

An Analysis of the Legal Classification of Animals: Toward a Step-wise Deconstruction of the Property Status of Animals

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Introduction

The extent of animal exploitation in American society is staggering. Millions upon millions of animals are killed each year in the name of scientific research. The overwhelming amount of this research occurs for purposes that cannot be regarded as necessary in any meaningful way. From a legal standpoint these practices are justified by the notion that animals are property and thus lack legally enforceable rights to protect their interests from exploitation. This property classification originates from our common law, which in turn derives from ancient laws and philosophies whose foundations have long since been discredited by scientific and moral progress. Science has shown that animal physiology and psychology is so similar to that of humans that any difference in interest must be one of degree and not kind. Moral tenets dictate that competing interests should be analyzed according to the principle of equal consideration so that for instance, my interest in avoiding pain is equal to any other being's interest in avoiding pain. By treating animals as property the law makes animal interests count for less than that of a person's interest and thereby permits actions that do not require the equal consideration to animal interests. In this manner the property status of animals has perpetuated the unnecessary exploitation of animals. If the law is to be regarded as capable of resolving current disputes it must rest upon knowledge that is both accurate and complete. This article urges the common law to more completely incorporate our modern scientific and moral understanding of animals into its development.

This article will demonstrate that the Federal Animal Welfare Act, which regulates the use of animals in research laboratories, results in the inequitable protection of animal interests because it is premised on the property status of animals. The property status of animals justifies subordinating animal interests even when the complete protection of those interests would not interfere with the successful outcome of an experiment. Furthermore, the property status of animals allows the deprivation of fundamental animal interests in the name of research that does not aim to further any fundamental human interest, such as our well-being or survival capability. Because of the

widespread failure of our legislation to prevent unnecessary animal exploitation, the judiciary should incorporate the scientific and moral principles of our time into the development of the common law and give animals the protection that the principle of equal consideration of interests mandates. While this evolutionary stride may at first appear radical, the requisite legal classification and devices currently exist to facilitate the transition of animals as property to holders of rights. In this way the law can facilitate the treatment of animals in a manner consistent with modern scientific and moral understanding of animals as beings with inherent value worthy of protection.

I. The legal status of animals as property

A. The implication of animal as property

The law has developed an artificial dichotomy between persons and property.¹ Property has only extrinsic value, which is acquired by virtue of its utility to an owner.² Because the law does not recognize the intrinsic value of property, its interests, if any, are generally not protected with legally enforceable rights.³ Conversely, the law recognizes the intrinsic value of a person and protects his interest with legally enforceable rights.⁴ Rights are like fences that keep the world out of certain areas of our lives.⁵ They protect our interests from being unjustly overcome by competing interests in society.⁶ Legal interests are demands, desires, or expectations which human beings, either individually or collectively seek to satisfy.⁷ For instance, a person's interest in not having his personal property arbitrarily taken from him by the government is protected by the fourteenth amendment of the United States Constitution, which provides that "no state shall...deprive any person of life, liberty, or property, without due process of law."⁸ Similarly, the Nuremberg Code and the Helsinki Declaration protect a person's interest in avoiding pain and suffering caused by their involuntary use in laboratory experiments.⁹

In American law, human beings are person and animals are property.¹⁰ Therefore, animals do not have legally enforceable rights and generally cannot bring suit to contest any deprivation of their interests.¹¹ The absence of legally enforceable rights facilitates the exploitation of animals in society.¹² Animals may be used for experiments,

economic gain, as collateral for a loan, may be sold, taken away as part of a legal judgment, given away, or euthanized.¹³ The legal classification of animals as property has led to unspeakable stories surrounding inordinate numbers of animals without legal repercussions.¹⁴ Despite the existence of federal animal welfare laws, tens of millions of animals are killed each year in scientific research to produce scientific data that aims to enrich our lifestyle but contributes nothing to our well being or survival capability.¹⁵

B. Property status and morality

The use of animals in research poses a conflict between the interests of a property owners who desires to use his property for research, and the interest of the animal in continuing to live, express his nature, and be free from pain and suffering.¹⁶ The moral resolution of any conflict of interest must satisfy the principle of equal consideration-the rule that like cases ought to be treated alike unless there is a justified reason not to do so.¹⁷ This principle is a necessary component to any plausible moral theory.¹⁸ Any theory that permits dissimilar treatment of similar interests fails to accord moral significance to a morally significant entity and for that reason alone is an untenable moral theory.¹⁹

Society does not treat animals as morally significant because we do not give their interests the same protections that we give to similar human interests.²⁰ Animals and humans have an interest in avoiding pain and suffering yet animals are used in scientific research while humans are not. The reason for this is that an animal is property and her interest counts for less than ours does.²¹ If applying the principle of equal consideration creates a conflict between human and animal interests, then we ought to balance the suffering to humans in not using the animal against the suffering endured by the animal through her use.²² If our suffering in not using the animal outweighs the suffering of the animal through her use, then human interests prevail and the animal use is justified.²³ If no justifiable human interests are at stake, then the loss of interest to the animal outweighs our loss of interest and her use must be regarded as unnecessary.²⁴ Because animals are property, any balancing is unfair from the outset.²⁵ The balancing

involves the interest of a property owner versus the interest of his property.²⁶ This system is set up to avoid any potential conflict of interest because the interest of property will always count for less than the interest of its owner.²⁷ The balance will always tip in favor of avoiding the loss of interest to the property owner who can not use his property as he wants.²⁸ The property status of animals makes the principle of equal consideration virtually inapplicable to animals.²⁹

C. Property status and the law

Because animal welfare laws are premised on the property status of animals, they do not differentiate between animal uses that will further a fundamental human interest and animal uses that do not.³⁰ These laws do not verify whether researchers are experimenting on animals to obtain scientific data that will further the well being or survival of humans or simply enhance some aspect of our lifestyle.³¹ Many experiments permitted under current and applicable law involve great pain to animals in order to produce scientific data that may potentially enrich our lifestyle. The Animal Welfare Act (“AWA”), for instance, does not consider whether our interest in improving our lifestyle through animal tested cosmetics outweighs the animal’s interest in avoiding pain and suffering. Our interest in producing better cosmetics is assumed to outweigh the interest of the animal, who has the products dripped in her eyes, from being free of pain and suffering because her property status makes her interests count for less than ours.³² The law simply presupposes that the use of animals is justified because the animal is property of the research facility.³³ What the law does attempt to prevent is the infliction of “unnecessary” pain and suffering, which is greater suffering than is necessary to obtain reliable scientific data.³⁴ For instance the AWA attempts to prevent “unnecessary” pain and suffering during the experimental production of reliable scientific data.³⁵ The only requirement of the AWA is that the investigator, “minimize pain and distress to animals” and “considers alternatives to any procedures likely to produce pain.”³⁶ Yet because the AWA is based on the property status of animals, it gives the owner absolute discretion as to whether he wants to comply with these provisions or not.³⁷ These so-called requirements of the AWA are therefore nothing more than recommendations. Such laws mean little to the animals when they can not be used to

put an end to suffering that result from trivial human interests.³⁸ The property status of animals generates welfare laws that are supposed to lead to the humane exploitation of animals. Nevertheless, the actual effects of the welfare laws do little, if anything to relieve suffering sustained by research animals.³⁹ Any good that such measures may bring are likely offset by the public perception that animal suffering is made more humane when in fact the institutionalized torture of research animals continues unfettered.⁴⁰ The property status of animals must be abolished so that the law can adequately recognize the inherent value of animals and protect the deprivation of their interests for unnecessary human gain.⁴¹

It has been suggested that property status is not what needs to change to put an end to the cruel treatment of animals.⁴² Rather the agencies responsible for enforcing the respective animal welfare laws must ramp up their efforts.⁴³ The AWA together with other federal statutes give animals “rights,” or legally enforceable claims, against cruelty and mistreatment.⁴⁴ For instance, under the AWA an animal has a right to food, shelter, adequate ventilation and medical care, “and they enjoy these rights against their owners.”⁴⁵ The reason these rights don’t matter is that there is little enforcement activity pursuing violations.⁴⁶ However, the right to food, shelter and adequate ventilation is not truly a right. For one thing, these alleged rights can be disregarded by the investigator if he states his reason for doing so in the research protocol.⁴⁷ For another, these are simply basic requirements that “ensure that these resources are used efficiently, which, in this situation, means that they produce reliable scientific data.”⁴⁸ Legal rights do more than ensure the mere survival of an animal. They prevent the unnecessary deprivation of animal interests by securing their right to express their natural instinct and prohibit those situations that will prevent them from doing so. As mentioned earlier, humans enjoy such rights.⁴⁹ Nonhuman animals do not.⁵⁰ Monkeys, for example, have a natural desire to swing, groom, play, forage, love and will avoid suffering to continue to live and engage in these activities.⁵¹ Because animals are property, humans take these interests from them for reasons that cannot always be regarded as necessary.⁵² Animals may be given food and water yet live in laboratory cages that only allow them to take at most 2 steps forward and 2 steps backward. They

may live in these small cages and be given water twice daily for an hour each time.⁵³ If the investigator desires he may exempt a nonhuman primate from the water requirement altogether.⁵⁴ Nonhuman animals may never see grass, sunlight, or interact socially with members of their species.⁵⁵ The most thoroughly enforced welfare laws do nothing to prevent this. Heightened enforcement of welfare laws will not protect animals from having their interests taken from them for unnecessary reasons. By eliminating the property status of animals, laws can evolve to protect animals from the deprivation of their interests for unnecessary human gain.

D. Property status and access to courts

The property status of nonhuman animals prevents them from being plaintiffs in lawsuits, which is a crucial requirement to achieving protection under the law.⁵⁶ Since nonhuman animals are property and have no rights, animals that are mistreated cannot have a representative assert their interest in court.⁵⁷ Ironically, this means that nonhuman animals that are wronged through violations of the AWA cannot enforce the very laws created to protect them despite the AWA's stated purpose of insuring that animals intended for use in research facilities be provided humane care and treatment.⁵⁸ Even people willing to fight for the proper treatment of nonhuman animals face insurmountable obstacles.⁵⁹ While many people believe that the existence of welfare laws means animals are adequately protected from inhumane treatment, the very conditions that fueled the passing of these laws continue unimpeded, without an adequate enforcement mechanism.⁶⁰

1. Standing for individual plaintiff

The legal mechanism preventing nonhuman animals from asserting their interests in court is the element of human injury-in-fact required by the standing doctrine.⁶¹ Standing is one of several doctrines used to determine whether a case is justiciable, or whether a litigant is entitled to have the court decide the merits of a dispute or particular issue.⁶² Federal courts may only adjudicate cases in the context of an actual dispute between parties who have an actual stake in the outcome of the suit.⁶³ This limitation

on the courts' authority arises from Article III Section 2 of the Federal Constitution, which states that courts may act only when there is a case and controversy.⁶⁴ While the Constitution does not specifically state the requirements to achieve standing, the doctrine has evolved through case law.⁶⁵ To establish standing to sue, a claimant must meet three requirements.⁶⁶ The United States Supreme Court has said that "at an irreducible minimum, Art III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."⁶⁷

