likely the first animals to be freed from invasive research. A discussion of ending the exploitation of other animals in laboratories is beyond the scope of this Note.

38. Dignity is defined as “the quality or state of being worthy, honored, or esteemed.” MERRIAM-WEBSTER’S, *supra* note 12, at 350. This Note understands dignity as being honored and treated with respect by being given autonomy and control over one’s physical being. Black’s Law Dictionary defines torture as “[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.” BLACK’S LAW DICTIONARY 1627 (9th ed. 2009). Merriam-Webster defines torture as “anguish of body or mind.” MERRIAM-WEBSTER’S, *supra* note 12, at 1320. This Note understands torture as the infliction of intense pain to the body or mind of an animal to extract information. Information, in this context, is scientific knowledge extracted from the bodies of animals.

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This Note aims to illuminate that the AWA, as currently enacted and administratively enforced, values human interests over, and ironically at the expense of, animal welfare. This Note suggests that ending painful and distressing laboratory research requires deconstructing speciesist ideology that legitimizes the use of animals in research and cultivating compassion through awareness, which in turn should effect change in the law.

I. NONHUMAN PRIMATES USED IN RESEARCH ARE INTELLIGENT, EMOTIONAL, SOCIAL BEINGS

Primates³⁹ have been used in a wide range of painful and distressing behavioral studies, medical research, and pharmaceutical experiments such as studies on drug addiction,⁴⁰ maternal and sensory deprivation,⁴¹ the effect of space tra-

39. Macaques, in particular the rhesus monkey, an Old World monkey native to Asia, are the most commonly used primate in laboratory research in the United States. *Questions and Answers About Monkeys Used in Research*, THE HUMANE SOC'Y OF THE U.S., Sept. 28, 2009, http://www.humanesociety.org/animals/monkeys/qa/questions_answers.html#What_types_of_monkeys_are_most_frequent!; *see also Non-Human Primates Used in Research*, AMERICAN ANTI-VIVISECTION SOC'Y, http://www.aavs.org/site/c.bkLTKfOSLhK6E/b.6456925/k.63CB/Nonhuman_Primates_Used_in_Research.htm (last visited June 11, 2011). In addition, marmosets, squirrel monkeys, and tamarins are among those species frequently used in research. *Questions and Answers About Monkeys Used in Research*, *supra*.

40. *See, e.g.,* Lori Whitten, *Low Dopamine Receptor Availability May Promote Cocaine Addiction*, NAT'L INST. ON DRUG ABUSE (Apr. 2009), http://drugabuse.gov/NIDA_notes/NNvol22N3/Low.html. Harvard University, for example, has conducted numerous studies on cocaine addiction using primates. *See* Bertha K. Madras, et al., *Dopamine Systems in Primate Brain: Addiction, Parkinson's Disease and Attention Deficit Hyperactivity Disorder*, HARVARD DEP'T OF PSYCHIATRY, <http://www.hms.harvard.edu/psych/redbook/redbook-basicresearch-neuropharmacology-02.htm> (last visited June 11, 2011) (current research ongoing at Harvard); Roger D. Spealman & James K. Rowlett, *Nonhuman Primate Models of Addiction: Biological Basis and Experimental Therapeutics*, HARVARD DEP'T OF PSYCHIATRY, <http://www.hms.harvard.edu/psych/redbook/redbook-addictions-09.htm> (last visited June 11, 2011) (current research ongoing at Harvard).

41. *Britches' Story*, BRITCHES.ORG, <http://www.britches.org.uk/story.asp> (last visited June 11, 2011). For example, Britches, a stump-tailed macaque monkey, was separated from his mother at birth to study maternal deprivation, and his eyelids were sewn shut to study sensory deprivation and blindness. *Id.*; *see also Britches*, ANIMAL LIBERATION FRONT, <http://www.animalliberationfront.com/ALFront/Actions-USA/Britches.htm> (last visited June 11, 2011); *Britches' Story*, PETA, <http://www.peta.org/tv/videos/animal-experimentation/britches-story.aspx> (last visited June 11, 2011). In 1985, when Britches was five weeks old, the Animal Liberation Front (ALF), an animal rights group, broke into the University of California, Riverside where Britches was confined and released him. *Britches' Story*, BRITCHES.ORG, *supra*; *see also Britches*, *supra*; *Britches' Story*, PETA, *supra*. ALF activists reported that they

vel,⁴² radiation, and brain damage;⁴³ toxicology;⁴⁴ infectious disease;⁴⁵ and age-related research.⁴⁶ Such use in research has led to the decline of the population of some species of primates.

One hundred years ago, an estimated five million chimpanzees lived free in Africa.⁴⁷ Today, however, chimpanzee “populations have been decimated as humans have destroyed African tropical forests, hunted . . . chimpanzees for food, and captured thousands of chimpanzees for sale to American and European laboratories,

found Britches alone in a cage with bandages around his eyes and a sonar device attached to his head that emitted a high-pitched screech every few minutes. He was clinging to a device, covered in towelling [sic], that had two fake nipples attached, apparently intended to serve as a surrogate mother.

Britches’ Story, BRITCHES.ORG, *supra*; see also *Britches*, *supra*; *Britches’ Story*, PETA, *supra*.

42. See Tara Gray, *A Brief History of Animals in Space*, NASA HISTORY PROGRAM OFFICE (Aug. 2, 2004), <http://history.nasa.gov/animals.html>. In the 1950s, “[t]he United States Air Force create[d] a breeding colony of 65 wild-caught chimpanzees for use in the space program.” *A History of Advocating for Chimpanzees Used in Research*, THE HUMANE SOC’Y OF THE U.S. (Sept. 29, 2010), http://www.humanesociety.org/issues/chimpanzee_research/timelines/history.html. On January 31, 1961, Ham, a chimpanzee, “paved the way for the successful launch of America’s first human astronaut, Alan B. Shepard, Jr.”; and on November 29, 1961, Enos, also a chimpanzee, paved the way for astronaut John Glenn. Gray, *supra*; see also *Chimpanzees: An Unnatural History*, Video: *Chimps in the Space Program*, PBS, <http://www.pbs.org/wnet/nature/episodes/chimpanzees-an-unnatural-history/video-chimps-in-the-space-program/4468/> (last visited June 11, 2011); *Project Mercury—Launching and Recovery of Mercury Capsule with the Chimpanzee Named Ham on Board*, NASA IMAGES (Feb. 9, 1961), <http://www.nasaimages.org/luna/servlet/detail/nasaNAS~13~13~70215~175392:PROJECT-MERCURY—LAUNCHING-AND-REC> (last visited June 11, 2011). See generally NAT’L AERONAUTICS & SPACE ADMIN., RESULTS OF THE PROJECT MERCURY BALLISTIC AND ORBITAL CHIMPANZEE FLIGHTS (1963), <http://history.nasa.gov/SP39Chimpanzee.pdf> (last visited June 11, 2011) (detailing the training and evaluation of the chimpanzees used in the Mercury Chimpanzee Program). Most of the surviving chimpanzees used in the space program were later leased out by the Air Force for biomedical research. New England Anti-Vivisection Soc’y, *Air & Space*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/harm-suffering/research-history/air-space/> (last visited June 11, 2011).

43. See *infra* notes 138-139 and accompanying text.

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44. See *Chimpanzee Facts*, THE CHIMPANZEE & HUMAN COMM’N INST., <http://www.cwu.edu/~cwuchci/faq.html> (last visited June 11, 2011); *Non-Human Primates Used in Research*, *supra* note 39.

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45. See *Chimpanzee Facts*, *supra* note 44. For example, chimpanzees have been used for hepatitis research, see *supra* notes 16-17 and accompanying text (Booee and Bruno at LEMPIS), and AIDS research, see *Chimpanzee Facts*, *supra* note 44; *infra* notes 56-62 and accompanying text (Jerom).

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46. See *Non-Human Primates Used in Research*, *supra* note 39.

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47. RATTLING THE CAGE, *supra* note 7, at 6; *Chimpanzee Facts*, *supra* note 44 (“[C]himpanzees are indigenous only to Africa.”).

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circuses, and zoos.”⁴⁸ As a result, chimpanzees are an endangered species;⁴⁹ their population has dwindled and it is “estimate[d] that there are only 80,000 [to] 130,000 chimpanzees left in the entire world.”⁵⁰

“In the wild, chimpanzees live in very diverse social groups and travel several miles in one day.”⁵¹ In contrast, in the laboratory, they often “live alone in cold, metal cages approximately the size of a closet.”⁵² Although they may see and hear other primates, they may be denied their physical contact and companionship.⁵³ Housing chimpanzees alone “can cause severe problems such as depression, heightened aggression, frustration and even self-mutilation.”⁵⁴ Life in a laboratory is one of isolation, deprivation, boredom, fear, and suffering.

Most chimpanzees in laboratories today are warehoused—confined, but not used in procedures.⁵⁵ Many of the chimpanzees currently warehoused—the surplus—were bred for AIDS research.⁵⁶ Chimpanzees, however, do not develop the symptoms of AIDS after being infected with HIV as humans do.⁵⁷ Jerom was one of the many lives wasted discovering this.⁵⁸ Jerom was infected with three strains of HIV before he was five years old; he was euthanized in

48. *Chimpanzee Facts*, *supra* note 44; *see also* RATTLING THE CAGE, *supra* note 7, at 5-6.

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49. *See* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006). Wild chimpanzees are listed as an “endangered” species under the Endangered Species Act (ESA); whereas, captive chimpanzees are classified as a “threatened species.” *Id.* §§ 1532-1533. This classification protects chimpanzees born in the wild, but permits laboratory research on chimpanzees bred in captivity.

50. *Chimpanzee Facts*, *supra* note 44.

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51. *Questions and Answers about Chimpanzees Used in Research*, THE HUMANE SOCIETY OF THE U.S. (Apr. 9, 2010), http://www.humanesociety.org/issues/chimpanzee_research/qa/questions_answers.html [hereinafter *Chimpanzees Used in Research*].

52. *Id.*

53. FOUTS & MILLS, *supra* note 15, at 284.

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54. *Chimpanzees Used in Research*, *supra* note 51; *see also infra* Part III.C (discussing inadequate environmental enhancements to promote the psychological well-being of rhesus monkeys).

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55. *Chimpanzees Used in Research*, *supra* note 51.

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56. Nancy R. Hoffman & Robun C. McGinnis, 2007-2008 *Legislative Review*, 15 ANIMAL L. 265, 269 (2009); New England Anti-Vivisection Soc’y, *HIV/AIDS Debacle*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/harm-suffering/research-current/hiv-aids-debacle/> (last visited June 11, 2011).

57. Hoffman & McGinnis, *supra* note 56, at 269-70; *HIV/AIDS Debacle*, *supra* note 56.

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58. *See* RATTLING THE CAGE, *supra* note 7, at 1-2; *HIV/AIDS Debacle*, *supra* note 56.

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1996, just “shy of his fourteenth birthday.”⁵⁹ He lived in “a large, windowless, gray concrete box, one of eleven bleak steel-and-concrete cells 9 feet by 11 feet by 8.5 feet” in the Chimpanzee Infectious Disease Building at the Yerkes Regional Primate Research Center (Yerkes).⁶⁰ Rachel Weiss, a former animal care technician at Yerkes, cared for Jerom in the final six months of his life as an “AIDS-like illness” ravaged his body.⁶¹ Weiss, reflecting on her time with Jerom, stated,

As is often the case with experiments on live animals, *Jerom suffered for much of his illness without being given medical treatment to relieve his pain or misery, because doing so would have interfered with the course of the experiment* Instead of a proud figure, he was lean and gaunt, his hair dull, his skin pale, his eyes sunken from wasting and bright with fear and fever. He suffered in almost every way a caged chimpanzee can suffer, and then he died.⁶²

Some chimpanzees, however, have been spared the fate of those in the laboratory. Washoe, for example, was the first chimpanzee to communicate with humans using American Sign Language (ASL).⁶³ She was abducted from Africa as an infant and brought to the United States for use in the National Aeronautics and Space Administration’s (NASA) space chimpanzee program.⁶⁴ Instead of being used in NASA’s program, Washoe was adopted and raised by Allen and Beatrix Gardner in their home until she was five years old, when she was relocated to a primate institute that housed other chimpanzees.⁶⁵ In 2007, at the approximate age

59. RATTLING THE CAGE, *supra* note 7, at 1; *see also HIV/AIDS Debacle*, *supra* note 56.

60. RATTLING THE CAGE, *supra* note 7, at 2.

61. *HIV/AIDS Debacle*, *supra* note 56 (internal citations omitted). Jerom’s “AIDS-like illness” was an exception to other HIV research done on chimpanzees; it was the result of being infected with multiple HIV strains, which is not representative of the infection and progression of the illness in humans. *Id.*

62. *HIV/AIDS Debacle*, *supra* note 56 (emphasis added); *see also RATTLING THE CAGE*, *supra* note 7, at 1-2.

