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

Karina L. Schrengohst

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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.”

INTRODUCTION

The United States Department of Agriculture (USDA) reported that there were 124,385 nonhuman primates confined in laboratories in 2009. Of those confined, 70,444 primates were used in laboratory research. 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. 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 Report Animal Usage by Fiscal Year, Pain Type: With Pain, No Drugs 2009, available at http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf.
The use of primates in laboratory research 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.” Designated as property, animals are perceived, by some, as voiceless “things.” Primates, however, have emotional, social, and intellectual lives: they think, communicate, learn, have memories, grieve, empathize, and suffer. And despite widespread agreement that some primates are intelligent, emotional, social beings that deserve some level of protection, there is

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.” Loraine 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.”).


inadequate protective legislation. 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. This argument rests on the belief that harm to animals must be balanced against human benefit. This Note rejects that perspective because speciesism 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, 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. Primates, however, share more than genetics with humans. In the 1970s, a pioneering group of primates learned American Sign Language from primatologist Roger Fouts. Some of these chimpanzees, among
them Booee 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. 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.

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

Booee was spared the same fate. Thirteen years after Booee 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. “Millions of viewers watch[ed],

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

17. FOUTS & MILLS, supra note 15, at 283-84.
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.”).
22. Id. at 353. The Great Ape Project aired on May 5, 1995. Id. at 356.
overwhelmed, as Booee recognize[d] and ecstatically greet[ed] Dr. Fouts.”23 After the show aired, donations from viewers flooded into ABC to fund Booee’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, Booee and eight other chimpanzees were released to a non-profit wildlife sanctuary in California.26 In contrast to their living quarters at LEMSIP, Booee 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.


25. Id.

26. Id. at 356-57.

27. Id. at 357.


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

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

33. The Feminist Care Tradition in Animal Ethics 3 (Josephine Donovan & Carol J. Adams, eds. 2007).
34. Favre, supra note 32, at 91.
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.


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.
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

Primates have been used in a wide range of painful and distressing behavioral studies, medical research, and pharmaceutical experiments such as studies on drug addiction, maternal and sensory deprivation, the effect of space trauma.

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.bkLTkJOSLhK6E/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.


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, radiation, and brain damage; toxicology; infectious disease; and age-related research. 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. 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.


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


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 LEMPS), and AIDS research, see Chimpanzee Facts, supra note 44; infra notes 56-62 and accompanying text (Jerom).

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

47. RATTLING THE CAGE, supra note 7, at 6; Chimpanzee Facts, supra note 44 (“[C]himpanzees are indigenous only to Africa.”).
circuses, and zoos.” As a result, chimpanzees are an endangered species; their population has dwindled and it is “estimate[d] that there are only 80,000 [to] 130,000 chimpanzees left in the entire world.”

“In the wild, chimpanzees live in very diverse social groups and travel several miles in one day.” In contrast, in the laboratory, they often “live alone in cold, metal cages approximately the size of a closet.” Although they may see and hear other primates, they may be denied their physical contact and companionship. Housing chimpanzees alone “can cause severe problems such as depression, heightened aggression, frustration and even self-mutilation.” 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. Many of the chimpanzees currently warehoused—the surplus—were bred for AIDS research. Chimpanzees, however, do not develop the symptoms of AIDS after being infected with HIV as humans do. Jerom was one of the many lives wasted discovering this. Jerom was infected with three strains of HIV before he was five years old; he was euthanized in 2007.

48. chimpanzee facts, supra note 44; see also rattling the cage, supra note 7, at 5-6.
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.
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.
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).
55. chimpanzees used in research, supra note 51.
58. See rattling the cage, supra note 7, at 1-2; HIV/AIDS Debacle, supra note 56.
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

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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.