In order for a human person to establish standing within the context of animal mistreatment, the human plaintiff must plead injury to himself as a result of mistreatment to an animal that he has continuous interaction with.⁶⁸ Although this approach allows persons to bring claims concerning animal mistreatment, it is fraught with limitations. First, the requirement of continuous interaction fails to protect the overwhelming number of nonhuman animals in research labs that are not accessible to humans.⁶⁹ For example, in *International Primate Protection League v. Institute for Behavioral Research Inc.*, the plaintiff, a former employee of defendant-researcher brought suit under the AWA on behalf of monkeys being experimented on in an extremely cruel manner and being kept in inhospitable conditions.⁷⁰ The research involved surgically abolishing the sensation in the limbs of monkeys in an effort to mimic the lack of sensation found in stroke victims.⁷¹ The researcher investigated techniques to retrain the limbs by using restraint, electric shock and withholding of food to coerce animals to use the limbs they could not feel.⁷² Authorities raided the lab and found each monkey in a small cage that had not been cleaned for days.⁷³ Several of the monkeys had bitten off fingers, and some had chewed into their limbs, leaving raw, open wounds the size of silver dollars that were covered with filthy bandages or not covered at all.⁷⁴ Authorities confiscated the monkeys and plaintiff claimed that if the monkeys were returned to the lab his relationship with them would be disrupted and he would suffer a direct injury.⁷⁵ In denying standing the court stated that the plaintiff would not suffer an injury if the

monkeys were returned because he would never be able to visit and see the conditions in which the monkeys live.⁷⁶ The plaintiff did not have the personal involvement necessary to plead injury to him self and thereby lacked standing.⁷⁷ Private ownership thus prevents the requisite continuous interaction between plaintiff and the monkeys to produce direct injury and thus establish standing.⁷⁸ Per the court logic, no private person “could claim standing to challenge the treatment of what the court essentially regarded as pieces of property.”⁷⁹ The second limitation to filing a claim for an injured animal by pleading human injury is that it focuses on the interest of the person and not the interest of the nonhuman animal.⁸⁰ The person bringing the suit is required to make up an injury to address the injury of true concern, namely the injury to the animal.⁸¹ Finally, this approach creates a potential conflict of interest for those who have standing to bring suit.⁸² For example, a researcher who works in the laboratory and is aware of cruel treatment to animals is one of the few persons likely to have the required level of continuous interaction with the animal to satisfy standing.⁸³ However, since her primary interest is conducting research she is unlikely to get involved in litigation.⁸⁴ Initiating litigation could be devastating to a researcher’s career by risking her current position and any long-term prospects.⁸⁵

2. Standing for Nonhuman animals

Court decisions have been inconsistent with granting nonhuman animals standing to bring suit. Some courts have allowed nonhuman animals to be named as plaintiffs but have offered no explanation for their decision.⁸⁶ Other courts have explicitly denied animals standing in court without explaining their decision pursuant to the standing doctrine.⁸⁷ In cases where defendant challenged an animal plaintiff’s standing, courts have unanimously denied standing to the animal plaintiff.⁸⁸ In *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*, a dolphin named Kama challenged the decision by the aquarium to transfer her to the navy for testing.⁸⁹ In denying Kama standing the court noted that case law confirms that “animals are treated as property of their owners, rather than entities with their own legal rights”⁹⁰

One commentator has argued that animals cannot have standing simply because Congress has not explicitly given them that privilege.⁹¹ Congress explicitly grants standing to “persons” under the general provisions of the Marine Mammal Protection Act and the Endangered Species Act.⁹² Because Congress has not expressly stated in any federal statute that animals can sue in their own name, animals lack standing.⁹³ However, there is no reason to conclude that the word “person” needs to be put in a statute in order for a person to sue.⁹⁴ The text of Article III Section 2 of the Federal Constitution does not explicitly limit the ability to bring a claim in federal court to humans.⁹⁵ Article III and the case law through which the standing doctrine has evolved “requires injury-in-fact, causation, and redressability, not opposable thumbs.”⁹⁶ Moreover, when the Framers created the Constitution they did not have the scientific knowledge available today, which demonstrates that animals are socially and psychologically intricate beings.⁹⁷ Nonhuman animals use tools, communicate with language, display emotions, have social relations, establish culture, and display rational thought and even exhibit altruism.⁹⁸ Abolishing the property status of animals will facilitate the Constitution’s ability to broaden its scope and accommodate for the social and scientific understanding of animals that we have today.⁹⁹

II. Animal Interests

A. Animals have an interest in the continued existence of their life

The societal practice of harming or killing an animal for scientific research poses serious ethical issues.¹⁰⁰ Any part of this practice that is deemed unethical creates a compelling reason to eliminate it.¹⁰¹ Some commentators argue that these practices are not unethical because animals are not aware of the future and thus have no interest in the continued existence of their life.¹⁰² Under this view, the quality of the animal life and not the end of the life is what requires heightened consideration.¹⁰³ Animal cognitive theorists support this latter position with the mental time travel hypothesis.¹⁰⁴ This theory suggests that, unlike humans, animals cannot mentally travel forward in

time to anticipate and plan for the future.¹⁰⁵ Animals are bound to the present, or “stuck in time,” and this is defined by their current motivational state.¹⁰⁶ Because nonhuman animals have no sense of the future and cannot anticipate the misery of not being alive, they have no interest in continuing to live.¹⁰⁷ Experimented mongrel-pigs do not care when they die of circulatory shock from a human inflicted penetrating injury because they are fully anesthetized and do not suffer.¹⁰⁸ They only care if they survive the experiment and endure the subsequent pain and suffering.¹⁰⁹ The practical implication of this view is that experimenting on animals is morally permissible insofar as the live animal receives good treatment, lives pleasantly and is killed quickly and painlessly.¹¹⁰ Many animal advocates adhere to this view.¹¹¹ However, its basis seems to defy cognitive and evolutionary understanding.¹¹² The ability to experience pain is a physiological and neurological capacity that has evolved through time in part to enable an animal to escape threatening situations and secure her survival.¹¹³ Animals escape injury in order to remain alive because they desire to continue to exist.¹¹⁴

Recent studies demonstrate that animals indeed anticipate and plan for future needs and desires independent of current ones.¹¹⁵ A compelling study showed that scrub-jays (*Aphelocoma californica*) with experience stealing another bird's cache will re-cache their stores in new caches only when they are observed caching by other birds.¹¹⁶ Birds without the experience of stealing will not re-cache even when observed caching.¹¹⁷ This indicates that scrub jays relate information about their previous experience as a thief to the possibility of future stealing by another bird, and modify their caching strategy accordingly to protect their feed and successfully satisfy their future motivational need of hunger.¹¹⁸ Another study showed the scrub-jays spontaneously plan for a future state without reference to their current motivational state by caching food in a place where they have learned they will be hungry but where food is not otherwise available.¹¹⁹ Other studies have shown that apes will select, transport and store certain tools not because it will satisfy a current motivational need or desire but because they may need it to satisfy a need sometime in the future.¹²⁰ In one study, apes were presented with various tools but selected a tool that they had previously

learned would enable them to open a device with food inside.¹²¹ The apes were presented with the tools in the absence of any visible device yet selected and stored the tool because it would enable them to recover food at some future time.¹²² When the apes were eventually presented with the device they recovered the stored tool and utilized it to open the device and recover the food.¹²³ These studies provide evidence that animals do have prospective cognition, anticipate future motivational needs not linked to current ones and make plans to satisfy those future motivations.¹²⁴

The idea that animals, unlike humans, do not have an interest in the continued existence of their life seems to defy the theory of evolution.¹²⁵ The writings of Charles Darwin revised our understanding of the animals' position within our world.¹²⁶ Until his time the prevailing understanding concerning the relationship between animals and humans derived from the book of Genesis.¹²⁷ Genesis states that God created man in his own image and let him rule "over the fish of the sea, the birds of the air, and the cattle, and over all the wild animals and all the creatures that crawl on the ground."¹²⁸ This story led to the natural assumption that an animal and a human are two distinct types of beings.¹²⁹ The introduction of the theory of evolution revolutionized this view by describing humans as merely another link in the evolutionary chain.¹³⁰ Darwin observed that every human characteristic could be found in at least one other nonhuman species making the difference between a human and nonhuman one of degree and not kind.¹³¹ Darwin's observations led him to the conclusion that animals are able to think and be emotional like humans.¹³² He wrote that "the senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason....may be found in...the lower animals."¹³³

B. Animals have fundamental interests

Nonhuman animals like human animals have a natural instinct toward expressing their species-defining interests.¹³⁴ All animals have unique and fundamental interests that are indispensable to the expression of their creaturely character, their essence, their wolf-ness, monkey-ness, chicken-ness, or person-ness.¹³⁵ These are social, biological,

physiological and nutritional interests that are required for an animal's physical and mental well being.¹³⁶ Such interests are reflected in the natural environment that allows an animal to express and experience those specific characteristics and behaviors that are species defining.¹³⁷ Animals instinctually want to exercise, stretch the limbs or wings, groom one self and turn around.¹³⁸ This is true regardless of whether or not an animal has ever lived in conditions that permitted this.¹³⁹ To be able to reproduce, sustain life with water and food, and use ones body in modes for which it is built is fundamental to almost all-living creatures.¹⁴⁰ Social grouping is fundamental to primates but not snakes.¹⁴¹ Rhesus monkeys need terrain to forage and trees to climb.¹⁴² Birds need perches, cheetahs need space to run, frogs need ponds, boa constrictors need branches, hogs need space to root and wallow, sheep need space to sit in social groups and chew their cud.¹⁴³ Each species has developed characteristics by which they survive and reproduce.¹⁴⁴ When humans create an artificial environment depriving animals of the ability to express their species-defining behavior they deprive animals of a fundamental interest.¹⁴⁵ If these acts are done for the sake of advancing a human interest that is not essential to its well being or survival it cannot be justified.

C. Individual animal interests

Interests vary not only from species to species but also among individual members of the same species.¹⁴⁶ It is conceivable, for example, that one cat possesses greater intelligence than another and thus is more sensitive to an experiment endured in isolation.¹⁴⁷ One author has argued that it is the totality of individual capacities, and not just sentience, which defines our moral duty toward nonhuman animals.¹⁴⁸ Sentience, autonomy, self-awareness, conception of one self existing over time, and rationality are morally relevant properties indicative of personhood.¹⁴⁹ Failure to focus on all of the distinct capacities of an individual nonhuman animal will potentially result in morally impermissible harm to that animal.¹⁵⁰ It is thus our moral obligation to contemplate what human actions will result in the maximization of individual nonhuman animal capacities.¹⁵¹ This is analogous to the approach encompassed by the Americans with

Disabilities Act of 1990 (ADA).¹⁵² This law, which seeks to rectify unjustifiable limits on persons with disabilities, determines eligibility on a case by case basis.¹⁵³ Generalizations are not made across individuals living with the same impairment because the objective impairment and the subjective nature of living with the impairment may be different among individuals.¹⁵⁴ Within the context of animal ethics, however, this approach poses difficulties. First, there is no clear scientific consensus that the emotional, intellectual and communicative capacities that we observe in nonhuman animals provide the same experience as it does in humans.¹⁵⁵ However, even if one assumes that the existence of morally relevant properties can be empirically ascertained, we will always lack the internal perspective of nonhuman animals required to assess the value of living life with those properties.¹⁵⁶ We therefore can not be certain that when we observe a nonhuman animal express these morally relevant properties that it translates into the same experience as it offers humans.¹⁵⁷ The lack of objective consensus and subjective perspective surrounding morally relevant properties possessed by animals is thus not likely to seriously challenge judicial precedents disallowing rights for animals any time soon.¹⁵⁸