63. FOUTS & MILLS, *supra* note 15, at 4; Roger S. Fouts & Deborah H. Fouts, *Chimpanzees’ Use of Sign Language*, in THE GREAT APE PROJECT 28-41 (Paola Cavalieri & Peter Singer, eds. 1993), available at <http://www.animal-rights-library.com/texts-m/fouts01.pdf>; Kolber, *supra* note 8, at 172. *See generally* FOUTS & MILLS, *supra* note 15 (detailing the events of Washoe’s life); *Meet Washoe*, FRIENDS OF WASHOE, <http://www.friendsofwashoe.org/> (last visited June 11, 2011).

64. FOUTS & MILLS, *supra* note 15, at 4; *Chimpanzee Facts*, *supra* note 44; *Meet Washoe*, *supra* note 63; *see also* Gray, *supra* note 42.

65. Fouts & Fouts, *supra* note 63; Kolber, *supra* note 8, at 172.

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of forty-two, Washoe died at a primate sanctuary after a short illness.⁶⁶

Washoe’s “accomplishments, along with those of her African cousins, have served as a small flame in the dark halls of human ignorance.”⁶⁷ She and other chimpanzees have

demonstrate[d] that they have complex minds, are self-conscious and self-aware, exhibit some or all of the elements of a theory of mind (they know what other chimpanzees see or know what other chimpanzees know), understand symbols, construct complicated societies, transmit culture, use a human language or sophisticated language-like communication system, and engage in such complicated mental operations as deception, pretending, imitation, and insightful solving of difficult problems.⁶⁸

Koko, a gorilla, was born in 1971 and learned sign-language when she was one year old.⁶⁹ She has a vocabulary of over 1,000 signs, and she understands approximately 2,000 English words.⁷⁰ “Koko has a tested IQ of between 70 and 95 on a human scale, where 100 is considered ‘normal.’”⁷¹ Beyond her intellectual ability, Koko has demonstrated a range of emotional responses. Koko had a pet cat she named “All Ball” who was hit by a car and killed.⁷² She mourned when she was given the news.⁷³ Dr. Francine Patterson, recalling Koko’s reaction to All Ball’s death, stated,

66. *Meet the Family: Washoe’s Biography*, FRIENDS OF WASHOE, http://www.friendsofwashoe.org/washoe_bio.shtml (last visited June 11, 2011). The average lifespan of a chimpanzee is forty years; in captivity they can live up to sixty years, in the wild fifty-three. *Learn About Chimpanzees*, FRIENDS OF WASHOE, http://www.friendsofwashoe.org/learn_about_chimpanzees.shtml (last visited June 11, 2011).

67. Fouts & Fouts, *supra* note 63, at 31.

68. *The Legal Thinghood of Nonhuman Animals*, *supra* note 7, at 227. In 2007, a study conducted to measure short-term memory compared the ability of young chimpanzees and human adults: “the chimps won.” Malcolm Ritter, *Young Chimp Outscores College Students in Memory Test*, NAT’L GEOGRAPHIC NEWS, Dec. 3, 2007, <http://news.nationalgeographic.com/news/2007/12/071203-AP-chimp-memory.html>. “That challenges the belief of many people, including a number of scientists, that ‘humans are superior to chimpanzees in all cognitive functions’” *Id.* (quoting researcher Tetsuro Matsuzawa of Kyoto University).

69. The Gorilla Foundation, *Koko’s World*, KOKO.ORG, <http://www.koko.org/world/> (last visited June 11, 2011).

70. *Id.*

71. *Id.*

72. FRANCINE PATTERSON, *KOKO’S KITTEN* (Scholastic, ed., 1985) (pages not numbered); Kolber, *supra* note 8, at 172.

73. PATTERSON, *supra* note 72; Kolber, *supra* note 8, at 172.

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I told her that Ball had been hit by a car; she would not see him again.

Koko did not respond. I thought she didn't understand, so I left the trailer.

Ten minutes later, I heard Koko cry. It was her distress call—a loud, long series of high-pitched hoots

Three days later, Koko and I had a conversation about Ball.

“Do you want to talk about your kitty?” I asked.

“Cry,” Koko signed.

“Can you tell me more about it?” I asked.

“Blind,” she signed.

“We don't see him anymore, do we? What happened to your kitty?” I asked.

“Sleep cat,” Koko signed.

A few weeks later, Koko saw a picture of a gray tabby who looked very much like Ball. She pointed to the picture and signed, “Cry, sad, frown.”⁷⁴

Koko also grieved after her companion of twenty-four years, Michael, died.⁷⁵ She “uttered frequent, mournful cries, particularly at night.”⁷⁶ And, in what appeared to be an effort to alleviate her emotional distress, she requested, in sign language, a nightlight be left on at night.⁷⁷ The loss of her relationships with All Ball and Michael had a significant emotional impact on Koko, which she communicated to her human guardians.⁷⁸

Rhesus monkeys, the most commonly used primate in laboratory research in the United States, have also demonstrated their capacity for complex learning and intelligence. In a recent study at Yale School of Medicine, researchers played “rock, paper, scissors” with rhesus monkeys, which demonstrates rhesus monkeys’ capacity for disappointment and regret.⁷⁹ “[E]ach time a monkey lost, it was more likely in the next round to use the gesture that would have won in the previous one (. . . for instance, if the researcher’s rock beat the monkey’s scissors, the monkey was more likely to throw a rock in the next round).”⁸⁰ According to researchers, this “suggests

74. PATTERSON, *supra* note 72.

75. *Koko's Mourning for Michael*, *supra* note 8.

76. Kolber, *supra* note 8, at 174; *Koko's Mourning for Michael*, *supra* note 8.

77. Kolber, *supra* note 8, at 174; *Koko's Mourning for Michael*, *supra* note 8.

78. *Koko's Mourning for Michael*, *supra* note 8.

79. Meredith Melnick, *Monkeys, Like Humans, Make Bad Choices and Regret Them, Too*, TIME, May 31, 2011, <http://healthland.time.com/2011/05/31/monkeys-play-rock-paper-scissors-and-show-regret-over-losing/>.

80. *Id.*

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the monkeys were capable of analyzing past results and imagining a different outcome.”⁸¹ In another recent study at Yerkes National Primate Research Center rhesus monkeys demonstrated “that they are able to recall things from recent memory.”⁸²

Primates have repeatedly demonstrated that they are intelligent, emotional, social beings. Thus, they deserve legislative protection that retires them from laboratories to sanctuaries where they will be guaranteed a right to dignity and a life free from confinement and torture in laboratories.

II. EVOLVING THEORY, PROTECTIVE LEGISLATION & ACCESS TO THE COURTS

The animal welfare movement dates back to the late 1800s.⁸³ Societies for the prevention of cruelty to animals were first established in the United States in the 1860s.⁸⁴ In 1876, Britain passed the first national law that regulated the use of animals in experimental research, the Cruelty to Animals Act of 1876.⁸⁵ Although the United States Congress conducted hearings on vivisection in 1900,⁸⁶ federal legislation regulating the use of animals in laboratories was not passed until 1966.⁸⁷ Despite gains in animal protection generally and primate protection specifically, current legislation inadequately protects the welfare of animals. Furthermore, enforcement of protective legislation is hindered by standing requirements. And finally, a glance at the international community reveals that the United States has been slow to enact legislation protecting primates, specifically chimpanzees.

81. *Id.*

82. Michael Marshall & Aria Pearson, *Monkeys Show Ability to Recall Patterns*, WASH. POST, May 9, 2011, http://www.washingtonpost.com/national/science/monkeys-show-ability-to-remember-things/2011/05/05/AFq1BgDG_story.html.

83. UNTI, *supra* note 29, at 1.

84. *Id.* The Humane Society of the United States (HSUS), one of the largest animal welfare organizations, was established in 1954. *Id.* at 3. “The Humane Society of the United States opposes and seeks to prevent all use or exploitation of animals that causes pain, suffering, or fear.” *Id.* (quoting HSUS’s guiding policy). For history of the HSUS, see *id.* at 2-40.

85. UNTI, *supra* note 29, at 66; see also FRANCIONE, *supra* note 7, at 190 (noting that the “British legislation . . . tightly controlled [the] use of animals in painful experiments”).

86. See *Vivisection: Hearing on the Bill (S. 34) for the Further Prevention of Cruelty to Animals in the District of Columbia Before the S. Comm. on the District of Columbia*, 56th Cong. (1900).

87. Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (current version at 7 U.S.C. §§ 2131-2159 (2006)).

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A. *Evolving Theory: Animal Welfare Theory, Animal Rights Theory, and Feminist Care Theory*

The social movement to protect the welfare of and confer legal rights on animals has grown in the last thirty-five years. This growth has paralleled humans' changing understanding of the internal lives of animals, especially primates. Animal welfare and rights are topics of social, political, and legal debate that have gained international attention.⁸⁸ And animal law is a rapidly developing area of legal academia and practice.⁸⁹

In the animal law community, there is a divide between some animal welfare theorists and some animal rights theorists. This is not, however, a bright line divide, and some theorists take a middle ground and recognize the value in advocating for both protective legislation and legal rights. The welfare-rights debate centers around whether animals should be better protected or granted legal rights. Problematically, however, during this debate about whether there should be bigger cages or no cages, animals remain confined in cages.

Animal welfare theorists are concerned with enforcing and expanding current legislation and conservatively focus their attention on preventing animal suffering. These reformist measures are criticized by some rights theorists as authorizing exploitation.⁹⁰ Gary L. Francione, animal rights legal scholar and professor of law, broadly describes animal welfare as “the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as ‘humanely’ as possible.”⁹¹ The Animal Welfare Act,⁹² for example, as will be discussed, authorizes exploitation because under its provisions animals may be subjected to pain if scientifically justified. Although animal welfare advocates' methods may be perceived as authorizing exploitation, their approach currently may be the most practical way to address some of the suffering of animals presently confined in cages. However, the inadequacies of

88. See, e.g., Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 29 (2009).

89. *Id.* “There are 131 law schools in the U.S. and Canada that have offered a course in animal law.” *Animal Law Courses*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/userdata_display.php?modin=51 (last visited June 11, 2011).

90. See, e.g., FRANCIONE, *supra* note 7, at 7.

91. *Id.* at 6.

92. Animal Welfare Act, 7 U.S.C. §§ 2131-2159.

current protective legislation, as will be discussed, illustrate the ineffectiveness of this approach.

Animal rights theorists, on the other hand, focus their attention on granting animals legal rights such as legal standing⁹³ and legal personhood.⁹⁴ “Rights theorists argue that . . . some animals possess . . . some of the same rights enjoyed by humans . . . [that is,] animals [do not] lose their rights whenever, or just because, humans stand to benefit from exploiting animals.”⁹⁵ Because animal rights advocates strive for ending all exploitation of animals, they are sometimes criticized as too radical.⁹⁶ This criticism flows, in part, from the reality that granting animals rights will require massive economic and social restructuring because the food, clothing, entertainment, and biomedical research industries rely on the legal exploitation of animals.⁹⁷

An alternative to rights theory is feminist animal care theory.⁹⁸ Feminist care theorists emphasize that empathy and compassion are essential to deconstructing speciesist ideology.⁹⁹ Feminist care theorists also argue that it is important to consider animals not in relation to their similarities or differences to human animals, but rather to value them for themselves.¹⁰⁰ Rights theorists, on the other

93. See *infra* Part II.C.3.

94. See *infra* Part II.C.2.

95. FRANCIONE, *supra* note 7, at 8. Steven M. Wise, animal rights attorney and legal scholar, addresses the question of where to draw the line, suggesting a sort of hierarchical structure. See generally STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS (2002) (discussion includes great apes, dolphins, elephants, and honeybees).