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.
of forty-two, Washoe died at a primate sanctuary after a short illness.\footnote{Meet the Family: Washoe’s Biography, FRIENDS OF WASHOE, \url{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, \url{http://www.friendsofwashoe.org/learn_about_chimpanzees.shtml} (last visited June 11, 2011).}

Washoe’s “accomplishments, along with those of her African cousins, have served as a small flame in the dark halls of human ignorance.”\footnote{Fouts & Fouts, \textit{supra} note 63, at 31.} She and other chimpanzees have demonstrated 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.\footnote{The Legal Thinghood of Nonhuman Animals, \textit{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, \textit{Young Chimp Outscores College Students in Memory Test}, \textsc{Nat’l Geographic News}, Dec. 3, 2007, \url{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’ . . . .” \textit{Id.} (quoting researcher Tetsuro Matsuzawa of Kyoto University).}

Koko, a gorilla, was born in 1971 and learned sign-language when she was one year old.\footnote{The Gorilla Foundation, \textit{Koko’s World}, \url{http://www.koko.org/world/} (last visited June 11, 2011).} She has a vocabulary of over 1,000 signs, and she understands approximately 2,000 English words.\footnote{\textit{Id.}} “Koko has a tested IQ of between 70 and 95 on a human scale, where 100 is considered ‘normal.’”\footnote{\textit{Id.}} 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.\footnote{FRANCINE PATTERSON, \textit{Koko’s Kitten} (Scholastic, ed., 1985) (pages not numbered); Kolber, \textit{supra} note 8, at 172.} She mourned when she was given the news.\footnote{\textit{Id.}} Dr. Francine Patterson, recalling Koko’s reaction to All Ball’s death, stated,
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.”

Koko also grieved after her companion of twenty-four years, Michael, died. She “uttered frequent, mournful cries, particularly at night.” 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. The loss of her relationships with All Ball and Michael had a significant emotional impact on Koko, which she communicated to her human guardians.

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. “[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).” 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.
80. Id.
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.
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”).
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. And animal law is a rapidly developing area of legal academia and practice.

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. 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.” The Animal Welfare Act, 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

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.
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 standing\textsuperscript{93} and legal personhood.\textsuperscript{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.”\textsuperscript{95} Because animal rights advocates strive for ending all exploitation of animals, they are sometimes criticized as too radical.\textsuperscript{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.\textsuperscript{97}

An alternative to rights theory is feminist animal care theory.\textsuperscript{98} Feminist care theorists emphasize that empathy and compassion are essential to deconstructing speciesist ideology.\textsuperscript{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.\textsuperscript{100} Rights theorists, on the other

\textsuperscript{93.} See infra Part II.C.3.
\textsuperscript{94.} See infra Part II.C.2.
\textsuperscript{95.} \textsc{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 \textsc{Steven M. Wise, Drawing the Line: Science and the Case for Animal Rights} (2002) (discussion includes great apes, dolphins, elephants, and honeybees).
\textsuperscript{96.} See Taimie L. Bryant, \textit{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.”).
\textsuperscript{97.} \textsc{Francione, supra} note 7, at 253-54.
\textsuperscript{98.} See, e.g., \textsc{The Feminist Care Tradition in Animal Ethics}, supra note 33.
\textsuperscript{100.} Linda Vance, \textit{Beyond Just-So Stories: Narrative, Animals, and Ethics}, in \textsc{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.”).
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.\textsuperscript{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.\textsuperscript{102} Life magazine’s 1966 photo-essay Concentration Camps for Dogs significantly shaped public support of the issue of animal welfare.\textsuperscript{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.\textsuperscript{104} Wayman captured horrific images of the neglectful and inhumane conditions dogs were kept in before being sold to laboratories.\textsuperscript{105} Accounts of the police raid describe horrendous conditions in which more than one hundred dogs were suffering.\textsuperscript{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.”\textsuperscript{107} Some dogs were “too weak to crawl over to the iced up cattle entrails strewn about the junkyard for them to

\textsuperscript{101}. See supra note 14 and accompanying text.

\textsuperscript{102}. See, e.g., FrAngone, supra note 7, at 190.

\textsuperscript{103}. Id.; Unti, supra note 29, at 71; Wayman, supra note 29, at 23-29.

\textsuperscript{104}. Unti, supra note 29, at 71; Wayman, supra note 29, at 23-29.

\textsuperscript{105}. Unti, supra note 29, at 71; Wayman, supra note 29, at 23-29.

\textsuperscript{106}. Unti, supra note 29, at 71; Wayman, supra note 29, at 23-29.

eat.”