The only criterion that ought to be necessary to integrate a nonhuman animal into the moral community is sentience. The overwhelming majority of decisions and actions humans make are aimed at either increasing pleasure or reducing suffering.¹⁵⁹ Many laws exist to protect a human's ability to pursue those experiences that will provide pleasure or prevent suffering. Humans by and large understand what it is like to experience pleasure and suffering not only from an internal perspective but from a scientific one as well.¹⁶⁰ We can be very certain that nonhuman animals experience pleasure and pain analogous to human pleasure and pain because animal pain physiology works in the same way as human pain physiology.¹⁶¹

D. Animals have an interest in not suffering

In the seventeenth century, Rene Descartes (1596-1650) concluded that everything composed of matter, including human beings and animals, was governed by mechanistic principles.¹⁶² To reconcile his scientific conclusion with his devout Catholic beliefs, Descartes proposed that God gave humans a soul that operated independent of these mechanistic rules.¹⁶³ Because animals lacked a soul they were essentially

robotic and could not experience pain, pleasure, or any other sensation or emotion.¹⁶⁴ The Cartesian view of non-sentient animals sparked a tremendous increase in vivisection leading to unthinkable experiments on unanesthetized animals.¹⁶⁵ Research in cardiology, for example, involved nailing conscious, unanesthetized dogs to boards by their four paws and cutting open their chests to examine the beating heart.¹⁶⁶ Because they were considered machines, their cries of pain were regarded as analogous to the squealing of a drill press.¹⁶⁷

Other philosophers spoke out in compassion on behalf of animals.¹⁶⁸ Immanuel Kant (1724-1804) recognized that animals are sentient and thus suffer.¹⁶⁹ Kant argued, however, that humans do not have a direct moral duty toward animals because animals cannot formulate moral principles to direct their conduct and thus lack moral standing.¹⁷⁰ Animals mattered only because of the impact their treatment had on how humans treat each other.¹⁷¹ In the late 18th century Jeremy Bentham (1748-1832) argued that despite any differences, humans and animals are similar in that they both suffer.¹⁷² This similarity creates a direct moral duty to not impose unnecessary suffering on them.¹⁷³ Bentham maintained that animals had been degraded into a class of things because their interest in not suffering had been neglected.¹⁷⁴

There is a substantial body of scientific evidence suggesting that animals do feel pain.¹⁷⁵ The "Guide for the Care and Use of Laboratory Animals," endorsed by the American Association of Laboratory Animal Scientists, states that "the ability to experience and respond to pain is widespread in the animal kingdom...procedures that cause pain in humans also cause pain in animals."¹⁷⁶ Physiologists have observed that animal pain physiology works the same way as human pain physiology.¹⁷⁷ Animal pain involves the same neurological circuits as human pain and for the same evolutionary reasons.¹⁷⁸ Indeed, much of animal testing is based on this premise.¹⁷⁹ Otherwise, there would be no empirical basis for dripping cosmetic chemicals into the eyes of nonhuman animals to assess whether and to what degree it causes pain.¹⁸⁰ The entire

body of state animal cruelty laws combined with federal animal welfare laws that aim to regulate the treatment of animals reflects our recognition that animals have an interest in being free of pain and suffering.¹⁸¹ Most of Western civilized society now accepts that animals can suffer and we therefore have a moral obligation not to impose unnecessary suffering on them.¹⁸²

III. The Effects of Animal Welfare Laws

A. Animal welfare laws do not protect animal interests

Tens of millions of animals are used in research facilities each year.¹⁸³ Exact figures are impossible to obtain because accurate reporting mechanisms do not exist and over 95% of research animals, particularly birds, rats and mice are not counted as animals under the Animal Welfare Act (“AWA”).¹⁸⁴ However, according to the Animal Welfare Report for Fiscal Year 2001, more than 1.2 million animals *other than birds, rats and mice* were used in research, experiments, testing and teaching in the U.S. in 2001.¹⁸⁵ This includes 70,082 dogs; 22,755 cats; 49,382 primates; 256,193 guinea pigs; 167,231 hamsters; 267,351 rabbits; 22,236 sheep; 60,253 pigs; 75,160 other farm animals; and 242,251 other animals-totaling 1,236,903 animals.¹⁸⁶ Various industry sources have estimated that roughly 20 to 25 million birds, rats and mice are used and killed in research each year.¹⁸⁷ The sheer number of animals used is alarming given the enactment of animal welfare laws that are supposed to protect animals. Equally alarming is the depressing quality of life and inhumane treatment that animals receive under the purview of these very laws. A close look at Federal animal protection laws reveals that welfare-based laws are nothing but illusory protections that produce greater harm to animals than good by subordinating animal interests for even the most trivial human interests.¹⁸⁸

1. Federal Laws fail to protect animal interest

Federal laws fail to protect the inherent value of animals in any meaningful way.¹⁸⁹ History has been punctuated by moments of intense public outcry surrounding animal exploitation.¹⁹⁰ In response, the Federal government has passed laws to regulate the

industrial use of animals “that have since proved worse than useless; their very existence gives the public the impression that the institutionalized torture of animals in this country has ended when, in fact, it continues unabated.”¹⁹¹ Indeed, the primary effect of these laws has been to make the public feel that animals are being treated humanely when in fact they have led to increased suffering by rendering exploitation more economically efficient and socially acceptable.¹⁹² A close look at either of the Federal Animal Welfare Act or the Federal Humane Slaughter Act demonstrates just how ineffective animal-welfare legislation is. This article will focus on the AWA.¹⁹³

a. The Animal Welfare Act

i. Codification and enforcement of the AWA

The AWA is part of the United States Code (“USC”).¹⁹⁴ The United States Department of Agriculture (“USDA”) is responsible for enforcing the AWA. The Secretary of the USDA has further developed the AWA by promulgating regulations found in Title 9 of the Code of Federal Regulations (“CFR”).¹⁹⁵ The USDA has assigned one of its subdivisions, the Animal and Plant Health Inspection Services (“APHIS”), to enforce the AWA.¹⁹⁶ Research facilities must provide APHIS with access to its facilities during unannounced visits.¹⁹⁷ APHIS’s inspections focus on numerous aspects of animals’ housing, care, ventilation, lighting, sanitation, food and water supply and handling.¹⁹⁸ APHIS must insure that the research facility is treating animals in a manner consistent with AWA and 9 CFR¹⁹⁹

ii. Historical developments of the AWA

The U.S. Congress passed the AWA “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.”²⁰⁰ The 1966 Laboratory Animal Welfare Act (“LAWA”) served as the precursor to the AWA.²⁰¹ The main purpose of the LAWA was to protect pets from being stolen from their homes and being sold to scientific research labs.²⁰² For instance, prior to LAWA the court in *Central Humane Society v. Hilleboe* found

constitutional a statute that allowed an animal to be surrendered to scientific research after three days retention in a pound.²⁰³ The court held that the statute contained reasonable safeguards against the taking of an animal contrary to the rights of the owner and that the statute was necessary to help advance medical science.²⁰⁴ It wasn't until a 1966 article in *Life* magazine entitled *Concentration Camp for Dogs* that the general public became aware of the unspeakable conditions surrounding the trafficking of dogs and cats to be used in medical experiments.²⁰⁵ *Life* received more mail on behalf of this article than any other article in the history of the magazine.²⁰⁶ The public outcry that followed sparked congressional hearings on proposed laws to regulate animal trafficking and animal treatment in research laboratories.²⁰⁷ This culminated in the passage of LAWA in 1966.²⁰⁸ Under LAWA the Secretary of the USDA was authorized to promulgate minimum standards for the care, housing, sale and transport of dogs, cats, primates, rabbits, hamsters, guinea pigs and other animals held on the premises of animal dealers or laboratories.²⁰⁹ The Act required licensing of cat and dog dealers and research facilities and the identification of dogs and cats to prevent their theft.²¹⁰ Significantly, the legislation specified that it was not meant to deter research in any way and thus the secretary could not alter the handling, care or treatment of animals during experimentation.²¹¹

The first amendment in 1970 changed the name to The Animal Welfare Act.²¹² This amendment expanded coverage to regulate other warm-blooded animals that the Secretary determines are being used for research, testing, experimentation, and exhibition purposes or as a pet.²¹³ It also called for research facilities to undergo annual inspection and use anesthetic, analgesic, or tranquilizing drugs in prescribed circumstances.²¹⁴ Again, the law contained the express prohibition of any interference with research experimentation.²¹⁵

In 1981 a high profile case emerged in which a scientific investigator performing research under a federal program was charged with violating the state of Maryland's animal cruelty statute.²¹⁶ The trial court found the scientist guilty of failing to provide veterinary care for six of seventeen monkeys.²¹⁷ However, the appellate court

reversed, holding that the state animal cruelty law was inapplicable to animals involved in research conducted under federally funded programs.²¹⁸ In response to the documented claims of mistreatment and the public outcry that followed, Congress held hearings before the House of Representatives Subcommittee on Science, Research and Technology.²¹⁹ Between 1981 and 1984 several Bills were introduced into the House and Senate regarding the care of animals in research laboratories.²²⁰ This led to the 1985 amendment of the AWA through the enactment of the Improved Standards for Laboratory Animal Act (“ISLAA”).²²¹ This amendment sought to strengthen AWA standards for laboratory animal care, increase enforcement and mandate training for those who handle animals.²²² The amendment established an internal system of supervision at each institution through Institutional Animal Care and Use Committees (“IACUC’s”) to oversee animal care and ensure alternatives are considered to experiments that involve pain and suffering.²²³ It also sought to incorporate environmental enrichment by directing the Secretary to promulgate minimal regulations providing for the exercise of dogs and a physical environment that promotes the psychological well being of primates.²²⁴ APHIS began promulgating regulations to enforce the new amendment in 1987.²²⁵ The initial proposal was published in 1989 and, after receiving over 10,000 comments, the Secretary published revised regulations in 1990.²²⁶ After receiving over 11,000 additional comments the Secretary published the final revised regulations in February of 1991.²²⁷

iii. Lack of efficacy of the AWA

The current Act and its associated regulations are made completely ineffective by its exceptions, vague terminology and absolute deference given to the scientific community to determine what constitutes appropriate animal use and treatment.²²⁸ To begin with, consider the Secretary’s Title 9 regulations, which aim to govern the humane care of animals by providing minimal standards for things like food, housing, medical care, minimization of pain and distress, and the use of tranquilizers, analgesics and anesthetics for procedures involving pain.²²⁹ These regulations are virtually meaningless because the vague terminology of the law allows the chief investigator to have absolute decision-making authority on animal care and use.²³⁰ For instance,

researchers can withhold tranquilizers, anesthesia, analgesia or euthanasia when they regard it as “scientifically necessary.”²³¹ An animal may not be used in more than one major operative experiment “except in cases of scientific necessity” or due to “other special circumstances.”²³² Researchers are required to insure that pain and distress are “minimized” and that the principal investigator “considered alternatives” to those procedures.²³³ Specific guidelines to clarify what is meant by the minimization of pain, scientific necessity, and what suffices as having considered alternatives are not given. These important considerations are deferred to the discretion of the investigator or laboratory veterinarian. Even if such guidelines were provided, they would in no way limit the scientific investigator since any regulation promulgated by the Secretary may be waived.²³⁴ To waive out of the regulations all that is required is that the laboratory veterinarian or principal investigator explain the deviation in the research protocol and in a report filed with the IACUC.²³⁵ The explanations given for any deviations from the regulations or the Act do not even have to be approved by the IACUC; they must only be filed.²³⁶ Thus, the already minimal regulations concerning housing, feeding, medical care, minimization of pain and distress, the consideration of alternatives and the use of analgesics and anesthetics for procedures likely to produce pain can all be waived.²³⁷ There is nothing in the Act that prevents a researcher from including an explanation for waiving every regulation in every single protocol that he or she writes.²³⁸ The practical effect of this waiver provision is to give the researchers whom are allegedly regulated the choice of whether or not to be regulated.²³⁹ As if these provisions did not already make clear that scientific researchers have absolute decision making authority with respect to animal use and treatment, the regulations spell it out by stating that:²⁴⁰

“nothing in this act...shall be construed as authorizing the Secretary to promulgate rules [or] regulations...with regard to the design, outlines, or guidelines of actual research or experimentation...performance of actual research or experimentation [or to] interrupt the conduct of actual research or experimentation.”