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96. See Taimie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL EDUC. 237, 238 (2010) (“If ‘animal rights’ is understood as the position that animals should have rights to prevent humans from exploiting them, the concept can be considered ‘radical’ because animal exploitation is so deeply engrained in our society.”).

97. FRANCIONE, *supra* note 7, at 253-54.

98. See, e.g., THE FEMINIST CARE TRADITION IN ANIMAL ETHICS, *supra* note 33.

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99. See generally Josephine Donovan, *Feminism and the Treatment of Animals: From Care to Dialogue*, 31 SIGNS 305 (2006). The lack of empathy that some humans have for animals is arguably a learned behavior. Brian Luke, *Taming Ourselves or Going Feral? Toward a Nonpatriarchal Metaethic of Animal Liberation*, in ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLORATIONS 306 (Carol J. Adams & Josephine Donovan eds., 1995) (“The ability to harm animals on a daily basis without overwhelming distress requires an empathic curtailment which must be carefully inculcated.”); see also Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143, 154-55 (2002).

100. Linda Vance, *Beyond Just-So Stories: Narrative, Animals, and Ethics*, in ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLORATIONS, *supra* note 99, at 185 (“The goal is not to make us care about animals because they are like us, but to care about them because they are themselves.”).

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hand, have a tendency to focus on the similarities between, for example, nonhuman primates and human primates. This similarity is a hook some rights theorists use to argue why primates should be granted rights. Problematically, this similarity is also a hook that advocates *for* animal research use.¹⁰¹

Welfare-based and rights-based theory are each valuable. Strengthening and passing new protective legislation is important because it addresses current suffering of animals. Attaining legal rights for animals is essential for the larger, long-term goal of ending animal exploitation. In addition, care-based theory has valuable insights that should not be rejected because it rests on an emotional, rather than a rational basis.

B. *The Progression of Protective Legislation*

1. Laboratory Animal Welfare Act

In the 1960s, animal welfare became a salient issue in the United States when there was public outrage about the theft and sale of companion animals for laboratory research.¹⁰² *Life* magazine’s 1966 photo-essay *Concentration Camps for Dogs* significantly shaped public support of the issue of animal welfare.¹⁰³ Photographer Stan Wayman accompanied Frank McMahon, field director of the Humane Society of the United States, and Maryland state police as they raided dog dealer Lester Brown’s property.¹⁰⁴ Wayman captured horrific images of the neglectful and inhumane conditions dogs were kept in before being sold to laboratories.¹⁰⁵ Accounts of the police raid describe horrendous conditions in which more than one hundred dogs were suffering.¹⁰⁶ Emaciated dogs were “diseased, numbed by the cold, chained to ramshackle boxes and barrels, jammed into chicken crates and wire pens, and wallowing in their own wastes.”¹⁰⁷ Some dogs were “too weak to crawl over to the iced up cattle entrails strewn about the junkyard for them to

101. See *supra* note 14 and accompanying text. R
102. See, e.g., FRANCIONE, *supra* note 7, at 190. R
103. *Id.*; UNTI, *supra* note 29, at 71; Wayman, *supra* note 29, at 23-29. R
104. UNTI, *supra* note 29, at 71; Wayman, *supra* note 29, at 23-29. R
105. UNTI, *supra* note 29, at 71; Wayman, *supra* note 29, at 23-29. R
106. UNTI, *supra* note 29, at 71; Wayman, *supra* note 29, at 23-29. R
107. *Animal Abuse Case Details: Dog Found Frozen in Box on Property*, PET-ABUSE.COM, <http://www.pet-abuse.com/cases/9039/MD/US/> (last visited June 11, 2011).

eat.”¹⁰⁸ “Another dog lick[ed] desperately at a dish of water that was frozen solid.”¹⁰⁹ One “dog [was] frozen inside a box.”¹¹⁰

Public response to the mistreatment of these dogs was overwhelming, resulting in “more letters to *Life* than the magazine had received on any other article, and . . . more letters to Congress than were sent on issues such as civil rights and the war in Vietnam.”¹¹¹ Six months after the publication of the *Life* magazine photo-essay, a House Conference Report recognized that the “conscience and concern” of “many thousands of Americans throughout the Nation”¹¹² played a role in the enactment of the Laboratory Animal Welfare Act (LAWA),¹¹³ now known as the Animal Welfare Act (AWA),¹¹⁴ which President Lyndon Johnson signed into law.¹¹⁵

President Johnson stated at the signing:

science and research do not compel us to tolerate the kind of inhumanity which has been involved in the business of supplying stolen animals to laboratories or which is sometimes involved in the careless and callous handling of animals in some of our laboratories. This bill will put an end to these abuses.¹¹⁶

Although the LAWA was the first federal law regulating any aspect of the use of animals in research, it did *not* regulate the use of animals *during* research.¹¹⁷ President Johnson’s statement at the signing continued, “At the same time the bill does not authorize any

108. *Id.*; see also Wayman, *supra* note 29, at 23-29.

109. Wayman, *supra* note 29, at 27.

110. *Id.* at 26.

111. FRANCIONE, *supra* note 7, at 192. Congressional representatives received more than 80,000 letters from Americans. UNTI, *supra* note 29, at 71.

112. H.R. REP. NO. 89-1848, at 6 (1966) (Conf. Rep.), available at http://www.nal.usda.gov/awic/pubs/AWA2007/confrep_aug1966.pdf.

113. Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (current version at 7 U.S.C. §§ 2131-2159 (2006)).

114. Animal Welfare Act, 7 U.S.C. §§ 2131-2159.

115. FRANCIONE, *supra* note 7, at 190; UNTI, *supra* note 29, at 71.

116. President Lyndon B. Johnson, Remarks Upon Signing the Animal Welfare Bill, (Aug. 24, 1966), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=27796>.

117. The LAWA required that the United States Department of Agriculture establish and promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers and research facilities The foregoing *shall not* be construed as authorizing the Secretary to prescribe standards for the handling, care, or treatment of animals *during* actual research or experimentation by a research facility as determined by such research facility.

Laboratory Animal Welfare Act § 13, 80 Stat. at 352 (emphasis added); see also FRANCIONE, *supra* note 7, at 192.

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sort of interference with actual research or experimentation. They just must go on.”¹¹⁸ This statement illustrates that the primary concern of this legislation was *not* animal welfare.

Rather than protecting animals, the purpose of the LAWA was, in relevant part, “to protect the owners of dogs and cats from theft of such pets, [and] to prevent the sale or use of dogs and cats which have been stolen.”¹¹⁹ This stated purpose reflects a desire to protect the property rights of owners of companion animals. Further illustrating this, the LAWA required record keeping regarding “the purchase, sale, transportation, identification, and previous ownership of dogs and cats, *but not* monkeys, guinea pigs, hamsters, or rabbits.”¹²⁰

2. Animal Welfare Act

In 1970, the LAWA was amended and renamed the Animal Welfare Act (AWA),¹²¹ which is currently the primary federal legislation protecting animals.¹²² The purpose of the AWA is

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.¹²³

The 1970 amendment required, among other things, the use of anesthetic, analgesic, or tranquilizing drugs during experimentation.¹²⁴

118. Johnson, *supra* note 116.

119. Laboratory Animal Welfare Act § 1, 80 Stat. at 350; *see also* S. REP. NO. 89-1281 (1966), available at http://www.animallaw.info/administrative/adusrep1281_1966.htm.

120. Laboratory Animal Welfare Act § 10, 80 Stat. at 351.

121. Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560 (current version at 7 U.S.C. §§ 2131-2159 (2006)). The 1970 amendment expanded the definition of “animal.” *Id.* § 3(g), 84 Stat. at 1561. In 2002, the 1970 more inclusive definition was amended and “animal” was redefined to exclude “birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research.” Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 134, 491 (current version at 7 U.S.C. § 2132(g)).

122. *See* Animal Welfare Act, 7 U.S.C. § 2143. The Endangered Species Act is another source of protection. 16 U.S.C. §§ 1531-1544 (2006); *see supra* note 49 (endangered versus threatened classifications).

123. Animal Welfare Act, 7 U.S.C. § 2131.

124. Animal Welfare Act § 1, 84 Stat. at 1562. This amendment illuminates a recognition of the painful and distressing nature of laboratory research.

In 1976, the AWA was again amended,¹²⁵ this time driven by public concern regarding dog fighting¹²⁶ and the inhumane treatment and death of animals during transportation due to improper shipping containers, exposure to extreme temperatures, and lack of ventilation and water.¹²⁷ A cougar, for example, died several days after being left in an

airless, coffin-like crate in a hot hangar for five hours on a day when temperatures soared into the 90's. The water pipe leading into the crate was too narrow and rusty to be usable. The inside of the crate was lined with wires, which the cougar tore and twisted trying to get out, lacerating her paws in the struggle.¹²⁸

Despite USDA resistance,¹²⁹ the 1976 amendment brought transportation carriers¹³⁰ and intermediate handlers¹³¹ of animals under the provisions of the AWA. It established standards for “[shipping] containers, feed, water, rest, ventilation, temperature, and handling” to promote better care for animals during transport.¹³² In addition, it added a new provision that prohibits knowingly sponsoring, participating, transporting, or using the mail to promote fighting of animals.¹³³

125. Animal Welfare Act of 1976, Pub. L. No. 94-279, 90 Stat. 417 (current version at 7 U.S.C. §§ 2131-2159).

126. In 2007, the AWA was again amended with animal fighting, specifically birds, in mind. See Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

127. Animal Welfare Act of 1976, 90 Stat. 417. “[Dogs’] crates are frequently makeshift, poorly-ventilated and lacking in bedding and water containers. We have seen them in airline warehouses, crying and whimpering with the need to relieve themselves after having been cooped up for 24 hours or longer.” *Animal Welfare Improvement Act of 1975: Hearing on S. 1941, S. 2070, S. 2430 Before the Subcomm. on the Env’t of the Comm. of Commerce, 94th Cong. 57 (1975)* (statement of Fay Brisk, Director of Airport Activities, Washington Humane Society), available at http://lawlibrary.rutgers.edu/gdoc/hearings/7/76601708/76601708_1.pdf.

128. *Animal Welfare Improvement Act of 1975, supra* note 127, at 59.

129. In 1975, the USDA, which is responsible for enforcing the AWA, opposed amending the AWA to better protect animals in transit, but instead favored “voluntary cooperation” with improved standards of care in transportation. *Id.* at 43 (statement of Dr. Pierre A. Chaloux, Assistant Deputy Administrator, Veterinary Services, Animal and Plant Health Inspection Service, Department of Agriculture). The USDA also opposed amendments regarding animal fighting because it believed that this was the responsibility of the state and local law enforcement agencies and because it lacked “the kind of trained manpower and other resources necessary to prohibit animal fights or arrest the involved persons.” *Id.* at 45.

130. Animal Welfare Act of 1976, 90 Stat. at 418 (current version at 7 U.S.C. § 2132(2)(j) (2008)).

131. *Id.*

132. *Id.* § 9, 90 Stat. at 419.

133. *Id.* § 17, 90 Stat. at 421.

Public outrage, in response to two highly publicized cases of horrific mistreatment of primates in laboratory research, led to Congress again amending the AWA with the passage of the Food Security Act of 1985.¹³⁴ In 1983, the Silver Spring Monkey case revealed severe mistreatment of monkeys.¹³⁵ Alex Pacheco, co-founder of People for the Ethical Treatment of Animals (PETA), documented numerous violations of the AWA while volunteering at the Institute for Biological Research in Silver Spring, Maryland, leading to the seizure of seventeen monkeys.¹³⁶ The Silver Spring Monkeys were not provided “sufficient food or water, a sanitary environment, or adequate veterinary care.”¹³⁷ And in 1984, the Animal Liberation Front, an animal rights group, released videotapes that revealed “severe mistreatment of baboons by government-funded researchers” at the Head Injury Clinic at the

134. Food Security Act of 1985, Pub. L. No. 99-198, §§ 1751-1759, 99 Stat. 1354, 1645-50. This amendment introduced exercise requirements for dogs in research facilities, and a requirement for “a physical environment adequate to promote the psychological well-being of primates.” *Id.* § 1752, 99 Stat. at 1650.