“Another dog lick[ed] desperately at a dish of water that was frozen solid.”

One “dog [was] frozen inside a box.”

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.”

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” played a role in the enactment of the Laboratory Animal Welfare Act (LAWA), now known as the Animal Welfare Act (AWA), which President Lyndon Johnson signed into law.

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.

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. 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.
115. FRANCIONE, supra note 7, at 190; UNTI, supra note 29, at 71.
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 determined by such research facility.
Laboratory Animal Welfare Act § 13, 80 Stat. at 352 (emphasis added); see also FRANCIONE, supra note 7, at 192.
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.
120. Laboratory Animal Welfare Act § 10, 80 Stat. at 351.
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, this time driven by public concern regarding dog fighting 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. 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.

Despite USDA resistance, the 1976 amendment brought transportation carriers and intermediate handlers 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. In addition, it added a new provision that prohibits knowingly sponsoring, participating, transporting, or using the mail to promote fighting of animals.

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.
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. In 1983, the Silver Spring Monkey case revealed severe mistreatment of monkeys. 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. The Silver Spring Monkeys were not provided “sufficient food or water, a sanitary environment, or adequate veterinary care.” 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
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.


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 . . . [i]f [Jackson County has authority to operate a dog pound] . . . 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. The Animal and Plant Health Inspection Service (APHIS), an agency within the USDA, is responsible for administration through its Animal Care (AC) program. 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,” including minimum standards “for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species.” “and for a physical environment adequate to promote the psychological well-being of primates.” These standards of humane care and treatment are contained in Title 9 of the Code of Federal Regulations. 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.”

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


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

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

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


159. Id.
tries.\textsuperscript{160} The United Kingdom, for example, banned licenses for chimpanzee research in 1997.\textsuperscript{161} In 2000, New Zealand was the first nation to ban chimpanzee research.\textsuperscript{162} The Netherlands followed in 2002, Sweden in 2003, Austria in 2006, and Belgium in 2008.\textsuperscript{163} Australia issued a policy statement limiting chimpanzee research in 2003.\textsuperscript{164} Japan put a strong moratorium on chimpanzee research in 2006.\textsuperscript{165}

In the United States, Congress first passed legislation specifically regarding primate research in 2000.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{168} The CHIMP Act was amended in


\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{167} Chimpanzee Health Improvement, Maintenance, and Protection Act, 42 U.S.C. § 287a-3a(a).
\textsuperscript{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).

\textit{Id.}
2007 and now prohibits the return of retired chimpanzees to research.\textsuperscript{169}

There has also been proposed legislation, namely the Great Ape Protection Act (GAPA),\textsuperscript{170} which aims to end all invasive research\textsuperscript{171} on great apes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{174} However, currently “[t]here are more than 112,000 nonhuman primates

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{172}. “Great apes” include chimpanzees, bonobos, gorillas, orangutans, and gibbons. \textit{Id.}


\textsuperscript{174}. \textit{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 GAP Act 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 “the right to possess, use, and enjoy a determinate thing.” 178 A thing is “the subject matter of a right.” 179 The legal status of nonhuman animals is “legal thinghood.” 180 There is historical 181 and legal precedent 182 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 GAP Act 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).
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 imploy’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.

Similarly, the law recognizes a property right in an animal that has been removed from its natural habitat. 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.”

There is a link between the property status of animals and the “presumed moral superiority and entitlement of humans.” Humans have created a belief system that animals exist for human use. The law is rooted in this belief. Changing this ideology
will require massive economic and social restructuring because the food, clothing, entertainment, and biomedical research industries are dependent on the legal exploitation of animals. 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.” Women were also historically denied the right to share legal space in our laws, 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, suffered grief after losing a baby. To ease Washoe’s grief, Fouts found “a baby for Washoe to adopt.” Fouts purchased Loulis for ten thousand dollars plus 7.5 percent sales tax.

2. Legal Personhood

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

191. FRANCIONE, supra note 7, at 253-54.
192. Bryant, supra note 188, at 330.
193. See infra Part III.A.
194. See supra notes 63-66 and accompanying text.
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)).
199. MERRIAM-WEBSTER’S, supra note 12, at 924; see also BLACK’S LAW DICTIONARY, supra note 38, at 1257.
200. BLACK’S LAW DICTIONARY, supra note 38, at 102.
201. Corporations and ships, for example, are legal persons. Fisher, supra note 5, at 439. In the late 1800s, 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.”