From a practical standpoint, these regulations suggest that scientific investigators can do what they want provided they simply comply with the formalities expressed in the law.²⁴¹ In some instances, the law expressly states that researchers are immune to the regulations even when they are found violating the law. For instance, the law allows inspectors to confiscate or destroy animals found to be suffering as a result of violations of the Act or regulations unless that animal is still required by the research facility to

carry out further research.²⁴² The absolute subordination of the laws and regulations to the mission of scientific research is precisely what Congress envisioned when creating the law, as evidenced by their remark “under this bill the research scientist still holds the key to the laboratory door.”²⁴³ Although the rules and regulations of the AWA may appear to offer an organized framework for protection of animal interests, it is nothing more than a jumble of formalities with no certified protection of animal welfare or interests whatsoever.²⁴⁴

The AWA was severely weakened in 2002, when the Federal Farm Bill contained an amendment by Jesse Helms (R-NC) to exclude from the definition of “animal” all birds, mice of the genus *Mus*, and rats of the genus *Rattus*, bred for use in research.²⁴⁵ Senator Helms explained to the Senate that the amendment was necessary so that none of the important work that was taking place in the medical research community got delayed or made more expensive.²⁴⁶ During the debates surrounding the amendment a video began circulating among members of Congress. The video showed a researcher cutting open the skull of a squirming baby rat and removing his brain without first numbing the animal in a bucket of ice, a procedure which the researcher acknowledged was in violation of experimental protocol to begin with.²⁴⁷ Companies who notoriously test on animals, such as Colgate-Palmolive and Procter & Gamble protested the passage of the Helms amendment.²⁴⁸ A survey conducted prior to the passage of the Helms amendment demonstrated that 73.3% of the members of the IACUC’s opposed the exclusions called for by the amendment.²⁴⁹ Nevertheless, Congress passed the amendment and erased ninety-five percent of all animals used in experimentation from any legislative protection.²⁵⁰ The amendment applies to birds, mice and rats used not only in medical research but all other types of research including cosmetics, perfumes, toothpaste, shampoo and industrial detergents. Thus, the minimal protections provided by the AWA now only covers five percent of all animals used in research, leaving ninety-five percent unprotected by any laws.²⁵¹ To put this into context, in 2001 more than 1.2 million animals other than birds, rats and mice were used in research, experiments and testing in the United States.²⁵² An estimated 20 to 25 million birds, rats and mice are used and killed in research and education each year.²⁵³

The AWA lacks provisions for the criminal prosecution of persons who torture animals in research laboratories.²⁵⁴ Most state animal-cruelty laws contain exceptions that make it inapplicable to what occurs in the research laboratory.²⁵⁵ Even those state statutes that have not expressly listed such exceptions are trumped by the AWA, meaning that lab-animals are at the mercy of the scientists running the lab.²⁵⁶ In *Taub v. State*, Dr. Edward Taub conducted research by surgically abolishing sensation in the limbs of monkeys in an effort to mimic the lack of sensation found in stroke victims.²⁵⁷ Dr. Taub investigated techniques to retrain the limbs by using restraint, electric shock and withholding of food to coerce animals to use the limbs they could not feel.²⁵⁸ Authorities raided the lab and found each monkey in a small cage that had not been cleaned for days.²⁵⁹ Several of the monkeys had bitten off fingers, and some had chewed into their limbs, leaving raw, open wounds the size of silver dollars that were covered with filthy bandages or not covered at all.²⁶⁰ The trial court found Dr. Taub guilty of violating the state anticruelty law for failing to provide veterinary care for six of seventeen monkeys.²⁶¹ However, the appellate court vacated the conviction holding that the state animal cruelty law was inapplicable to research animals pertaining to a federally funded program.²⁶² This landmark case indicates that state animal cruelty statutes simply do not apply to animals involved in federally funded research, which are regulated by the AWA.²⁶³ Given the lack of efficacy of the AWA and its complete deference to the investigators conducting the experiment, the implication is that those who experiment on animals are protected by absolute immunity from laws prohibiting cruelty to animals provided they comply with the formalities of the law.²⁶⁴

b. Regulations designed to promote psychological well being of primates

The regulations in Title 9 CFR requiring a physical environment adequate to promote the psychological well being of primates are inadequate and completely fail to fulfill its expressed purpose.²⁶⁵ To develop the initial 1989 proposed regulations APHIS called for the recommendations of the National Institute of Health and the American Association of Zoological Parks and Aquariums.²⁶⁶ The consensus among the primate experts was to require “sufficient space to engage in species-typical behavior,”

enclosure complexities, manipulable objects and varying methods of feeding.²⁶⁷ The “reports [from these experts] indicated that social interaction and exercise are equally necessary to promote psychological well being and that social grouping increases the primates’ physical activity.”²⁶⁸ Consequently, the regulations proposed in 1989 required social groupings, multiple forms of inanimate enrichments, and regular exercise.²⁶⁹ The discussions surrounding the proposal acknowledged that the minimal cage size requirements might not be large enough for the performance of species typical behavior, with or without other enrichments. The proposed standards resolved this by requiring the regular release of primates from cages for exercise.²⁷⁰ However, the final rule issued in 1991 removed the requirement for the release of primates from cages due to the risk of human safety and further refrained from imposing general group housing requirements.²⁷¹ Instead, APHIS simply reasserted the principle of social grouping, a balance of multiple enrichment forms and adequate space to achieve psychological well being of primates.²⁷²

i. social grouping and environmental enrichment

Every research facility must develop and follow an environmental enhancement plan that addresses the social needs of non-human primates known to exist in social groups in nature as well as the environmental requirements enabling them to express their species-typical activities.²⁷³ The provisions must be in accordance with accepted professional standards.²⁷⁴ The problem is that the generally accepted standards describe conditions in which non-human primates fail to demonstrate behavioral pathologies in captivity.²⁷⁵ The absence of abnormal behavior alone is not the best indicator of well being.²⁷⁶ A proper social grouping for nonhuman primates reflects the organizational and social structure in their natural environment and not in an artificial environment that fails to produce behavioral pathologies.²⁷⁷ Consider the rhesus macaques (*Macaca mulatta*), who are the most widely used nonhuman primates in research laboratories today.²⁷⁸ These nonhuman primates are intensely social by nature and, like human primates, require basic social interactions for their psychological well being.²⁷⁹ Overall, heterosexual group sizes for *M. Mulatta* is 8-180.²⁸⁰ The groups

consist of mothers, fathers, sisters, brothers, playmates and grooming partners.²⁸¹ Generally there are from two to four times as many adult females than males.²⁸² There exist dominance hierarchies in both sexes.²⁸³ Relationships among males range from peaceful to hostile while females generally live together in harmony.²⁸⁴ There is generally a tendency for mating between high-ranking adults.²⁸⁵ Although males lead and defend the group, the females and infants form a central subgroup within which the young are raised.²⁸⁶ The social status of the young is dependent on the ranking of the mother.²⁸⁷ All macaques have arboreal capability.²⁸⁸ They come down from the trees to forage or move over long distances.²⁸⁹ The macaque spends many hours traveling long distances, roughly 1,428 meters per day.²⁹⁰ They travel searching and foraging for food, which includes a wide variety of fruit, berries, grains, buds, seeds, leaves, grasses, roots and invertebrates.²⁹¹ As she chooses, the macaque can climb a tree, relax under a bush, groom her mother or nurse her infant.²⁹² These macaques are able swimmers and divers and prefer areas with accessible stretches of water.²⁹³ Their amazing intelligence makes them able to perform complex tasks, such as using colored rings as markers of different value in exchange for treats of different popularity.²⁹⁴ One macaque who went on a space flight learned to operate a complex system of levers, buttons and keys in the correct sequence in response to certain signals.²⁹⁵

In captivity the social grouping of nonhuman primates is radically distorted.²⁹⁶ Single caging is still the norm for laboratory primates.²⁹⁷ Solitary confinement is a serious stressor leading to apathy, depression, and behavioral pathologies such as self-mutilation, self-grasping, eye poking, rocking, pacing, and jumping in place and autoerotic stimulation.²⁹⁸ Self-stimulation is an exaggerated coping mechanism to combat boredom because "the chimpanzee's body and its products are among the very few objects in the restricted environment that are freely manipulable and subject to alteration."²⁹⁹ Rocking helps an infant compensate for the lack of motion stimulation

normally provided by the mother.³⁰⁰ Behavioral pathologies such as self-mutilation are more common among single-caged monkeys than severely stressed socially grouped monkeys.³⁰¹ Single-caged monkeys have a higher rate of diseases, such as hypertension, coronary atherosclerosis and immunosuppression.³⁰² Even monkeys that are paired with mothers and are repeatedly separated for routine research procedures, such as weighing and blood draws, exhibit higher levels of distress and pathological disturbance.³⁰³ In one study the value of social companionship was so high that some nonhuman primates chose it instead of food even when they were very hungry.³⁰⁴ Every potentially meaningful provision in the federal regulations concerning social grouping is crippled by the deference given to scientific investigators who create disturbing housing arrangements for these social and energetic animals.³⁰⁵ For instance, the committee may exempt an individual member from participation in the environmental enhancement plans “for scientific reasons set forth in the research protocols.”³⁰⁶ One need only look to specific environmental enhancement plans to verify that these exceptions are thoroughly exploited.³⁰⁷ The Southwest National Primate Research Center places macaques in single cages “if required by approved research protocol.”³⁰⁸ The New York University School of Medicine environmental enrichment plan states “while species-typical groupings...clearly provide the richest and most naturalistic social stimulation, this housing setting is often not possible for animals used in biomedical research.”³⁰⁹ It then states that “housing without social contact is employed if...necessary...for research protocols.”³¹⁰

The provisions in Title 9 CFR requiring facilities to address the social needs of nonhuman primates fail to insure that the social requirements of nonhuman primates are actually met and thus do not protect their fundamental interests.³¹¹ A research facility can decide whether or not it wants to accommodate and cultivate the social needs of the nonhuman primate. If it does not want to it simply records a reason for not doing so in the research protocol, such as fear of disease transmission.³¹² From the Federal Register’s legislative history up to and including the final rule social grouping was meant to become the default-housing scheme.³¹³ Those discussions acknowledged “group housing to be the most efficient and appropriate method of

ensuring that animals' social needs are met."³¹⁴ The failure of the final regulations to mandate social grouping was unsuccessfully challenged in court.³¹⁵ The court noted that while not formally mandated, the enumeration of exceptions to social grouping, such as contagious diseases and incompatibility of companions makes social grouping the norm.³¹⁶ However, nearly half of inspectors for APHIS who were polled felt that exemptions for social grouping were claimed by facilities for convenience rather than legitimate reasons.³¹⁷ They further reported that at least half of the facilities they were assigned to inspect were single housing primates.³¹⁸ During a follow-up interview, APHIS inspectors stated that too many primates were unnecessarily single-housed.³¹⁹ The very young monkeys (even 1-day old) were removed from their mothers for human hand rearing to create highly human dependent animals.³²⁰ These animals develop severe behavior pathologies and are never truly domesticated.³²¹ They become aggressive toward humans and, as a result, have their teeth removed to improve human safety.³²² The behavioral and anatomical pathologies that result from failed attempts to domesticate the nonhuman primates completely cripple the primate's ability to ever successfully integrate into a social group.³²³