135. Taub v. State, 463 A.2d 819 (Md. 1983); *see also* Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986); *infra* notes 245-250 and accompanying text. R

Twelve of the seventeen monkeys had disabled limbs as a result of surgical interference (deafferentation) when they were juveniles

No one bothered to bandage the monkeys’ injuries properly (on the few occasions when bandages were used at all), and antibiotics were administered only once; no lacerations of self-amputation injuries were ever cleaned. . . . The monkeys also suffered from a variety of wounds that were self-inflicted or inflicted by monkeys grabbing at them from adjoining cages. I saw discoloured, exposed muscle tissue on their arms. Two monkeys had bones protruding through their flesh. Several had bitten off their own fingers and had festering stubs

Alex Pacheco & Anna Francione, *The Silver Spring Monkeys*, in *IN DEFENSE OF ANIMALS* 136-37 (Peter Singer ed., 1985).

136. *See generally* Pacheco & Francione, *supra* note 135, at 136-46. R

137. *Int’l Primate Prot. League*, 799 F.2d at 936. “In addition to the tiny, filthy cages, Pacheco noted that no one properly bandaged the monkeys limbs, that the monkeys went for many days without being fed, that no one cleaned the cages and lab rooms regularly, and that Taub never used a [veterinarian].” Marci Messet, *They Asked for Protection and They Got Policy: International Primate’s Mutilated Monkeys*, 21 *AKRON L. REV.* 97, 101 n.51 (1987) (citing Pacheco & Francione, *supra* note 135, at 136-41). “When the police went into his laboratory, they discovered monkeys with open wounds from self-amputation and a disturbing lack of hygiene, including cages ‘caked with feces.’” *Id.* at 101 n.51 (quoting Karen L. McDonald, Comment, *Creating a Private Cause of Action Against Abusive Animal Research*, 134 *U. PA. L. REV.* 399, 406 (1986) (footnotes omitted)). R

University of Pennsylvania.¹³⁸ “The tapes showed government-funded experiments in which baboons were knocked repeatedly on their heads without first being properly anesthetized. Other scenes recorded the primates coming out of anesthesia before doctors had finished operating on their brains. The tapes were viewed by millions of television viewers across the country.”¹³⁹

In 1990, another amendment to the AWA was motivated by the issue of stolen pets and focused on the use of ex-pets in laboratories.¹⁴⁰ This amendment requires shelters to hold all dogs and cats for at least five days, allowing time for pet owners to claim their pets or for adoption to new homes.¹⁴¹ In some states, after this five-day window, ex-pets may be sold to research facilities and laboratories.¹⁴² This shift from pet to laboratory subject illuminates animals’ status as things, as property.

138. Colette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 224-25 (2006).

139. Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 799 & n.38 (1997) (citing David Masci, *Fighting Over Animal Rights: Has Public Support for the Movement Peaked?*, CQ RESEARCHER, Aug. 2, 1996, at 673-96); see also *Unnecessary Fuss*, PETA, <http://www.peta.org/tv/videos/animal-experimentation/803731940001.aspx> (last visited June 11, 2011) (video of brain damage experiments by government funded researchers at the University of Pennsylvania).

140. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 2503, 104 Stat. 3359, 4066 (current version at 7 U.S.C. § 2158 (2006)).

141. *Id.*

142. Under Michigan law, for example,

Dogs and cats shall not be offered for sale or sold to a research facility at public auction or by weight; or purchased by a research facility at public auction or by weight. A research facility shall not purchase any dogs or cats except from a licensed dealer, public dog pound, humane society, or from a person who breeds or raises dogs or cats for sale. Any county, city, village or township operating a dog pound or animal shelter *may sell for an amount not to exceed \$10.00 per animal or otherwise dispose of unclaimed or unwanted dogs and cats to a Michigan research facility.*

MICH COMP. LAWS ANN. § 287.389 (West 2010) (emphasis added); see also *Youngblood v. Jackson Cnty.*, 184 N.W.2d 290, 291 (Mich. Ct. App. (1970) (holding that “[i]f Jackson County has authority to operate a dog pound . . . [it is] authori[z]ed to sell] . . . impounded and unlicensed dogs to the University of Michigan”). Under Massachusetts law, however, “no person, institution, animal dealer or their authorized agents shall transport, or cause to be transported, any animal obtained from any municipal or public pound, public agency, or dog officer acting individually or in an official capacity into the commonwealth for purposes of research, experimentation, testing, instruction or demonstration.” MASS. GEN. LAWS ch. 140, § 174D (2008). In 2009, the USDA reported that there were 20,160 cats and 67,337 dogs used in laboratory research. PAIN TYPE: TOTAL 2009, *supra* note 2, at 2. Of those, 180 cats and 782 dogs were used in painful procedures, but their pain *was not* alleviated because pain relieving drugs would have

The USDA is responsible for enforcing the AWA and promulgating regulations.¹⁴³ The Animal and Plant Health Inspection Service (APHIS), an agency within the USDA, is responsible for administration through its Animal Care (AC) program.¹⁴⁴ Under the AWA, the Secretary of Agriculture has a duty to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by . . . research facilities,”¹⁴⁵ including minimum standards “for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species,”¹⁴⁶ “and for a physical environment adequate to promote the psychological well-being of primates.”¹⁴⁷ These standards of humane care and treatment are contained in Title 9 of the Code of Federal Regulations.¹⁴⁸ The Secretary, however, does not have authority “to promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility.”¹⁴⁹

To ensure compliance, the AWA requires that private research facilities be licensed by¹⁵⁰ or registered with the Secretary of Agriculture.¹⁵¹ Each non-federal research facility that uses animals must be inspected once a year.¹⁵² APHIS has approxi-

interfered with or compromised the research. PAIN TYPE: WITH PAIN, NO DRUGS 2009, *supra* note 2, at 2.

143. APHIS ANIMAL CARE, THE ANIMAL CARE PROGRAM AND THE U.S. DEPARTMENT OF AGRICULTURE’S AUTHORITY UNDER THE ANIMAL WELFARE ACT: BASIC QUESTIONS AND ANSWERS (2005), http://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/faq_awa.pdf.

144. *Id.*

145. Animal Welfare Act, 7 U.S.C. § 2143(a)(1) (2006).

146. *Id.* § 2143(a)(2).

147. *Id.* § 2143(a)(2)(B).

148. 9 C.F.R. §§ 1.1 -3.142 (2010).

149. Animal Welfare Act, 7 U.S.C. § 2143(a)(6)(A)(i).

150. *Id.* § 2133.

151. *Id.* § 2136.

152. *Id.* § 2146(a); ANIMAL CARE ANNUAL REPORT OF ACTIVITIES: FISCAL YEAR 2007, at 11 (2008) [hereinafter ANIMAL CARE ANNUAL REPORT OF ACTIVITIES], available at http://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/2007_AC_Report.pdf. Federal facilities are not required to register with APHIS and they are not inspected to ensure compliance; however, they must comply with the AWA’s regulations. *Id.* Federal research facilities must establish a Federal [Institutional Animal Care and Use] Committee that has the same composition and responsibilities required of nonfederal research facilities. 7 U.S.C. § 2143(c); see also 9 C.F.R. § 2.37. Instead of reporting deficiencies to APHIS, the Federal Committee reports to the head of the federal agency conducting the research. 7 U.S.C. § 2143(c); see also 9 C.F.R. § 2.37. The head of the federal agency is “responsible for (1) all corrective action to be taken at the facility; and (2) the granting of all exceptions to inspection

mately 100 AC inspectors who document compliance of standards.¹⁵³

According to the USDA, approximately 20,000 violations of the AWA occurred every year between October 1, 2003 and September 30, 2006, affecting over two million animals.¹⁵⁴ Reports from October 1, 2005 to September 30, 2006 documented 20,281 violations affecting 453,194 animals.¹⁵⁵ A similar report from 2004 to 2005 documented 20,845 violations affecting 1,364,358 animals.¹⁵⁶ From 2003 to 2004, there were 18,275 violations affecting 382,823 animals.¹⁵⁷ Over this three-year period, the number of reported AWA violations per year remained fairly constant, thus suggesting that the current system of sanction is an ineffective deterrent.

3. Legislation Protecting Great Apes

An August 2005 poll revealed that “[n]early twice as many Americans support a ban on chimpanzee research as do those who oppose such a ban.”¹⁵⁸ The retirement of “chimpanzees used in research for more than 10 years” is supported by 71 percent of Americans.¹⁵⁹ The United States, however, has not been at the forefront of the international movement to protect primates; whereas, there are bans or limits on chimpanzee research in many other coun-

protocol.” 7 U.S.C. § 2143(c); *see also* 9 C.F.R. § 2.37. All registered and federal research facilities must also submit a report of their activities involving the number of animals used, their species, and the number of procedures that were or were not painful, and whether pain-relieving drugs were administered during painful procedures. ANIMAL CARE ANNUAL REPORT OF ACTIVITIES, *supra*, at 12.

153. ANIMAL CARE ANNUAL REPORT OF ACTIVITIES, *supra* note 152, at 8.

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154. USDA, VIOLATION SUMMARY OCT. 1, 2005 TO SEPT. 30, 2006, at 22 (2007) [hereinafter VIOLATIONS 05-06], available at http://www.aphis.usda.gov/animal_welfare/downloads/violations/2006violations.pdf; USDA, VIOLATION SUMMARY OCT. 1, 2004 TO SEPT. 30, 2005, at 24 (2005) [hereinafter VIOLATIONS 04-05], available at http://www.aphis.usda.gov/animal_welfare/downloads/violations/2005violations.pdf; USDA, VIOLATION SUMMARY OCT. 1, 2003 TO SEPT. 30, 2004, at 22 (2005) [hereinafter VIOLATIONS 03-04], available at http://www.aphis.usda.gov/animal_welfare/downloads/violations/2004violations.pdf. These summaries include all violations of the AWA, not only the violations within the laboratory context.

155. VIOLATIONS 05-06, *supra* note 154, at 22.

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156. VIOLATIONS 04-05, *supra* note 154, at 24.

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157. VIOLATIONS 05-06, *supra* note 154, at 22.

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158. New England Anti-Vivisection Society, *Public Opinion*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/mission/end-chimpanzee-research/public-opinion> (last visited June 11, 2011).

159. *Id.*

tries.¹⁶⁰ The United Kingdom, for example, banned licenses for chimpanzee research in 1997.¹⁶¹ In 2000, New Zealand was the first nation to ban chimpanzee research.¹⁶² The Netherlands followed in 2002, Sweden in 2003, Austria in 2006, and Belgium in 2008.¹⁶³ Australia issued a policy statement limiting chimpanzee research in 2003.¹⁶⁴ Japan put a strong moratorium on chimpanzee research in 2006.¹⁶⁵

In the United States, Congress first passed legislation specifically regarding primate research in 2000.¹⁶⁶ The Chimpanzee Health Improvement, Maintenance, and Protection Act (CHIMP Act) provides a national sanctuary system “for the lifetime care of [surplus] chimpanzees that have been used, or were bred or purchased for use, in research conducted or supported by . . . agencies of the Federal Government.”¹⁶⁷ When the CHIMP Act was first enacted, however, there was a provision that allowed for the temporary removal of retired chimpanzees from the sanctuary for medical research.¹⁶⁸ The CHIMP Act was amended in

160. New England Anti-Vivisection Society, *International Bans*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/mission/end-chimpanzee-research/country-bans> (last visited June 11, 2011).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Chimpanzee Health Improvement, Maintenance, and Protection Act of 2000, Pub. L. No. 106-551, 114 Stat. 2752 (current version at 42 U.S.C. § 287a-3a(a) (2006)).