“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.” 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.” There is constitutional standing, which requires a plaintiff to show injury in fact, causation, and redressability; and prudential standing. 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. 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) is ineffective because animal welfare advocates and organizations have difficulty litigating under the statute because they often lack standing. The Fourth Circuit stated, “The statutory design [of the AWA] is . . .


204. FRANCIONE, supra note 7, at 67.
207. Lujan, 504 U.S. at 560.
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.”

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. 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?”

Cases brought under the Endangered Species Act (ESA) 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. 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.”

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 human-kind’s most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiff’s assert.


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 an 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).


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.


225. Id. at 5.
tions originate, in part, from humans’ speciesest belief system. The AWA, for example, contains provisions that allow painful and distressing procedures, which contradicts the stated purpose of “humane care and treatment” of animals. These exceptions arise in situations when such procedures are deemed “scientifically necessary” or “scientifically justified.” 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.” 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.” Similar to animals, women were considered property; they were owned and controlled by their fathers and husbands. 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. In Muller v. Oregon, the Court stated, “healthy mothers are essential to vigorous offspring, the

226. See supra note 12 (definition of speciesism).
228. Id. § 2143(a)(3)(C)(v).
229. FRANCIONE, supra note 7, at 205.
231. See, e.g., Trammel v. United States, 445 U.S. 41, 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.
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 unfit 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.
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” 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.”

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.

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

In 1970, a House committee report balanced interests similar to those balanced by the passage of LAWA. 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. 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. Furthermore, intentionally conducting painful procedures and withholding pain-killing drugs is not compassionate care.

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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.


243. Id. (emphasis added).

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


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

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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.\textsuperscript{250}

This was \textit{not responsible} primate research. This was not research done with compassion and care. And the only “humane care and treatment”\textsuperscript{251} this particular primate received was euthanasia \textit{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.

\textbf{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{255} Second, a primate may be exempted “from participation in some or all of the otherwise required environment enhancement plans \textit{for scientific reasons} set forth in the research

\begin{footnotes}
\textsuperscript{250} \textit{Id.} at 139.
\textsuperscript{252} \textit{See id.}; 9 C.F.R. § 3.81 (2010).
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} 9 C.F.R § 3.81(e)(1) (emphasis added).
\end{footnotes}
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.  

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.” The HSUS has submitted a 108-page complaint to the USDA, which alleges at least 338 violations of the AWA. Videotape evidence from the investigation

256. Id. § 3.81(c)(2) (emphasis added).
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”).
261. Investigation Reveals Abuse of Chimps, supra note 173.
263. Vivisection is the practice of experimenting on living animals. Merriam-Webster’s, supra note 12, at 1400.
264. Singer, supra note 262, at 201.

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. 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.’” As a result of this disconnected and contradictory position, “chimpanzees [and other primates] are treated as if they are unfeeling machines.”

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.” 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.” 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

266. Kerwin, supra note 257, at 25.  
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

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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 be] 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

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.”).
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.
provisions of the AWA\textsuperscript{282} and the accompanying regulations\textsuperscript{283} authorize torture\textsuperscript{284} 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.\textsuperscript{285} When deemed scientifically necessary, the infliction of intense pain to the body or mind of an animal may be used to extract information.\textsuperscript{286} Information, in this context, is scientific knowledge extracted from the bodies of animals.

\textbf{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.

\textsuperscript{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 \textit{minimized.”} \textit{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 \textit{necessary} shall continue for only the \textit{necessary} period of time.” \textit{Id.} § 2143 (a)(3)(C)(v) (emphasis added).

\textsuperscript{283} See supra note 272.

\textsuperscript{284} See supra note 38.

\textsuperscript{285} \textit{Id.}

\textsuperscript{286} \textit{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.”

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. “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.” Bruno clearly communicated this when he signed from the cage he was confined in: “KEY OUT.”

Karina L. Schrengohst*

287. Clayton, supra note 36.
289. Donovan, supra note 20, at 375.