Research facilities fail to provide adequate environmental enrichment for the nonhuman primates.³²⁴ The regulations require an enriched environment that will permit the expression of species-typical behavior.³²⁵ Examples listed to achieve this include perches, swings, mirrors, objects to manipulate, task-oriented feeding methods and interactions with humans.³²⁶ The lack of specificity fails to make clear what constitutes an acceptable plan.³²⁷ Hence, providing a single perch a few inches off the floor or a single toy such as a Frisbee satisfies the law.³²⁸ Because federal regulations allow a human to clean a cage while the primate is still in it a research facility could consider it adequate psychological enrichment that a human interacted with the primate by making her move to one side of the cage to avoid being blasted by the hose.³²⁹ Perhaps several times a day a human may come into the lab to draw her blood.³³⁰ The rest of the time the monkey may sit still, bored, perhaps turning around occasionally, 24 hours

a day, 7 days a week.³³¹ As the years go by the monkey may be driven mad by loneliness, fear and boredom.³³² She may begin to bounce up and down, occasionally stopping to bite herself, and in the process drawing blood or tearing flesh.³³³

Especially disturbing is the section purporting to give “special attention” to infants, juveniles, those in psychological distress and those used in research for which the protocol requires restricted activity.³³⁴ It is unthinkable that these special cases, along with any other nonhuman primate in the lab, may be exempt from any part of, or the entire enhancement plan for reasons due to health, well being or “scientific reasons set forth in the research proposal.”³³⁵ Nevertheless, this is precisely what the regulations permit.³³⁶ On the contrary, all nonhuman primates, especially those requiring special attention with legitimate health problems or whom captivity and the stress of research have depleted their ability to cope, should be provided with alternative forms of enrichment and not the absence of it.³³⁷ Indeed, if a research protocol can not be accomplished without providing for the psychological and environmental needs of a nonhuman primate then it simply should not be approved.³³⁸ If nonhuman primates are unwillingly sacrificing their lives for a research project then the lab should be required to pay for their every need to protect the nonhuman primate’s interest to the best of its ability.³³⁹

APHIS inspectors have reported concerns about facilities that satisfy enrichment requirements with one perch, one rubber toy and occasional grapes for a single-caged primate.³⁴⁰ Some facilities address one area of species-typical behavior but neglect others.³⁴¹ APHIS inspectors have reported that the requirement for special attention for certain primates fails to generate the needed increase in enrichment for these animals.³⁴² In fact, a relatively large percentage of citations issued to violators have involved the provision for primates requiring special attention.³⁴³ APHIS inspectors have indicated that the lack of specific criteria and the vague language of the regulations make it difficult to judge whether a facility is in compliance or out of compliance with the regulations.³⁴⁴

ii. cage sizes

The living conditions required for primate housing is utterly astonishing. Cage sizes are established based on the weight of the animal, not its size, and this falls far short of the necessary space to promote the well being of this intelligent and dynamic species.³⁴⁵ Under current regulations it is acceptable to house a 22-pound monkey in a cage that is 2x2x2 feet, which yields 4.3 square feet of floor space and 30 inches in height.³⁴⁶ This is equivalent to keeping a full-grown cocker spaniel in a 2x2-foot cage. Long-tailed macaques will sit with their tail soaking in pans of their urine and feces because cage size regulations do not take into account the length of the animal, including the tail.³⁴⁷ Surely, we know enough about these animals to know that such regulations are an unequivocal interference with their fundamental interest.³⁴⁸ Incredibly, research facilities may be exempt from even these most minimal of standards by simply stating their reason in the research proposal or receiving approval by the veterinarian.³⁴⁹

The laboratory conditions under which the nonhuman primates live are staggering. APHIS has publicly admitted that the federal requirements establish standards that are less than ideal and encourages facilities to surpass these minimum standards.³⁵⁰ Our Federal government's failed attempt to improve the welfare of these animals that unwillingly surrender their lives for the sake of human scientific knowledge must be reconsidered. The interests of these animals must be irrevocably protected. Not only are the current federal laws and regulations grossly incapable of preventing the suffering caused by research protocols, they fail to require without exception that measures be taken to meet the most basic and fundamental needs of nonhuman primates. They fail to mandate the comfort of family and friends. They fail to mandate social grouping to permit physical contact, grooming, sharing and caring. They fail to mandate interesting and stimulating activities to occupy their bodies and their minds. They fail to ensure adequate space for animals to express their desire to run, swing and play. When research institutions claim that their practices comply with current and applicable law, do not be comforted, because individuals living in these institutions are not. They suffer, each and every day, under current and applicable animal welfare law.

a. Lack of enforcement of the law and its regulations

A 2005 Audit Report published by the USDA's Office of the Inspector General of the Animal Care Program's Inspection and Enforcement Activities further conveys the

inadequacies of animal care and treatment.³⁵¹ The report itself reflects the results of an audit of APHIS's Animal Care unit and the effectiveness of the IACUC.³⁵² The report indicated that APHIS's Eastern Region failed to pursue enforcement actions against 126 of 439 violators of AWA.³⁵³ While the region reported an average of 209 suspected violators to the Inspector in 2002-2003, only 82 cases were reported in 2004.³⁵⁴ Referring to the report, Congressman George E. Brown stated that he was "deeply concerned with the agency's ability and willingness to adequately monitor and reasonably ensure the humane care and treatment of animals."³⁵⁵

The report also indicated that "fines assessed against violators of the AWA are usually minimal."³⁵⁶ APHIS gives an automatic 75-percent discount to almost all violators as a means of reaching an agreement on the fine amount and avoiding the court.³⁵⁷ As a result of the net minimal fine "violators now consider the monetary stipulation as a normal cost of conducting business rather than as a deterrent for violating the AWA."³⁵⁸ In addition to the 75-percent discount, APHIS offers other concessions, such as using a portion of the fine to improve facilities, making the fines utterly meaningless.³⁵⁹ In one instance, APHIS calculated the fine to be \$17,325.³⁶⁰ After the 75-percent discount the fee was \$4,300-\$1,000 in cash and \$3,300 to be forgiven if there is compliance with the AWA for 2 years.³⁶¹ In effect, the violator paid 6-percent of the original fine.³⁶² Lack of adequate resources was determined to be part of the problem associated with APHIS' inability to adequately monitor and inspect animals and facilities.³⁶³ In addition to fiscal constraints, however, the Inspector General's report indicated that APHIS was neglecting its statutory obligations by renewing facility licenses even when cited violations past and present had not yet been corrected.³⁶⁴ Additionally, APHIS is not inspecting research facilities before issuing the initial registrations; therefore, noncompliance with the Act may go unnoticed until APHIS' first inspection up to a year later.³⁶⁵ In the words of Congressman Brown, "much more needs to be done to ensure that the animals in our care are treated humanely....and provided a more meaningful level of protection."³⁶⁶ The question, then, is what can be done to provide this meaningful level protection of animal interest?

IV. Proposal for change

A. Property status is no longer justified

The property status of animals has led to laws that not only fail to protect the interest of animals but also facilitate the institutionalized torture of animals.³⁶⁷ Within the context of scientific research, the law cannot regulate the way animals are used because they are the property of the laboratory facility.³⁶⁸ The mere five- percent of research animals whose use is supposed to be regulated by the AWA cannot access the courts to contest any inhumane treatment because they have no enforceable legal rights.³⁶⁹ Interestingly, other forms of property such as corporations, ships and churches have been granted standing to sue in court.³⁷⁰ This is odd given the unique quality to living, breathing property that distinguishes it from inanimate property. Animals suffer, desire, love and learn, while other property forms such as corporations and ships do not.³⁷¹ It is puzzling that our legal system grants some forms of inanimate objects legally enforceable rights and denies them to sentient animals. One commentator explains that granting personhood to inanimate entities is an efficacious mechanism for courts to conduct and regulate business transactions and practices.³⁷² This is justified because it does not create the enormous societal upheaval that would occur if animals could no longer be enslaved or have their bodies used without their consent.³⁷³ Granting rights to nonhuman animals would incur significant costs to society in the loss of potential medical advances that will relieve suffering and death for both humans and animals.³⁷⁴ This logic is seriously flawed. It is akin to arguing that in a world where owning slaves does not provoke social upheaval, it may be justified if it is economically or socially efficacious. This type of argument highlights why ethical tenets ought to motivate our social and economic undertakings and not the other way around.

The property status of animals should be eliminated because the classification stems from ancient laws and philosophies whose foundations have been scientifically and morally discredited.³⁷⁵ The classification of animals as property emerged from the ancient Greek law.³⁷⁶ The first known comprehensive European Law Code, the Cretan Law Code of Gortyn from the 5th Century BC, referred to the ownership of cattle and to

the division of inherited livestock.³⁷⁷ The prevailing Stoic philosophy during the 3rd Century BC regarded the world and everything in it as created for the benefit of humans, who occupied the pinnacle of a natural hierarchy of living beings.³⁷⁸ Greek law considerably shaped Roman law, which in turn shaped Western law.³⁷⁹ Like the Greek law, Roman law regarded animals as property.³⁸⁰ A set of adjunct Roman laws created in 287 B.C. provided that anyone who unlawfully killed a four-footed beast was required to pay the highest value of the property.³⁸¹ The Old Testament, which was written between the years 1400BC-400BC describes humans as occupying a central place in the universe between God and nature.³⁸² According to the story of creation, after creating the fish, birds, and cattle, God created mankind in His own image. God let mankind “have dominion over the fish of the sea, the birds of the air, and the cattle, and over all the wild animals and all the creatures that crawl on the ground.”³⁸³ The English common law classification of animals as property was an amalgam of Greek, Roman and Biblical laws.³⁸⁴ In the mid-eighteenth century William Blackstone published his enormously influential *Commentary on the Laws of England* identifying the legal thinghood of animals as originating from Roman laws and cosmology. He referred to *Genesis* as the divine source of humanity’s claim to ownership of nearly everything, including nonhuman animals.³⁸⁵ One hundred years later in the post-revolutionary era, a man named James Kent transplanted the English common law to America through his *Commentaries on American Law*.³⁸⁶ American law thereby embraced the English common law principle that animals were property.³⁸⁷

The American animal laws that evolved from the property status of animals were generally interpreted under the assumption that humans transcended over nonhuman animals.³⁸⁸ While no record of legislative debates exist, the early construing courts commonly understood the statutes’ purpose as being “directed against acts which may be thought to have a tendency to dull humanitarian feelings” or “corrupt the morals” of those who observe such acts.³⁸⁹

“Such statutes were not intended to interfere...with the necessary discipline...of such animals...Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men...it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better

feelings of our race...human beings should be kind and just to dumb brutes; if for no other reason that to learn how to be kind and just to each other.”³⁹⁰

Judicial opinions convey that the impetus behind the creation of animal cruelty laws was not to protect the interest of animals but rather to prevent the desensitization of humans toward each other.³⁹¹ Modern cases have remained faithful to this notion of indirect duty to animals.³⁹²