167. Chimpanzee Health Improvement, Maintenance, and Protection Act, 42 U.S.C. § 287a-3a(a).

168. *Id.* § 287a-3a(d)(3)(A)(ii)(I) - (IV).

The chimpanzee may be used in research if – (I) the Secretary finds that there are special circumstances in which there is need for that individual, specific chimpanzee (based on that chimpanzee’s prior medical history, prior research protocols, and current status), and there is no chimpanzee with a similar history and current status that is reasonably available among chimpanzees that are not in the sanctuary system; (II) the Secretary finds that there are technological or medical advancements that were not available at the time the chimpanzee entered the sanctuary system, and that such advancements can and will be used in the research; (III) the Secretary finds that the research is essential to address an important public health need; (IV) and the design of the research involves minimal pain and physical harm to the chimpanzee, and otherwise minimizes mental harm, distress, and disturbance to the chimpanzee and the social group in which the chimpanzee lives (including with respect to removal of the chimpanzee from the sanctuary facility involved).

Id.

2007 and now prohibits the return of retired chimpanzees to research.¹⁶⁹

There has also been proposed legislation, namely the Great Ape Protection Act (GAPA),¹⁷⁰ which aims to end all invasive research¹⁷¹ on great apes.¹⁷² But this legislation would only begin to put an end to experimentation on primates. Chimpanzees are the only great apes currently used in laboratory research in the United States.¹⁷³ There are approximately 1,000 to 1,200 chimpanzees in nine research facilities in the United States, approximately half of these research facilities are owned by the United States.¹⁷⁴ However, currently “[t]here are more than 112,000 nonhuman primates

169. 42 U.S.C. § 287a-3a (amended 2007).

[A] chimpanzee accepted into the sanctuary system may not be used for studies or research, except . . . [that] [t]he chimpanzee may be used for noninvasive behavioral studies or medical studies based on information collected during the course of normal veterinary care that is provided for the benefit of the chimpanzee, provided that any such study involves minimal physical and mental harm, pain, distress, and disturbance to the chimpanzee and the social group in which the chimpanzee lives.

Id. § 287a-3a(d)(3)(A).

170. Great Ape Protection Act, S. 3694, 111th Cong. (2010); Great Ape Protection Act, H.R. 1326, 111th Cong. (2009). The Great Ape Protection Act was originally introduced on April 17, 2008. H.R. Rep. No. 5852, 110th Cong. (2008). On March 5, 2009, the Great Ape Protection Act was reintroduced in the House and on August 3, 2010 in the Senate. H.R. 1326; S. 3694.

171. Congress defines “invasive research” as

any research that may cause death, bodily injury, pain, distress, fear, injury, or trauma to a great ape, including – (i) the testing of any drug or intentional exposure to a substance that may be detrimental to the health or psychological well-being of a great ape; (ii) research that involves penetrating or cutting the body or removing body parts, restraining, tranquilizing, or anesthetizing a great ape; or (iii) isolation, social deprivation, or other experimental physical manipulations that may be detrimental to the health or psychological well-being of a great ape.

H.R. 1326. In contrast, noninvasive research is, for example, observing primates’ social behavior in a sanctuary.

172. “Great apes” include chimpanzees, bonobos, gorillas, orangutans, and gibbons. *Id.*

173. *Latest HSUS Undercover Investigation Reveals Abuse of Chimps, Other Primates in Federally Funded Research Laboratory*, THE HUMANE SOC’Y OF THE U.S. (Mar. 4, 2009), http://www.humanesociety.org/news/press_releases/2009/03/investigation_chimps_sm_030409.html [hereinafter *Investigation Reveals Abuse of Chimps*]; see also New England Anti-Vivisection Society, *Research Labs with Chimpanzees*, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/labs/labs-with-chimpanzees> (last visited June 11, 2011).

174. *Investigation Reveals Abuse of Chimps*, *supra* note 173; see also *Research Labs with Chimpanzees*, *supra* note 173.

being kept in more than 200 U.S. laboratories.”¹⁷⁵ Therefore, problematically, the GAPA would leave over 100,000 primates confined in laboratories and subject to continued research.¹⁷⁶

C. *Access to the Courts: Legal Thinghood, Personhood, and Standing*

1. Nonhuman Animals as Property

The law generally recognizes two categories: property and persons.¹⁷⁷ Property is defined as “[t]he right to possess, use, and enjoy a determinate *thing*.”¹⁷⁸ A thing is “[t]he subject matter of a right.”¹⁷⁹ The legal status of nonhuman animals is “legal thinghood.”¹⁸⁰ There is historical¹⁸¹ and legal precedent¹⁸² supporting the property status of animals.¹⁸³

Social contract theorist John Locke argued that when humans improve nature through their labor they translate it into prop-

175. *Investigation Reveals Abuse of Chimps*, *supra* note 173.

176. Great Apes receive much public attention and it is likely that many people view legislation such as the GAPA as adequately protecting the entire primate community. Therefore, there needs to be more public awareness about the primate population that will be unaffected by this proposed legislation.

177. This is problematic because “[a]nimals are not humans and [they] are not inanimate objects.” Bartlett, *supra* note 99, at 148 (citation omitted).

178. BLACK’S LAW DICTIONARY, *supra* note 38, at 1335 (emphasis added).

179. *Id.* at 1617.

180. RATTLING THE CAGE, *supra* note 7, at 4; *see also* FRANCIONE, *supra* note 7, at 166. *See generally* *The Legal Thinghood of Animals*, *supra* note 7, at 472.

181. RATTLING THE CAGE, *supra* note 7, at 10-22. “[H]istorical precedent has supported . . . [opponents of animal rights] unquestioned commitment to human dominance and the exploitative use of nonhuman animals as chattel.” Bartlett, *supra* note 99, at 152.

182. *See, e.g.*, *State v. Mata*, 668 N.W. 2d 448, 469 (Neb. 2003) (noting that “privately owned animals are ‘effects’ subject to the protections of the Fourth Amendment”); *Fackler v. Genetzky*, 595 N.W. 2d 884, 891 (Neb. 1999) (“[T]he general rule is that an animal . . . is personal property.”); *Campbell v. District of Columbia*, 19 App. D.C. 131 (1901) (“The owner of an animal dying within the city limits, is entitled to a reasonable opportunity to exercise his unextinguished right of property in the carcass . . .”).

183. There are two basic arguments supporting the property status of animals. The first is that humans are morally superior. The second argument is theological. FRANCIONE, *supra* note 7, at 36; Bartlett, *supra* note 99, at 149. “In the Book of Genesis, God gives man dominion over animals. We are the sovereign authority. We decide if and how they live, where and when they die.” *Improved Standards for Lab. Animals Act; and Enforcement of the Animal Welfare Act by the Animal and Plant Health Inspection Serv.: Hearing on H.R. 5725 Before the Subcomm. on Dep’t Operations, Research and Foreign Agric. of the H. Comm. on Agric.*, 98th Cong. 103 (1984) (statement of Donald McCaig, sheep farmer supporting the Improved Standards for Laboratory Animals Act).

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erty.¹⁸⁴ Capturing a wild animal is an example Locke used to illustrate his theory:

And even amongst us the Hare that any one is Hunting, is thought his who purses her during the Chase. For being a Beast that is still looked upon as common, and no Man’s private Possession; whoever has employ’d so much *labour* about any of that kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common, and hath *begun a Property*.¹⁸⁵

Similarly, the law recognizes a property right in an animal that has been removed from its natural habitat.¹⁸⁶ Under this reasoning, humans are entitled to ownership of animals over which they have dominion and control. “Humans are entitled under the laws of property to convey or sell their animals, consume or kill them, use them as collateral, obtain their natural dividends, and exclude others from interfering with an owner’s exercise of dominion and control over them.”¹⁸⁷

There is a link between the property status of animals and the “presumed moral superiority and entitlement of humans.”¹⁸⁸ Humans have created a belief system that animals exist for human use.¹⁸⁹ The law is rooted in this belief.¹⁹⁰ Changing this ideology

184. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 290 (Peter Laslett ed., Cambridge University Press 2003) (1690).

185. *Id.*

186. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (stating that wild animals that have been “wounded, circumvented or ensnared” are deprived of their natural liberty and thus subject to the control of the human who pursued them); *see also* *Geer v. Connecticut*, 161 U.S. 519, 523 (1896), *overruled by* *Hughes v. Okla.*, 441 U.S. 322 (1979) (“[A]ll the animals which can be taken upon the earth, in the sea, or in the air,—that is to say, wild animals,—belong to those who take them . . . because that which belong to nobody is acquired by the natural law by the person who first possesses it.”). Historically, the law similarly recognized that a married woman was the property of her husband. *See infra* note 231 and accompanying text.

187. FRANCIONE, *supra* note 7, at 24.

188. Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 328 (2008).

189. RATTLING THE CAGE, *supra* note 7, at 10. Based on these belief systems, humans consume animals in a variety of ways: for food, clothing, and entertainment, and in the form of the benefits of biomedical research such as pharmaceuticals.

190. *Id.* The AWA regulates human use of animals. *See supra* note 6 and note 123 and accompanying text. One of the stated purposes of the AWA is “to ensure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.” Animal Welfare Act, 7 U.S.C. § 2131 (2006) (emphasis added). The AWA also explicitly excludes from protection under its provisions farm animals “used or intended for use as food.” Animal Welfare Act, § 2132(g).

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will require massive economic and social restructuring because the food, clothing, entertainment, and biomedical research industries are dependent on the legal exploitation of animals.¹⁹¹ Taimie Bryant argues that “[s]haring legal space in our laws and in our courts seems unlikely as long as humans consider themselves morally superior to animals and reinforce that conception by treating animals as their property.”¹⁹² Women were also historically denied the right to share legal space in our laws,¹⁹³ and this concept was reinforced by treating women as their husband’s property.

As an illustration of the property status of primates, there were tax consequences when Fouts purchased an infant chimpanzee from a research facility. Washoe, the chimpanzee saved from the space program,¹⁹⁴ suffered grief after losing a baby.¹⁹⁵ To ease Washoe’s grief, Fouts found “a baby for Washoe to adopt.”¹⁹⁶ Fouts purchased Loulis for ten thousand dollars plus 7.5 percent sales tax.¹⁹⁷

2. Legal Personhood

Legal personhood is important because it “establishes one’s legal right to be ‘recognized as a potential bearer of legal rights.’”¹⁹⁸ A common understanding of the word “person” is “human.”¹⁹⁹ In contrast, “animal” is defined as “[a]ny living creature other than a human being.”²⁰⁰ But legal personhood is not about humanness.²⁰¹ As Congress understands it, “In determining the meaning of any

191. FRANCIONE, *supra* note 7, at 253-54. R
192. Bryant, *supra* note 188, at 330. R
193. *See infra* Part III.A.
194. *See supra* notes 63-66 and accompanying text. R
195. FOUTS & MILLS, *supra* note 15, at 234. R
196. *Id.*
197. *Id.* at 237, 343.
198. RATTLING THE CAGE, *supra* note 7, at 4 (quoting Michael Bogan, *Article 6, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 111 (Asbjorn Eide, et al. eds., 1992)). R
199. MERRIAM-WEBSTER’S, *supra* note 12, at 924; *see also* BLACK’S LAW DICTIONARY, *supra* note 38, at 1257. R
200. BLACK’S LAW DICTIONARY, *supra* note 38, at 102. R
201. Corporations and ships, for example, are legal persons. Fisher, *supra* note 5, at 439. In the late 1800s, R
the Supreme Court began finding corporations to be “persons” for some purposes under the Constitution, and in the 1900s, the Court began applying some but not all of the Bill of Rights’ protections to corporations. Presently, corporations enjoy Fifth Amendment due process protections, along with “first amendment guarantees of political speech, commercial speech, and negative free speech rights; fourth amendment safeguards against unreasonable regulatory search; fifth amendment double jeopardy and liberty rights; and sixth and seventh amendments entitlements to trial by jury.”

Act of Congress, unless the context indicates otherwise . . . the word[] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”²⁰² “Personhood is an important idea in the law, and . . . the manner in which a statutory scheme defines ‘person’ substantially impacts the interpretation and application of that scheme.”²⁰³ Legal personhood is a legal construction that establishes access to the courts, and without it, one lacks legal standing.

3. Nonhuman Primates and Legal Standing

Legal standing is one of the biggest threshold obstacles for animal activists. Francione states, “Standing is a prerequisite—perhaps the most important prerequisite—for the enforcement of rights.”²⁰⁴ There is constitutional standing,²⁰⁵ which requires a plaintiff to show injury in fact, causation, and redressability; and prudential standing.²⁰⁶ The latter requires, in the absence of an express citizen suit provision, a plaintiff to show her injury is within the zone of interests that Congress arguably intended to protect under the relevant statute, meaning she must assert her own rights and not those of a third party.²⁰⁷ Because the legal status of animals is legal thinghood, animals have no legal standing. Standing to challenge their treatment must come through humans.

In this respect, the Animal Welfare Act (AWA)²⁰⁸ is ineffective because animal welfare advocates and organizations have difficulty litigating under the statute because they often lack standing.²⁰⁹ The Fourth Circuit stated, “The statutory design [of the AWA] is . . .

Cupp, *supra* note 88, at 52-53 (quoting Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990)); *see also* Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting) (“Inanimate objects are sometimes parties in litigation.”); Tucker v. Alexanderoff, 183 U.S. 424, 438 (1902) (“A ship is born when she is launched She acquires a personality of her own”); Santa Clara Cnty. v. S. Pac. R. Co., 118 U.S. 394 (1886) (finding corporations are persons under the Fourteenth Amendment).

202. 1 U.S.C. § 1 (2006).

203. Michael J. Gerardi, Note, *The “Person” at Federal Law: A Framework and a Rico Test Suite*, 84 NOTRE DAME L. REV. 2239, 2267 (2009).

204. FRANCIONE, *supra* note 7, at 67.

205. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984).

206. Valley Forge Christian Coll. v. Am. United for Separation Church and State, Inc., 454 U.S. 464, 471 (1982).

207. *Lujan*, 504 U.S. at 560.

208. Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2006).

209. *See, e.g.*, Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986).

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inconsistent with [a] private right of action The Act . . . does not imply any provision for lawsuits by private individuals as a complement to the authority of the Secretary of Agriculture.”²¹⁰ Thus, an animal lacks the capacity to sue, and therefore cannot assert that there has been a violation of her rights, nor can anyone sue on her behalf.²¹¹ As Congressman Rose aptly stated while introducing a bill to amend the AWA to include a citizen suit provision, “if the animals can’t sue on their own behalf, and if people can’t sue on their behalf, who can?”²¹²

Cases brought under the Endangered Species Act (ESA)²¹³ do not always face the same difficulty as the AWA because there is a citizen suit provision, which allows a private individual standing to sue.²¹⁴ The ESA, however, does not provide a remedy for chimpanzees bred in captivity and used in laboratory research because they are classified as a “threatened species,” rather than an “endangered species.”²¹⁵

Although the Ninth Circuit dismissed a case brought under environmental laws for lack of standing, the court suggested its willingness to accept species standing if Congress modified the language of the statutes:

[W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridi-

The [Animal Welfare] Act seeks to insure that “animals intended for use in research facilities . . . are provided humane care and treatment.” . . . There is no indication, however, that Congress intended this goal to come at the expense of progress in medical research. To the contrary, both the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research hold for the treatment and cure of humankind’s most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiff’s assert.

Id. at 939 (quoting 7 U.S.C. § 2131(1)); see also Rob Roy Smith, Note, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After Animal Legal Def. Fund, Inc. v. Glickman*, 29 ENVTL. L. 989, 992 (1999).

210. *Int’l Primate Prot. League*, 799 F.2d at 939-40.

211. Deawn A. Hersini, Comment, *Can’t Get There From Here . . . Without Substantive Revision: The Case for Amending the Animal Welfare Act*, 70 UMKC L. REV. 145, 150 (2001).

212. 135 CONG. REC. H1932 (May 16, 1989) (statement of Rep. Rose).

213. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006).

214. *Id.* § 1540(g).

215. 16 U.S.C. § 1533; 50 C.F.R. § 17.11 (2010); *Investigation Reveals Abuse of Chimps*, *supra* note 173; *Chimpanzee Facts*, *supra* note 44.

cally incompetent persons such as infants, juveniles and mental incompetents.²¹⁶

This case illustrates a willingness of the judiciary to extend standing to animals, but deference to the legislature to act.

In 2005, a groundbreaking case in Brazil granted a chimpanzee access to the court.²¹⁷ A writ of habeas corpus was filed on behalf of Suíça, a chimpanzee who lived in the city zoo in Salvador, Bahia.²¹⁸

[T]he petitioner, member of the chimpanzee species, is imprisoned at Salvador Zoo in a[n] unsuitable enclosure (total area of 77.56 m², height 4.0 m, and confined area of 2.75 m), being hindered of her right of movement The lack of space, the bare cement floor, and the solitary confinement was causing great suffering to Suíça.²¹⁹

The relief sought was Suíça’s release from solitary confinement and transfer to a primate sanctuary.²²⁰ Unfortunately, Suíça died and the motion was dismissed.²²¹ This case is significant, however, because this was the first time a court recognized a nonhuman primate as a plaintiff.²²² Acknowledging that Suíça’s case involved a complex and controversial issue, Judge Edmundo Lucio da Cruz stated in his opinion,

I am sure that with the acceptance of the debate, I caught the attention of jurists from all over the country, bringing the matter to discussion. Criminal Procedural Law is *not static, rather subject to constant changes, and new decisions have to adapt to new times*. I believe that even with “Suíça’s” death the matter will

216. Cetcean Cmty. v. Bush, 386 F.3d 1169, 1176 (9th Cir. 2004) (holding that plaintiff, as representative for all whales, porpoises, and dolphins, lacked standing under environmental laws to challenge the Navy’s use of sonar).

217. See Tribunal do Júri de Salvador [Jury Court of Salvador], No.833085-3/2005, *In re Suíça*, Correio da Bahia, 19.9.2005 (Brazil), English translation available at <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm>, Portuguese decision available at <http://www.animallaw.info/nonus/cases/cabrsuicapt2005.htm>; Clayton, *supra* note 36.

218. *In re Suíça*, No. 833085-3/2005; Clayton, *supra* note 36.

219. Clayton, *supra* note 36.

220. *In re Suíça*, No. 833085-3/2005; Clayton, *supra* note 36.

221. *In re Suíça*, No. 833085-3/2005; Clayton, *supra* note 36.

222. *In re Suíça*, No. 833085-3/2005; Clayton, *supra* note 36; Heron Jose De Santana Gordilho, *Wildlife and the Brazilian Abolitionist Movement*, 5 J. ANIMAL L. 71, 82 (2009).

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continue to be discussed The topic will not die with this writ, it will certainly continue to remain controversial.²²³

As *Suíça*'s case demonstrates, the law is dynamic and adaptable and should change to reflect public attitudes about animals.

III. EVOLVING ATTITUDES, EVOLVING LAWS: ILLUMINATING LEGISLATIVE CONTRADICTIONS & INADEQUACIES

Movements for social justice disrupt what is socially and legally permissible. Historically, extending legal rights to a new entity or group of individuals has been unthinkable for some members of society and, thus, is met with resistance.²²⁴ This is not surprising because

each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of "us"—those who are holding rights at the time.²²⁵

The social movement to confer rights on women, for example, seemed odd or laughable to some people in the late 1800s to the mid-1900s.

A comparison of the social movement to confer legal protections and rights on animals and the women's rights movement reveals that there was a mindset about the property status of women that is strikingly similar to the current mindset of the property status of animals. This mindset evolved over time so that women were no longer perceived as property, which caused a shift in law. Similarly, there is a shift occurring in the mindset of the general public that some animals are more than things. In addition, more of the human population perceives primates, in particular great apes, as intelligent, emotional, social beings. Finally, there is an evolving attitude regarding animals' experience of pain. These shifts in public perception and attitude require a reexamination of the AWA and its accompanying regulations.

Contradiction is a theme in animal protective legislation, which partly explains why such legislation is inadequate. These contradic-

223. *In re Suíça*, No. 833085-3/2005 (emphasis added); see also Clayton, *supra* note 36; Gordilho, *supra* note 222, at 82; *The Entitlement of Chimpanzees*, *supra* note 8, at 279.

224. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* 3 (1996).

225. *Id.* at 5.

tions originate, in part, from humans' speciesist belief system.²²⁶ The AWA, for example, contains provisions that allow painful and distressing procedures, which contradicts the stated purpose of "humane care and treatment" of animals.²²⁷ These exceptions arise in situations when such procedures are deemed "scientifically necessary" or "scientifically justified."²²⁸ In other words, when there is some human benefit at stake. In this framework, animal welfare is secondary to human interests. As a result, as Professor Francione aptly recognizes, when the AWA was enacted and subsequently amended, "Congress simultaneously created a rule and an exception that was broad enough to swallow the rule."²²⁹ In practice, the AWA fails to adequately protect the physical integrity of animals and the psychological well-being of primates because there are exceptions built into the law that undermine their protection and humane treatment.

A. *The Social Movement to Confer Legal Protections and Rights on Animals is Met with Resistance Similar to that Encountered by the Women's Rights Movement*

Historically, women were legally powerless in American society. In 1908, the Supreme Court stated, "history discloses the fact that woman has always been dependent upon man."²³⁰ Similar to animals, women were considered property; they were owned and controlled by their fathers and husbands.²³¹ Women were identified by gender, whereas men were identified by humanness.

Granting women access to academic institutions, for example, was strongly resisted. The ideology behind this gender inequality was based on an understanding that education had a detrimental *physical* effect on a woman's reproductive ability; thus, some of society believed that women's access to education threatened the perpetuation of the human race.²³² In *Muller v. Oregon*, the Court stated, "healthy mothers are essential to vigorous offspring, the

226. See *supra* note 12 (definition of speciesism).

227. See Animal Welfare Act, 7 U.S.C. § 2131 (2006).

228. *Id.* § 2143(a)(3)(C)(v).

229. FRANCIONE, *supra* note 7, at 205.

230. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

231. See, e.g., *Trammel v. United States*, 445 U.S. 40, 41 (1980) ("[A] woman was regarded as a chattel and denied a separate legal identity."); *Baby v. State*, 916 A.2d 410, 422 (Md. Ct. Spec. App. 2007), *vacated*, 946 A.2d 436 (Md. 2008) (discussing "the historical notion that, because women were, in legal contemplation, chattel, loss of chastity was considered to be a devaluation of a man's property").

232. See *Muller*, 208 U.S. at 421-22.

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physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”²³³ Once women claimed the right to enter academic institutions from which they were previously excluded, there were massive social and economic consequences. The private and public spheres were redefined, as was the family. Although reproduction did decrease as women educated themselves and entered the labor market in new ways, the fate of the human race was not doomed by the social and economic consequences that flowed from changing gender roles.

In the late 1800s, women met legal resistance to their changing status in society. Myra Bradwell, for example, was denied admittance to practice law by the state of Vermont because she was a married woman.²³⁴ Justice Bradley’s concurring opinion is an illustration of the dominant societal attitude toward women’s movement out of the private sphere and into the public sphere:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.²³⁵

Charlotte Perkins Stetson Gilman, first-wave feminist and author, argued that the women’s movement of the nineteenth century first had to declare “that women are persons!”²³⁶ This is not to suggest that animals should be granted access to academic institutions, admitted to the practice of law, or declared persons, but to highlight a changing understanding of women’s property status and

233. *Id.* at 421.

234. *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872). The Supreme Court affirmed the lower court decision and found that such refusal was within the state’s power and did not violate the Constitution because the right to practice law was not a privilege or immunity of a citizen of the United States. *Id.* at 138-39; *see also* *Ex parte Lockwood*, 154 U.S. 116, 116-18 (1894) (denying a petition for a mandamus requiring the Supreme Court of Appeals of Virginia to admit petitioner, a woman, to practice law); *In re Goodell*, 1875 WL 3615, at *8 (Wis. Aug. 1875) (“We cannot but think the common law wise in excluding women from the profession of the law.”).