Early developing laws recognized that any attempt to prevent animal pain and suffering needed to be balanced against human interests.³⁹³ That is why statutes often only prohibit “unnecessary” pain and suffering.³⁹⁴ Unnecessary pain and suffering, or “cruel” treatment, is understood as that suffering that is not a part of customary practices or does not productively facilitate animal exploitation.³⁹⁵ If the conduct is not linked to economic benefit, or is accompanied by societal perspectives deemed undesirable, such as the moral disapproval of gambling that occurs with dog fighting, then the activity is considered “cruel” or unnecessary.³⁹⁶ For instance, pain and suffering is regarded as necessary when an animal is killed during research for the advancement of scientific knowledge.³⁹⁷ However, that same animal may not be starved to death just because the researcher feels like it since this behavior does not facilitate the exploitation of animals for science or any other purpose.³⁹⁸ The threshold for inflicting necessary pain and suffering on an animal is comparatively lower than that required for inflicting necessary pain and suffering on a human.³⁹⁹ If a researcher needed fifty non-consenting human beings in order to investigate a cure for HIV, most people would say that the rights of the potential victims trump the necessity of inflicting them with pain and suffering.⁴⁰⁰ When it comes to experimenting on animals, however, human interest in achieving a cure for HIV justifies the necessity of inflicting pain and suffering on the animal.⁴⁰¹

In the eighteenth century western legal philosophy began to separate itself from the theological teaching that God endowed man with dominion over all creatures of the earth.⁴⁰² The concept of a natural hierarchy of beings was scientifically discredited in the nineteenth century.⁴⁰³ The twentieth century produced scientific disciplines and

discoveries that reinforced Darwin's theory of evolution and this redefined the relationship between human and nonhuman animals in this world.⁴⁰⁴ Understood within the appropriate historical context, the classification of an animal as property "was borrowed from ancient laws whose foundations have been destroyed and whose mechanical application today [by the courts] violates modern notions of fundamental principles of justice."⁴⁰⁵ These revelations will only illuminate current judicial decisions when judges depart from previous judicial decisions that do not rest upon modern scientific knowledge.⁴⁰⁶ The court in *Bueckner v. Hamel* acknowledged this by stating that "the law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property."⁴⁰⁷ Immediate judicial action is an appropriate mechanism to help bring the law up to par with the scientific and moral developments of the day, especially in light of failed legislative efforts to do so.⁴⁰⁸ The courts have already acknowledged that animals have similar interests as humans and now the next step is to offer animals the protection not ordinarily provided to inanimate objects.⁴⁰⁹ Some courts have already blazed the trail toward this end.⁴¹⁰ The court in *Corso v. Crawford Dog and Cat Hospital, Inc.* stated, "this court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."⁴¹¹ In *Bueckner*, the court echoed this by stating:

"We now know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically...It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plight of stranded whales and dolphins...It is, on the contrary, a recognition of kinship that reaches across species boundaries...The law should reflect society's recognition that animals are sentient and emotive beings..."⁴¹²

B. Intermediate status of animals

The courts are well equipped to elevate the legal status of animals to a category that occupies a position between person and property.⁴¹³ For instance in *Davis v. Davis*, the issue was whether frozen pre-embryos produced through in-vitro-fertilization were

property or persons.⁴¹⁴ If they were persons then the court was obligated to provide the pre-embryos the opportunity for implantation and thereby ban any activity that might harm the pre-embryos.⁴¹⁵ If they were property the couple who produced the products could do as they wished with them.⁴¹⁶ The court found that the frozen products were not persons because they had not yet developed the features of personhood, had not become developmentally individual and may never realize their full biological potential.⁴¹⁷ Neither was the product property because of its potential to become a person.⁴¹⁸ The court concluded that a pre-embryo is neither “person” nor “property,” but instead occupies an “interim category” that entitles it to “special respect” because of its potential for human life.⁴¹⁹ The special respect created the obligation not to injure the potential offspring who might be born.⁴²⁰ The court made clear that this category is not a property interest.⁴²¹

Another entity that occupies an intermediate status is the sperm cell. In *Hecht v. Superior Court of Los Angeles County*, the issue was whether frozen sperm were property and thereby subject to the terms of a settlement agreement between the deceased donors children and his girlfriend.⁴²² The court concluded that sperm has the potential to create a child after fertilization, growth and birth and thus occupies an intermediate position between persons and property and should be treated with “special respect.”⁴²³ Similar to other biological entities, animals must be recognized as something more than property to have their interest rightfully protected. Like pre-embryos that have the potential for life, and sperm that have the potential to be fertilized and create a child, animals are sentient lives with the potential to feel pain, experience emotions, give and return love.⁴²⁴ People often love animals, especially their pets, because they convey some of the best human traits, including loyalty, trust, playfulness and love.⁴²⁵ The departure from property status captures our empirical understanding that the psychological, emotional and physiological characteristics of animals are very similar to ours. A departure from property status must be complete and unconditional such that the new legal category has no connection to, or in any way implicates, property status. Terms such as ‘quasi-property’ or ‘special-property’ would defeat the legal recognition of animals as having intrinsic value worthy of protection regardless of their utility to humans.⁴²⁶

The intermediate classification of animals would entitle animals to “special respect,” imposing upon humans the “obligation not to injure” the animals.⁴²⁷ This category would reflect the inherent value of animals by giving them legally enforceable rights to protect their interests.⁴²⁸ When the law balances the loss of human interest in not using the animal versus the loss of interest to the animal in being used, it can no longer presuppose that an animal’s interest counts for less than a human’s interest because the animal is no longer property. The protection of animal interests will shift the legal issue away from whether the least amount of suffering has been inflicted to achieve a given purpose toward whether a given reason to exploit animals is necessary in the first place. Unnecessary suffering will no longer be regarded as suffering over and above what is required to achieve a given purpose. Instead, unnecessary suffering will be that which is produced in order to achieve human interests that are not essential to the well being or survival of human beings. Under this classification, lifestyle enrichment “provided by improved cosmetics and perfume does not seem sufficient to justify the infliction of real suffering.”⁴²⁹ Scientific research, however, has provided a wealth of understanding that cannot be ignored.⁴³⁰ Research with primates spearheaded the development of the polio vaccine, and other animal research has contributed to the discovery of insulin, the invention of transplantation techniques, and the improvement of cancer therapies.⁴³¹ Although the rights of animals may lead to fewer experiments, any scientific experiments that will lead to advances that offer promise for survival benefit may be justified.⁴³² On the other hand, those experiments that kill and maim animals, yet serve no legitimate scientific purpose would not be justified.⁴³³ Rodent exposure to the saccharine equivalent to 1,800 bottles of soda pop a day would not justify the deprivation of the animal’s interests.⁴³⁴ Rhesus monkeys who are taught to hit a button to administer cocaine into their bloodstream, allowed to become addicted and to continue hitting the button again and again even in the midst of convulsions may not justify the deprivation of animal interest.⁴³⁵ Scientists with proposals for developing a cure for cancer or AIDS may have a stronger claim, but even still the rights of the animals will protect those interests whose deprivation is not necessary in order to achieve reliable scientific data, such as adequate living space to express their species-typical behavior and an enriched environment to stimulate their minds and bodies.⁴³⁶

As holders of rights, animals will have standing to access courts and defend the unlawful deprivation of their interests. Methods for bringing claims on behalf of plaintiffs that cannot defend themselves are already incorporated into the American judicial

system.⁴³⁷ A comatose man or a 6-month old child are able to defend their interests in court through the device of appointing a guardian *ad litem*, who is not required to plead any direct personal injury.⁴³⁸ A guardian *ad litem* can represent to interest of an anencephalic child or a person in a persistent vegetative state.⁴³⁹ Similarly, animals with legal rights will satisfy standing by meeting the three criteria of injury-in-fact, causation and redressibility. The guardian *ad litem* of the animal could plead as the injury-in-fact the injury to the animal.⁴⁴⁰ This would more completely capture the intent that the Framers had when developing the standing doctrine by providing access to federal courts to those with a personal stake in the outcome of a case.⁴⁴¹

C. Criteria for Animal Use

If the intermediate status of animals is to protect the deprivation of animal interests from unnecessary exploitation there must be some guidelines to follow. Here are some fundamental criteria that can be used:

1. Animals have fundamental rights
 - Fundamental rights include the right to be free from pain and suffering, the right to the continued existence of life, and the right to express species-typical behavior.
2. Any experiment that deprives animals of their right must aim to provide scientific data that will improve the well-being or survival capability of human.
 - Experiments that aim to improve the well-being of humans produce scientific data that will protect or promote the quality of human health.
 - Experiments that aim to improve the survival capability of humans produce scientific data that increase the longevity of human life.
3. An experiment can deprive only those animal interests whose protection would otherwise make the performance of the experiment impossible. Any interest that can be protected without interfering with the research protocol must be fully protected.

V. Animal Advocacy movement

The legal protections currently afforded to animals are welfare based.⁴⁴² The central tenet of animal welfare is that animal suffering can be considerably reduced by regulations that promote the humane treatment of exploited animals.⁴⁴³ The goal of welfare based laws is to incrementally improve the lives of exploited animals without directly challenging either the underlying exploitation itself or the property status of animals.⁴⁴⁴ That is why it is not only permissible to exploit animals for scientific research but also to deprive animals of those interests that are not indispensable to the successful performance of an experiment.⁴⁴⁵ Because animal welfare laws are grounded in the property status of animals, the interest of animals will always count for less than human interests do. For this reason, animal welfare laws will never equitably protect animal interests from human exploitation.

Laws granting animals legal rights can better protect animal interests because they will ultimately abolish, rather than regulate, animal exploitation except when justifiable human interests prevail.⁴⁴⁶ Because the property status of animals is a structural and practical obstacle to the recognition of animal rights, there must be an incremental deconstruction of the property status of animals through legal changes as well as social and individual education.⁴⁴⁷ The inevitable eradication of the property status of animals must be the end goal of any movement that seeks to provide animals with the equitable protection of their interests.

Conclusion

Animals are breathing, living beings. They have beating hearts. They have mothers and fathers. They form communities to foster their social and psychological interests. Although animals are property under the law it is all too apparent that they are not the typical inanimate objects. The legal status of animals as property is antiquated, inhumane and out of step with reality. Animals now deserve identifiable, enforceable legal rights that at the very least protect them from unnecessary harm, abuse, cruelty, suffering, starvation, inadequate shelter, and the deprivation of their fundamental interests. Their legal property status precludes their acquisition of these rights, which in turn facilitates the large-scale animal exploitation often for reasons that serve no fundamental human purpose. The reluctance of the political system to interfere with property rights of owners in order to protect animals is a result of a political system that is dominated by economic and personal interests that stand to lose in the event of tighter and more stringent animal protection.⁴⁴⁸ If science and morality support the equal consideration of living, breathing, sentient beings, then the law must develop

along side of these disciplines and not apart from them. To this end, the law ought to respect the inherent value of sentient animals by protecting their interests with rights. In order to give animals the rights they deserve changes in legal policy and procedure must be accompanied by change in the individual and social conscience. Heightened levels of education surrounding animal exploitation are indispensable to producing the social and individual political foundation to reinforce legal change. Education should address how animal rights will fundamentally change the way we live by ending those scientific experiments whose only purpose is to enhance our lifestyle but further no fundamental human purpose. Individuals must learn about the biological, physiological and psychological similarities between animals and humans that make the effects of their suffering and deprivation of interests the same as ours.⁴⁴⁹ This understanding undermines the contention that providing any rights to animals challenges the sanctity and primacy of human rights.⁴⁵⁰ The reason the first animal protection laws were passed in this country was to prevent the desensitization of humans toward each other.⁴⁵¹ The animal brutality that ensued during the so called enlightened period reminds us of the regrettable actions that may occur without appreciating the sanctity of all sentient life.⁴⁵² The societal and moral benefits that will accrue from respecting the interests of animals, including a reduction on violent crime, domestic violence and serial killing, are also important.⁴⁵³ The implication of elevating animal legal status to an intermediate position does not necessarily prevent our choosing human interests over animal interests in situations of genuine conflict- when the use of animals will lead to fundamental human gains. But it will require a moral obligation to stop using animals in situations that can not be considered necessary for the well being or survival of our species.

The underlying reason for animal exploitation must be challenged in order to achieve equal consideration of interest for animals. Animal welfare laws will never lead to the equal consideration of animal interests because the property status of animals justifies animal interests counting for less than human interests. The development of animal rights laws will better protect the interest of animals. The incremental deconstruction of the property status of animals will ultimately lead to the extension of genuine rights to animals and the equal consideration of their interests. This will protect animals from being exploited for trivial human interests. The common law is already equipped with the legal mechanisms to promote these ends. The courts have already developed the intermediate classification for biological entities that are regarded as more than property but not quite persons. The device of appointing a guardian *ad litem* allows persons to represent the best interest of animals who cannot defend themselves without help. The common law has historically proven itself willing to evolve along side moral and scientific advancements. Courts have already begun to recognize that animals have

inherent value whose interests are worthy of protection. Jurists should now use this recognition as the foundation for ending the unnecessary exploitation of animals through the equitable and just evolution of the common law.

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2 Gary L. Francione, "Animals-Property or Persons?" *Rutgers University (Newark) Legal Working Paper Series. Rutgers Law School (Newark) Faculty Papers*. Working Paper 21. 28-29 (Jan. 2004); Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 Law & Contemp. Prob. 9, 37 (2007).

3 *Id.*

4 Lee Hall & Anthony Jon Waters, *From Property to Persons: The Case of Evelyn Hart*, 11 Seton Hall Const.L.J. 1, 2 (Fall 2000) (arguing that science has demonstrated that great apes are complex beings with emotional lives. The framers of the constitution did not have this knowledge. Present scientific knowledge of their abilities compels their reclassification as persons and our constitution ought to adapt to this current knowledge).

5 BERNARD E. ROLLINS, ANIMAL RIGHTS AND HUMAN MORALITY, 116 (Prometheus Books, 1992).

6 David S. Favre, *Judicial Recognition of the Interests of Animals-A New Tort*, 2005 Mich. St. L. Rev. 333, 338-39 (2005).

7 *Id.* at 339.

8 U.S.Const amend XIV, §1.

9 Gary L. Francione, "Animals-Property or Persons?" *Rutgers University (Newark) Legal Working Paper Series. Rutgers Law School (Newark) Faculty Papers*. Working Paper 21. 28-29 (Jan. 2004); BARRY R. FURROW et. al., BIOETHICS: HEALTH CARE LAW AND ETHICS, 412-418 (4th ed., West Publishing Co., 2001).

10 Waters, *supra* note 4, at 1; Vanderau, *supra* note 169, at 722; Waisman, *supra* note 56, at 39.

11 Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 St. John's L. Rev. 455, (2006).

12 Francione, *supra* note 2, at 14.

13 *Id.*, at 15; see also In Re Estate of Howard H. Brand No. 28473 (Vt. Prob. Ct. Mar 17, 1999) (“Humane Societies are legally authorized to euthanize injured, sick, homeless or unwanted pets and animals”).

14 Vanderau, *supra* note 1, at 723.

15 Vanderau, *supra* note 1, at 723.

16 Francione, *supra* note 2, at 15.

17 Francione, *supra* note 2, at 22; Michael Pollan, An Animal's Place, N.Y. TIMES MAG., Nov. 10, 2002, at 58. (“where their interests are the same, the principal of equality demands they receive the same consideration”); PETER SINGER, ANIMAL LIBERATION, 5 (2nd ed. 1990) (quoting Bentham “Each to count for one and none for more than one”).

18 *Id.*

19 *Id.*

20 Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. Chi. Legal F. 231, 243 (2006).

21 See generally Francione, *supra* note 2, at 22

22 *Id.*, at 23.

23 *Id.*, at 12.

24 *Id.*

25 Francione, *supra* note 2, at 15, 23.

26 *Id.*

27 *Id.*, at 23-24; Thomas G. Kelch, *Toward a Non-Property Status For Animals*, 6 N.Y.U. Envtl. L.J. 531, 537 (1998).

28 Francione, *supra* note 2, at 15-16.

29 Francione, *supra* note 20, at 242.

30 Shigehiko Ito, *Beyond Standing: A Search for a New Solution In Animal Welfare*, 46 Santa Clara L. Rev. 377, 403 (2006) (arguing that in the context of scientific research it is easy to dismiss the interests of animals by regarding them as personal property).

31 Francione, *supra* note 2, at 18.

32 See generally Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty Free” Labeling on Cosmetics*, 81 N.Y.U.L.Rev. 454, 454-55 (2006); Ito *supra* note 30, at 403.

33 Francione, *supra* note 2, at 18.

34 *Id.*

35 Francione, *supra* note 2, at 18.

36 7 U.S.C. 2143(a)(3)(A); 7 U.S.C. 2143(a)(3)(B).

37 See generally 7 U.S.C. 2143 (a)(3)(E) (provision allows exceptions to any provision in the Act when specified in the research protocol and filed with the IACUC).

38 Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" With its Meaning in Animal Cases*, *Wm. & Mary Env'tl. L. & Pol'y Rev.* 681, 715 (Spring 2005).

39 Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *70 Law & Contemp. Prob.* 9, 45 (2007).

40 Francione, *supra* note 39, at 12; DeCoux, *supra* note 38, at 683-84.

41 Gary L. Francione, *Animals as Property*, *2 Animal Law* (i) (1996).

42 Cass R. Sunstein, "Standing For Animals" *University of Chicago Law School, Public Law and Legal Theory*. Working Paper No. 06. 32, 33 (Nov. 1999).

43 *Id.*

44 *Id.* at 32.

45 *Id.*; see also 7 U.S.C. 2143(a)(2)(A).

46 *Id.*

47 See generally 7 U.S.C. 2143 (a)(3)(E)

48 Ito, *supra* note 30, at 403 (quoting GARY L. FRANCIONE, *ANIMALS PROPERTY AND THE LAW*, 187-90 (Temple University Press, 1995).

49 See, U.S.Const amend XIV, §1, *supra* note 8; Francione, *supra* note 2, at 28-29; FURROW, *supra* note 9, at 412-418.

50 Francione, *supra* note 2, at 28-29.

51 See generally RONALD M. NOWAK, *PRIMATES OF THE WORLD*, 25-31, (John Hopkin's University Press 1999); Francione, *supra* note 2, at 34.

52 Francione, *supra* note 39, at 35, 41 ("It is not necessary in any sense to eat meat or dairy products. If the animal-rights movement cannot take a principled position on an activity that results in the suffering and death of billions of animals for no reason other than that we enjoy the taste of meat and dairy, then the movement can take no principled stand on any institutional exploitation").

53 9 C.F.R. § 3.83(b) (2005).

54 7 U.S.C. 2143 (a)(2)(A); 7 U.S.C. 2143 (a)(3)(E).

55 Francione, *supra* note 39, at 16 (In a parallel to my comment regarding bigger cages for monkeys, in discussing slaughterhouse compliance with new guidelines Francione states "Battery hens that supply

some of the major fast-food chains may now live in an area equivalent to a square of approximately 8.5 inches rather than the average industry standard - a square of approximately 7.8 inches - but it would be nonsense to claim that the existence of a battery hen in the larger cage is anything but miserable”).

56 SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, *ANIMAL LAW: CASES AND MATERIALS*, 39 (3rd ed. Carolina Academic Press 2006).

57 Kelch, *supra* note 27, at 535.

58 Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morgan*, 95 Calif. L. Rev. 513, 520 (April 2007) (arguing that the American legal system is already equipped to allow animals standing on the basis of their own injuries via judicially established guardianship); see also 7 U.S.C. 2131(1) (2005).

59 *Id.*, at 520.

60 Hogan, *supra* note 58, at 520.

61 *Id.*, at 520; see also *Ito supra* note 30, at 390; Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 935 (4th Cir. 1986) (the court held private citizens did not have standing to challenge a medical researcher's compliance with federal standards for the care of laboratory animals).

62 DeCoux, *supra* note 38, at 720; Waisman, *supra*, note 56, at 183 (quoting Warth v. Seldon, 422 U.S. 490, 498 (1975)).

63 *Id.*, at 722; Hogan, *supra* note 58, at 516.

64 U.S. Const. art. III, 2, cl. 1.

65 *Ito*, *supra*, note 30, at 386.

66 Waisman, *supra* note 56, at 183-4; Animal Legal Defense Fund v. Espy 23 F.3d 496 (D.C. Cir. 1994).

67 Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

68 See, e.g., Humane Soc'y of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) (finding no aesthetic injury where organizations' members had not visited the animal in question); Animal Legal Defense Fund v. Glickman 154 F.3d 426 (D.C.Cir. 1998) (on at least nine separate occasions plaintiff observed animals at zoo living in conditions that lawful regulations would have prohibited. As a result of unlawful regulations plaintiff was found to suffer an injury to his aesthetic interest in observing animals living in nonhumane condition).

69 Hogan, *supra* note 58, at 521.

70 Int'l Primate Prot. League v. Inst. For Behavioral Research, Inc., 799 F.2d 934, 936 (4th Cir. 1986) (monkeys were given inadequate food and water and were kept in unsanitary conditions. Some monkeys chewed their own fingers and mutilated their own limbs); see also Magnotti, *supra*, note 348, at 468-69.

71 Taub v. Maryland, 463 A.2d 819, 820 (Md. 1983).

72 NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF*, 141 (Viking Books 2007).

73 DeCoux, *supra* note 38, at 716 (citing Peter Carlson, The Great Silver Spring Monkey Debate, WASH. POST MAG., Feb. 24, 1991, at W15).

74 *Id.*

75 Magnotti, *supra* note 11, at 469-70.

76 See Int'l Primate Prot. League, 799 F.2d at 938-39.

77 *Id.*

78 Magnotti, *supra*, note 11, at 470-1.

79 *Id.* (quoting GARY L. FRANCIONE, ANIMALS PROPERTY AND THE LAW, 75 (Temple University Press, 1995)).

80 Francione, *supra*, note 39, at 28-29

81 Francione, *supra*, note 39, at 28-29.

82 Ito, *supra* note 30, at 411.

83 *Id.*

84 *Id.*

85 *Id.*

86 See e.g., Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1991) (court stated that the bird has legal status and wings its way into court in its own right); See also Northern Spotted Owl et al. v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988) (Northern Spotted Owl had standing to sue the Secretary of the Interior for not list the Owl as a threatened species); Marbled Murrelet, Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995) (the Marbled Murrelet, an endangered animal, had standing to sue a lumber company to to prohibit the taking of its habitat).

87 Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549 (D. Haw. 1991). (court denied standing to the nine remaining wild Hawaiian Crows to allow environmental officials access to their property and execute a plan to save them from extinction). Cetacean Comm. v. Bush, 386 F.3d 1169 (9th Cir. 2004) (without analyzing the standing doctrine court denyies standing to whales, dolphins, and porpoises challenging the Navy's use of low frequency active sonar).

88 Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium 836 F. Supp. 45 (D. Mass. 1993) (dolphin lacked standing to challenge the aquarium's decision to deliver her to the navy for testing).

89 *Id.*

90 *Id.*, at 49-50.