235. *Bradwell*, 83 U.S. at 141.

236. CHARLOTTE PERKINS STETSON, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* 49 (Carl N. Degler ed., 1966).

how the past social and legal status women occupied seems outrageous today.

The women's rights movement initially "sound[ed] odd or frightening or laughable"²³⁷ to some because it challenged what was socially and legally permissible. First- and second-wave feminists were met with strong resistance, which was grounded in years of ideology that supported a gender imbalance, the disruption of which had vast social and economic consequences. Despite this, the women's rights movement changed social and legal norms. Women obtained access to education and the labor market; they gained reproductive control; they attained the right to own property, contract, divorce, vote, and to defend their right to bodily integrity. Women's status as property changed when society began thinking about women differently, when society began treating women differently. Changes in the law followed, because "the law evolves from the way society thinks and behaves."²³⁸

B. *Allowing Unfettered Research to Advance Human Interests at the Expense of Animal Welfare Undermines the AWA's Protective Purpose*

The attempt to balance human and nonhuman animal interests creates a contradiction that is at the root of the AWA. This balancing act was clearly expressed from the passage of the AWA's predecessor, the LAWA, as is evident from a House Conference Report, which states that efforts had been made to create

an effective bill which will codify the noblest and most compassionate concern that the human heart holds for those small animals whose very existence is dedicated to the advancement of medical skill and knowledge while at the same time still preserving for the medical and research professions an unfettered opportunity to carry forward their vital work in behalf of all mankind.²³⁹

Compassion for animals was expressed in the same breath that characterized them as existing for the purpose of advancing medical science. Furthermore, the same legislation that limited or restricted research facilities to ensure humane handling, care, and treatment

237. STONE, *supra* note 224, at 5.

238. Clayton, *supra* note 36.

239. H.R. REP. NO. 89-1848, at 6 (1966) (Conf. Rep.), available at http://www.nal.usda.gov/awic/pubs/AWA2007/confrep_aug1966.pdf; see also *Medlock v. Bd. of Trs. of Univ. of Mass.*, 580 N.E.2d 387, 388 (Mass. App. Ct. 1991) ("The Act balances society's commitment to the humane treatment of animals with its need for research.").

of animals also allowed *unfettered* research that was considered to be vital to humankind.²⁴⁰ This echoes the argument that women’s access to education threatened the perpetuation of the human race.²⁴¹

In 1970, a House committee report balanced interests similar to those balanced by the passage of LAWA.²⁴² The purpose of the proposed bill was stated, in part, to

establish[] by law the humane ethic that animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperature, and adequate veterinary care including the appropriate use of pain-killing drugs. At the same time this ethic is embraced, the bill recognizes the responsibility and specifically preserves the necessary domain of the medical community. The bill in no manner authorizes the disruption or interference with scientific research or experimentation. Under this bill *the research scientist still holds the key to the laboratory door*. This committee and the Congress, however, expect that the work that’s done behind that laboratory door will be done with compassion and with care.²⁴³

Again, compassion is tempered by a reservation allowing for great deference to research facilities. The AWA authorizes the humane use of animals, which creates a tension between using animals and ensuring their welfare. This tension will almost always give on the side of human use and at the expense of animals’ welfare. Violations of the AWA are evidence that what is done behind the laboratory door is not always done with compassion and care.²⁴⁴ Furthermore, intentionally conducting painful procedures and withholding pain-killing drugs is not compassionate care.

240. The LAWA required that the United States Department of Agriculture establish and promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers and research facilities The foregoing *shall not* be construed as authorizing the Secretary to prescribe standards for the handling, care, or treatment of animals *during* actual research or experimentation by a research facility as determined by such research facility.

Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (current version at 7 U.S.C. §§ 2131-2159 (2006)) (emphasis added); *see also* FRANCIONE, *supra* note 7, at 192.

241. *See supra* notes 232-233 and accompanying text.

242. H.R. REP. NO. 91-1651 (1970), *available at* http://www.animallaw.info/administrative/adushrep91_1651_1970.htm.

243. *Id.* (emphasis added).

244. *See supra* notes 154-157 and accompanying text.

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In *International Primate Protection League v. Institute for Behavioral Research, Inc.*, the Fourth Circuit, discussing the plaintiff's lack of standing under the AWA, stated,

The [Animal Welfare] Act seeks to insure that "animals intended for use in research facilities . . . are provided humane care and treatment." . . . There is no indication, however, that Congress intended this goal to come at the expense of progress in medical research. To the contrary, both the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research holds for the treatment and cure of humankind's most terrible afflictions.²⁴⁵

Preserving this hope, in this case, came tragically at the expense of the primates involved.²⁴⁶ Taub, the defendant, "was studying the capacity of monkeys to learn to use a limb after nerves had been severed."²⁴⁷ Pacheco, the complainant, observed the horrific experiments that the Silver Spring Monkeys were subjected to and the conditions in which they were confined.²⁴⁸ Describing the "acute noxious stimuli test," Pacheco stated,

I was to take a monkey . . . and strap him into a homemade immobilizing chair, where he would be held at the waist, ankles, wrists and neck. The acute noxious stimuli were to be applied with a pair of haemostats (surgical pliers) clamped and fastened on to the animal, and locked to the tightest notch. I was to observe which parts of the monkey's body felt pain. . . .²⁴⁹

Pacheco, recalling a conversation he had with one of Taub's students about the "acute noxious stimuli test," stated that one of the monkeys

had been in such bad shape that he had begun to mutilate his own chest cavity, and she then confided that putting him in a

245. *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 939 (4th Cir. 1986); *see also* *Salk v. Regents of the Univ. of Cal.*, No. A120289, 2008 WL 5274536, at *5 (Cal. Ct. App. 2008) ("Congress intended that the federal AWA ensure that those animals used in research facilities are humanely treated. However, Congress did not intend this goal to be achieved at the expense of progress in medical research. The AWA was intended *both* to protect animal welfare and to subordinate animal welfare to the continued independence of research scientists. In this scheme, 'the research scientist still holds the key to the laboratory door.' Thus, Congress balanced competing goals when enacting the AWA." (internal citation omitted) (quoting H.R. REP. 91-1654 (1970)) (citing *Int'l Primate Prot. League*, 799 F.2d 934)).

246. *See supra* notes 135-137 and accompanying text.

247. *Int'l Primate Prot. League*, 799 F.2d at 936.

248. *See supra* notes 135-137 and accompanying text.

249. Pacheco & Francione, *supra* note 135, at 138.

restraining device, and administering the noxious stimuli test, with his chest ripped open, and having to experience the stench of his rotting body, was the most disgusting thing she had ever done. After the acute pain test, she said, he was destroyed.²⁵⁰

This was *not responsible* primate research. This was not research done with compassion and care. And the only “humane care and treatment”²⁵¹ this particular primate received was euthanasia *after* the research was concluded.

In the context of animal welfare, language such as “responsible research” and “humane treatment” is ironic. The competing goals of animal welfare and independence of research scientists cannot both be satisfied.

C. *Inadequate Environmental Enhancements to Promote the Psychological Well-being of Primates*

The AWA gives research facilities wide latitude in implementing the requirement of environmental enhancements adequate to promote the psychological well-being of primates.²⁵² This latitude means that those conducting the research are responsible for determining what is adequate in order to meet minimum requirements. “Some facilities claim their environment enhancement programs are adequate because there are no distressing behaviors or appearances of ill health with their primates.”²⁵³ But, “waiting to improve a minimally enriched environment” to minimize or manage psychological distress as it presents is contrary to the purpose of promoting psychological well-being and “was not the intent of the Animal Welfare Act.”²⁵⁴

In addition to this latitude, there are two exemptions to the environmental enhancement requirement. First, a primate may be exempted “from participation in the environment enhancement plan because of its health or condition, or in consideration of *its well-being*.”²⁵⁵ Second, a primate may be exempted “from participation in some or all of the otherwise required environment enhancement plans *for scientific reasons* set forth in the research

250. *Id.* at 139.

251. *See* Animal Welfare Act, 7 U.S.C. § 2131 (2006).

252. *See id.*; 9 C.F.R. § 3.81 (2010).

253. U.S. DEPARTMENT OF AGRICULTURE ANIMAL AND PLANT HEALTH INSPECTION SERVICE, FINAL REPORT ON ENVIRONMENT ENHANCEMENT TO PROMOTE THE PSYCHOLOGICAL WELL-BEING OF NONHUMAN PRIMATES (1999), http://www.nal.usda.gov/awic/enrichment/Environmental_Enhancement_NonHuman_Primates.htm#intent.

254. *Id.*

255. 9 C.F.R § 3.81(e)(1) (emphasis added).

proposal.”²⁵⁶ The first exemption involves the interests of the primate. The second exemption involves the interests of humans. The second exemption undermines the protection and humane treatment of primates and demonstrates that human interests can still be advanced at the expense of animal welfare.

As Amy Kerwin, a former primate researcher, illustrates, in practice the AWA’s requirement of environmental enhancement sometimes fails to adequately promote the psychological well-being of primates:

When I began working at the laboratory . . . the monkeys had wood in their cages. The wood was removed, however, because the shreds of wood (from being over-manipulated) were clogging the drains I tried to ask if the research facility could start providing wood again since the monkeys used it so much. I mentioned that a branch was one of the few things the monkeys do not get tired of The majority of the researchers voted to not supply the wood, however, because it was too inconvenient and time-consuming. A more convenient form of enrichment was to provide the monkeys with durable plastic toys Despite the toy . . . enrichment, abnormal behavior was still present in many of the monkeys. The behaviors included pacing, back-flipping, rocking, self-biting, and fur-plucking.²⁵⁷

The abnormal behavior that these rhesus monkeys exhibited shows that the enrichment provided is inadequate. The AWA’s environmental enhancement requirements should not be compromised for the sake of laboratory staff convenience.

The Humane Society of the United States (HSUS), in a nine-month (December 2007-September 2008) undercover investigation of the federally-funded New Iberia Research Center of the University of Louisiana at Lafayette, “reveal[ed] routine and unlawful mistreatment of hundreds of chimpanzees and other primates.”²⁵⁸ The HSUS has submitted a 108-page complaint to the USDA, which alleges at least 338 violations of the AWA.²⁵⁹ Videotape evidence²⁶⁰ from the investigation

256. *Id.* § 3.81(e)(2) (emphasis added).

257. AMY KERWIN, IMPROVING ANIMAL WELFARE AND DATA ACCURACY IN PRIMATE RESEARCH LABORATORIES: DISCUSSION AND RECOMMENDATIONS FOR THE USDA, THE IACUCs, AND THE RESEARCH FUNDING INSTITUTIONS 20 (2005) (report submitted to the USDA, Institutional Animal Care and Use Committees, and research funding agencies for the purpose of refining procedures and improving animal welfare in primate research institutions) (on file with author).

258. *Investigation Reveals Abuse of Chimps*, *supra* note 173.

259. *Id.*

shows severe distress of primates in isolation: They engage in self-mutilation by tearing gaping wounds into their arms and legs, a behavior that could be the result of New Iberia Research Center’s failure to provide adequate environmental enhancement. Routine procedures, such as the use of powerful and painful dart guns and frightening squeeze cages for sedation, are shown causing acute psychological distress to chimpanzees and monkeys. Infant monkeys scream as they are forcibly removed from their mothers so that tubes can be forced down their throats. Altogether, the investigation reveals animals forced to endure anxiety and misery behind the razor wire of the research facility.²⁶¹

The AWA recognizes that primates need psychological enhancements. This belief illuminates our understanding of primates as more than mere objects or things, but rather as intelligent, emotional, social beings. Despite this recognition, this provision of the AWA, in practice, fails to adequately protect those needs.

D. *Humans’ Interpretation of How Animals Experience Pain Allows for an Enormous Amount of Suffering Under the AWA*

Seventeenth century French philosopher René Descartes described animals as machines like clocks, lacking reason and incapable of experiencing pain.²⁶² Descartes’ philosophy was a mindset that accompanied the growth of vivisection²⁶³ in Europe during the seventeenth century.²⁶⁴ In addition, that philosophy illustrates the roots of current human understanding of animal pain within the context of vivisection. Although human understanding of animals

260. *Id.*; see *Primate Investigation, Undercover Investigation at Research Lab*, *supra* note 35 (video of “undercover investigation by the Humane Society of the United States[, which] reveals psychological suffering of primates in research laboratories”).

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261. *Investigation Reveals Abuse of Chimps*, *supra* note 173.

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262. PETER SINGER, *ANIMAL LIBERATION* 200 (1975) (citing RENÉ DESCARTES, *DISCOURSE ON METHOD*, Vol. V).

263. Vivisection is the practice of experimenting on living animals. *MERRIAM-WEBSTER’S*, *supra* note 12, at 1400.

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264. SINGER, *supra* note 262, at 201.

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They administered beatings to dogs with perfect indifference, and made fun of those who pitied the creatures as if they felt pain. They said the animals were clocks; that the cries they emitted when struck were only the noise of a little spring that had been touched, but that the whole body was without feeling. They nailed poor animals up on boards by their four paws to vivisect them and see the circulation of the blood

Id. at 201-02 (quoting an eyewitness account of vivisection in the late seventeenth century that illustrates Descartes’s theory in practice).

and their experience of pain has evolved since Descartes' time, remnants of the roots of his philosophy are evident in the language of protective legislation today, which recognizes, and then minimizes, or navigates around, animals' experience of pain.

This minimization is tied to the scientific justification that research on primates, for example, is valuable and necessary because they are similar to humans, but dissimilar enough that their physical and emotional integrity can be navigated around.²⁶⁵ According to Kerwin, "It was often argued in the laboratory that rhesus monkeys were valuable research subjects because they were closely related to humans. When it came to the animal's welfare, however, statements were made by [laboratory staff] that the monkeys 'have a high pain tolerance' and a 'different pain system.'"²⁶⁶ As a result of this disconnected and contradictory position, "chimpanzees [and other primates] are treated as if they are unfeeling machines."²⁶⁷

The AWA inadequately protects animals because it explicitly makes exceptions regarding the humane treatment of animals used in research facilities that are contradictory to the purported purpose of protecting animals. The Secretary of Agriculture must promulgate standards "for animal care, treatment, and practices in experimental procedures to assure that animal pain and distress are *minimized*."²⁶⁸ This provision acknowledges that experimental procedures sometimes result in pain and distress. It does not, however, prohibit such painful and distressing procedures; instead, it requires practices that *minimize* such pain and distress. Furthermore, "in any practice which could cause pain to animals . . . the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically *necessary* shall continue for only the *necessary* period of time."²⁶⁹ Again, this provision acknowledges that some procedures cause animals pain. And again, it does not prohibit such painful procedures; instead, it allows the withholding of pain-relieving drugs when scientifically *necessary*. Thus, an animal may be subjected to a painful and distressing experiment for as long as it takes to achieve a scientific objective, which is defined as some benefit to

265. Fouts & Fouts, *supra* note 63, at 39.

266. KERWIN, *supra* note 257, at 25.

267. Fouts & Fouts, *supra* note 63, at 39.

268. Animal Welfare Act, 7 U.S.C. § 2143(a)(3)(A) (2006) (emphasis added).

269. *Id.* § 2143(a)(3)(C), (C)(v) (emphasis added); see PAIN TYPE: TOTAL 2009, *supra* notes 2-4 and accompanying text (USDA 2009 report of number of animals used in painful procedures whose pain was *not* alleviated because pain-relieving drugs would have interfered with or compromised the research).

the human population. The allowance of withholding relief from pain contradicts the goal of humane treatment.

Because Congress did not define “pain,”²⁷⁰ APHIS, the agency responsible for administration of the AWA, through its Animal Care program, developed a policy regarding painful procedures.²⁷¹ Regulations have also been promulgated regarding painful procedures.²⁷² These kinds of policies and regulations indicate a recognition that (1) animals suffer as a result of laboratory research; and (2) guidelines to attempt to eliminate this suffering are necessary.

Policy 11 of the Animal Care Policy Manual defines painful procedures “as any procedure that would reasonably be expected to cause more than slight or momentary pain and/or distress in a human being to which that procedure is applied.”²⁷³ This policy requires that “[a]nimals exhibiting signs of pain, discomfort, or distress . . . receive appropriate relief unless written scientific justification is provided in the animal activity proposal and approved by the [Institutional Animal Care and Use Committee] IACUC.”²⁷⁴ Under Policy 11, animals are relieved of pain, discomfort, or distress *unless* there is scientific justification for their pain, discomfort, or distress.²⁷⁵

The Secretary must promulgate rules and regulations that allow AC

inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of [the AWA] or any regulation or standard issued thereunder if . . . such animal is held by a research facility

270. See Animal Welfare Act, 7 U.S.C. § 2132.

271. See U.S. DEP’T OF AGRIC., POLICY 11: PAINFUL PROCEDURES (1997) [hereinafter POLICY 11], available at http://www.aphis.usda.gov/animal_welfare/downloads/policy/policy11.pdf.

272. A proposal to use animals in research, for example, must contain [a] description of procedures designed to assure that *discomfort and pain to animals will be limited to that which is unavoidable for the conduct of scientifically valuable research*, including [a] provision for the use of analgesic, anesthetic, and tranquilizing drugs where indicated and appropriate to *minimize discomfort and pain* to animals.

9 C.F.R. § 2.31(e)(4) (2010) (emphasis added). Also, “[p]rocedures that may cause more than momentary or slight pain or distress to . . . animals . . . [must b]e performed with appropriate sedatives, analgesics or anesthetics, *unless withholding such agents is justified for scientific reasons*, in writing, by the principal investigator and *will continue for only the necessary period of time.*” 9 C.F.R. § 2.31(d)(iv), (iv)(A) (emphasis added).

273. POLICY 11, *supra* note 271, at 11.1.

274. *Id.* at 11.1-11.2 (emphasis added).

275. *Id.* at 11.2.

and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized.²⁷⁶

In other words, inspectors may confiscate or destroy animals that are in distress as long as they are no longer useful for the experiment that is causing them distress.²⁷⁷

The Animal Care policy regarding painful procedures is problematic for three reasons. One, an animal's pain and distress is measured against a human standard. A painful procedure is defined "as any procedure that would reasonably be expected to cause more than slight or momentary pain and/or distress in a human being to which that procedure is applied."²⁷⁸ Two, an animal exhibiting signs of pain, discomfort, or distress may be denied appropriate relief if there is scientific justification.²⁷⁹ In this framework, an animal will almost always lose because benefits to humans typically are understood to outweigh an animal's welfare. Three, because an animal cannot verbally communicate their pain and distress, laboratory staff must mostly rely on their clinical observations of objective measures of pain, discomfort, and distress, which include the exhibition of "decreased appetite [or] activity level, adverse reactions to touching inoculated areas, open sores [or] necrotic skin lesions, abscesses, lameness, conjunctivitis, corneal edema, and photophobia."²⁸⁰ These objective measures fail, in part, because they indicate a level of pain, discomfort, and distress that is well beyond the threshold at which such suffering begins to occur. Rather, these objective measures suggest that enough suffering has *already* occurred that there is now a visible indication of it.

As the AWA is currently written and interpreted administratively, there is wide space for justifying animal suffering. If there is scientific justification, an animal may be subjected to painful and distressing experiments.²⁸¹ The minimized pain and necessary time

276. Animal Welfare Act, 7 U.S.C. § 2146(a) (2006) (emphasis added); *see also* 9 C.F.R. § 2.129.

277. *Salk v. Regents of the Univ. of Cal.*, No. A120289, 2008 WL 5274536, at *5 n.10 (Cal. Ct. App. 2008) ("Department inspectors have the power to remove a suffering animal from a research facility, but only if that animal is no longer required by the research facility to carry out its research.").

278. POLICY 11, *supra* note 271, at 11.1 (emphasis added).

279. Policy 11 requires that "[a]nimals exhibiting signs of pain, discomfort, or distress . . . receive appropriate relief unless written scientific justification is provided in the animal activity proposal and approved by the IACUC." *Id.* at 11.2 (emphasis added).

280. *Id.*

281. *See* Animal Welfare Act, 7 U.S.C. § 2143 (a)(3)(C)(v).

provisions of the AWA²⁸² and the accompanying regulations²⁸³ authorize torture²⁸⁴ of animals. According to a common understanding and a legal definition of torture, minimized and scientifically necessary pain and distress can be interpreted as torture.²⁸⁵ When deemed scientifically necessary, the infliction of intense pain to the body or mind of an animal may be used to extract information.²⁸⁶ Information, in this context, is scientific knowledge extracted from the bodies of animals.

CONCLUSION

The social movement to guarantee humane treatment and confer legal rights on nonhuman animals may seem odd or laughable to some. But the portion of the human population that recognizes that animals, particularly primates, deserve to be treated with compassion, dignity, and respect is growing. And the law will slowly, but eventually, change to reflect that growing commitment to protect animals.

Currently, animal protective legislation is human-focused, which conflicts with its purported purpose of protecting animals. Granting animals legal protections and rights is about treating them with respect and compassion, about ensuring dignity, bodily integrity, and freedom from invasive research. Ideally, protective legislation would put an end to all animal suffering. This, however, is an unreasonable short-term goal in light of the massive economic and social restructuring necessary to achieve that goal. As an alternative, and a beginning, protective legislation should begin by banning all great ape invasive research and eventually phase out all primate invasive research. All chimpanzees currently confined in research facilities should be retired to sanctuaries where they can live out the remainder of their lives in dignity and free from further suffering. And as invasive research is phased out, all primates should be retired to sanctuaries.

282. The AWA requires the Secretary of Agriculture to promulgate standards “for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are *minimized*.” *Id.* § 2143 (a)(3)(A) (emphasis added). Furthermore, “in any practice which could cause pain to animals . . . the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically *necessary* shall continue for only the *necessary* period of time.” *Id.* § 2143 (a)(3)(C)(v) (emphasis added).

283. *See supra* note 272.

284. *See supra* note 38.

285. *Id.*

286. *Id.*

Efforts to guarantee humane treatment and confer legal rights on animals have primarily been driven by a theory of welfare or rights. A framework for welfare-based laws sometimes falls short of its intended goal because of contradicting, competing interests. A framework for rights-based laws sometimes falls short because of an entrenched understanding of property, persons, and standing. An alternative to the current framework of welfare- or rights-based laws is a theory based on care.

A care-based framework has the potential to disrupt the speciesist ideology that continues to support the current balancing of interests. Compassion alone is not sufficient; however, deconstructing speciesist ideology requires compassion. Compassion for the dogs who were being victimized was the momentum that created change in 1966 with the passage of the Laboratory Animal Welfare Act. Compassion was the fuel behind subsequent amendments to the Animal Welfare Act. The law changed when people witnessed the atrocities behind the laboratory door. As the history and evolution of the AWA demonstrates, the way society thinks and behaves is shaped, in part, by compassion. And the law “evolves from the way society thinks and behaves.”²⁸⁷

A care-based framework pays attention to what animals are already communicating. Our laws need to evolve to reflect our changing knowledge and understanding of animals.²⁸⁸ “We should not kill, . . . torture, and exploit animals because they do not want to be so treated, and we know that. If we listen we can hear them.”²⁸⁹ Bruno clearly communicated this when he signed from the cage he was confined in: “KEY OUT.”²⁹⁰

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287. Clayton, *supra* note 36.

288. See Tribunal do Júri de Salvador [Jury Court of Salvador], No.833085-3/2005, *In re Suíça*, Correio da Bahia, 19.9.2005 (Brazil), English translation, *available at* <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm>, Portuguese decision *available at* <http://www.animallaw.info/nonus/cases/cabrsuicapt2005.htm>; Clayton, *supra* note 36.

289. Donovan, *supra* note 20, at 375.

290. FOUTS & MILLS, *supra* note 15, at 354.

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