91 Sunstein, *supra* note 42, at 28.

92 *Id.*

93 *Id.*

94 DeCoux, *supra* note 38, at 740.

95 Ito, *supra* note 30, at 402.

96 DeCoux, *supra* note 38, at 743.

97 Waters, *supra* note 4, at 5 (“there will be a great deal of opportunity to adapt constitutional meaning to changes in both understanding and practice over time”).

98 In Re Estate of Howard H. Brand No. 28473 (Vt. Prob. Ct. Mar 17, 1999); Brooke J. Bearup, *Pets: Property and the Paradigm of Protection*, *Journal of Animal Law*, 177 Vol.3 (2007).

99 See generally Waters, *supra* note 4 (arguing that science has demonstrated that great apes are complex beings with emotional lives. The framers of the constitution did not have this knowledge. Present scientific knowledge of their abilities compels their reclassification as persons and our constitution ought to adapt to this current knowledge).

100 Favre, *supra* note 6, at 364; Pollan, *supra* note 17, at 58.

101 Favre, *supra* note 6, at 364.

102 Michael Pollan, *An Animal's Place*, N.Y. TIMES MAG., Nov. 10, 2002, at 58; Cass R. Sunstein, *The Rights Of Animals*, 70 U of Chi. L.R. 387, 395 (2003) (“eating meat would be acceptable if decent treatment were given to the animals used for food”); Francione, *supra* note 20 at 239 (citing PETER SINGER, ANIMAL LIBERATION, 229-30 (Random House 2d ed 1990) (it is morally justifiable to eat animals who have a pleasant existence in a social group suited to their behavioral needs, and are then killed quickly and without pain); Favre, *supra* note 6 at 364.

103 *Id.*

104 Nicola S. Clayton et al., *Can Animals Recall the Past and Plan for the Future?* 4 *Neuroscience* 685, 686 (Aug. 2003).

105 *Id.* at 685.

106 *Id.* at 685.

107 Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. Chi. Legal F. 231, 236-38 (2006).

108 See generally Charles B. Moomey et. al., *Prognostic Value of Blood Lactate, Base Deficit, and Oxygen Derived Variables in an LD50 Model of Penetrating Trauma*, *Critical Care Medicine*, 154-161, vol.27(1) (Jan. 1999) (Study conducted to determine whether blood lactate, base deficit, or oxygen derived hemodynamic variables correlate with morbidity and mortality rates after artificially induced penetrating trauma and hemorrhagic shock); Francione, *supra* note 20, at 238.

109 *Id.*, (13 of 29 experimental subjects died from hemorrhagic shock).

110 Cass R. Sunstein, *The Rights Of Animals*, 70 U of Chi. L.R. 387, 395 (2003) (“eating meat would be acceptable if decent treatment were given to the animals used for food”); Francione, *supra* note 20 at 239 (citing PETER SINGER, ANIMAL LIBERATION, 229-30 (Random House 2d ed 1990) (it is morally

justifiable to eat animals who have a pleasant existence in a social group suited to their behavioral needs, and are then killed quickly and without pain); Favre, *supra* note 6 at 364.

111 *Id.*, at 395; *see also* Pollan, *supra* note 17, at 110 ("What's wrong with animal agriculture-with eating animals-is the practice, not the principle...people who care should be working not for animal rights but animal welfare-to ensure that farm animals don't suffer and that their deaths are swift and painless").

112 Francione, *supra* note 2, at 33-36.

113 *Id.* at 33.

114 *Id.* at 34.

115 Clayton, *supra* note 104, at 686, 689-90.

116 N.J. Emery et. Al., *Effects of Experience and Social Context on Prospective Caching Strategies in Scrub Jays*, *Nature* 414, 443-46 (2001); *see also* Clayton, *supra* note 55, at 690.

117 *Id.*

118 *Id.*

119 C. R. Raby, *Planning for the Future by Western Scrub-Jays*, 445 *Nature* 919-21 (Feb. 2007).

120 Nicolas J. Mulcahy, et al., 312 *Science* 1038, 1039 (May 2006).

121 *Id.*, at 1038-39.

122 *Id.*, at 1038-9.

123 *Id.*

124 Clayton, *supra* note 104, at 686, 689-90; *see generally* Raby, *supra* note 119.

125 *See generally* Lauren Magnotti, *Giving a Voice to Those Who Can't Speak For Themselves: Toward Greater Regulation of Animal Experimentation*, 13 *Buff. Env't'l. L.J.* 179, 187-88 (2006).

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130 *Id.*

131 CHARLES DARWIN, *THE DESCENT OF MAN*, 105 (Princeton Univ. Press 1981); Magnotti, *supra* note 102 at 187.

132 *Id.* at 105.

133 *Id.*

134 Pollan, *supra* note 17, at 58.

135 Pollan, *supra* note 17, at 58.

136 Favre, *supra* note 6 at 356-58.

137 *Id.* at 357-58.

138 Pollan, *supra* note 17, at 58.

139 *Id.*

140 Favre, *supra* note 6 at 357-8.

141 *Id.* at 358; E Dettmer & D Fragaszy, *Determining the Value of Social Companionship to Captive Tufted Capuchin Monkeys (cebus apella)*, *Journal of Applied Animal Welfare Science*, 293-304, vol.3(4) (Jan. 2000) (study showing some monkeys preferred social grouping to food even when they are very hungry).

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143 Favre, *supra* note 6 at 358.

144 *Id.*

145 *Id.*

146 See e.g., Ani B. Satz, *Would Rosa Parks Wear Fur? Toward a Non-Discrimination Approach To Animal Welfare* 1 *J. Animal L. & Ethics* 139, 152 (May 2006).

147 *Id.*, 153-54.

148 Martha Nussbaum, *Facing Animal Complexity*, available at http://www.hcs.harvard.edu/~hrp/lecture/facing_animals-nussbaum.pdf (Apr. 2007).

149 Satz, *supra*, note 146, at 153.

150 *Id.*, 152-53.

151 *Id.*, at 157.

152 *Id.*, at 148-49; 42 U.S.C. 12101-12213 (2000).

153 42 U.S.C. 12102(2) (stating disabilities are evaluated "with respect to an individual").

154 See 42 U.S.C. 12102(2) (2000).

155 Richard L. Cupp, *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status* 60 *SMU L. Rev.* 3, 12-13 (Winter 2007).

156 Satz, *supra*, note 146, at 149; see also Richard L. Cupp, A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status 60 SMU L. Rev. 3, 13 (Winter 2007).

157 See also Richard L. Cupp, A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status 60 SMU L. Rev. 3, 13 ("if we cannot be certain what animals are thinking, we also cannot make conclusions that they think like we do.") (Winter 2007).

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159 See e.g., U.S. Const amend XIV, §1 ("no state shall...deprive any person of life, liberty, or property, without due process of law.").

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164 *Id.* at 185.

165 *Id.*

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169 Francione, *supra* note 2, at 5.

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173 *Id.* at 8.

174 *Id.* at 8.

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177 Kelch, *supra* note 27, at 557.

178 Michael Pollan, An Animal's Place, N.Y. TIMES MAG., Nov. 10, 2002, at 58.

179 *Id.*

180 *Id.*; Winders, *supra* note 32, at 454-55.

181 Favre, *supra* note 6, at 345-350.

182 Francione, *supra* note 2 at 8.

183 Waisman, *supra* note 56, at 374.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 This article focuses in the Federal Animal Welfare Law's failure to insure humane treatment of animals. For a description of the Federal Humane Methods Slaughter Act and its failure to insure the humane slaughter of animals see generally Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" With its Meaning in Animal Cases*, Wm. & Mary Envntl L. & Pol'y Rev. 681, 682, 697 (Spring 2005); see also Francione, *supra*, note 2, at 51.

189 Francione, *supra*, note 39, at 10-11.

190 DeCoux, *supra* note 38, at 689-91, 696.

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193 For a close look at how ineffective the Humane Methods Slaughter Act has been at insuring that the slaughter of animals used for food be humane see generally Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" With its Meaning in Animal Cases*, Wm. & Mary Envntl L. & Pol'y Rev. 681 (Spring 2005).

194 See generally 7 U.S.C. §§ 2131 – 59.

195 See generally 9 C.F.R. 1-4.11 (2005), available at http://www.aphis.usda.gov/aniamal_welfare/awr.shtml

196 See generally 9 C.F.R. § 2.38(b) (2005), available at http://www.aphis.usda.gov/aniamal_welfare/awr.shtml.

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199 Laboratory Primate Advocacy Group, *The Failure of Federal Animal Welfare Regulations to Promote the Well-Being of Nonhuman Primates Used in Biomedical Research*, February 8, 2005, <http://www.lpag.org/bureaucracy/failure.html>

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201 Melanie L. Vanderau, *Science at Any Cost: The Ineffectiveness and Underenforcement of the Animal Welfare Act*, 14, Penn St. Env'tl. L. Rev. 721 (Spring 2006) (arguing that the limitations of the AWA leads to experiments that kill animals or involve a great deal of suffering yet lead to no helpful scientific gains).

202 Ito, *supra* note 30, at (arguing that the problems of AWA make the law a collection of provisions reflecting formalities with no practical effect on the welfare of animals) ; see also Vanderau *supra* note 1, at 724.

203 Ctr. Westchester Humane Soc'y. v. Hilleboe, 116 N.Y.S.2d 403, 406 (App. Div. 1952).

204 *Id.*

205 Michel Silva, Concentration Camp for Dogs, LIFE, Feb. 4, 1966, at 22; see also DeCoux, *supra* note 38, at 696.

206 DeCoux, *supra* note 38, at 696.

207 *Id.*

208 *Id.* at 697; See Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (codified as amended at 7 U.S.C. 2131-2159 (2000 &2004)).

209 Waisman, *supra* note 56, at 374; see also Ito, *supra* note 30, at 381-82.

210 Waisman, *supra* note 56, at 374.

211 Ito, *supra* note 30, at 382; Vanderau, *supra* note 1, at 724.

212 Waisman, *supra* note 56, at 374.

213 Animal Welfare Act of 1970, Pub. L. No. 91-579, 3(g), 84 Stat. 1560, 1561 (codified at 7 U.S.C. 2132(g) (2000)).

214 *Id.*; see also Waisman, *supra* note 56, at 375.

215 Vanderau, *supra* note 1, at 725.

216 Taub v. Maryland, 463 A.2d 819, 820 (Md. 1983); see *infra* note 227 and accompanying text.

217 *Id.* at 820.

218 *Id.*

219 Congressman George E. Brown, Jr., *30 Years Of the Animal Welfare Act*, Animal Welfare Information Center Newsletter, 23, Vol. 8 No. 1 (Spring 1997).

220 Jodie A. Kupla-Eddy et. al., *USDA Perspective on Environmental Enrichment of Animals*, Institute for Laboratory Animal Research Journal, 84 vol.46 no.2 (2005).

221 *Id.*; Waisman, *supra* note 56, at 375-76.

222 Waisman, *supra* note 56, at 376.

223 7 U.S.C. 2143 (b)(1); Waisman, *supra* note 56, at 376; Ito, *supra* note 30, at 384.

224 7 U.S.C. 2143 (a)(2)(B); Kupla-Eddy, *supra* note 220, at 84; Waisman, *supra* note 56, at 376.

225 Kupla-Eddy, *supra* note 220, at 85.

226 *see* Animal Legal Defense Fund, Inc. v. Glickman, 204 F. 3d 229, 231 (D.C. Cir. 2001).

227 Kupla-Eddy, *supra* note 220, at 85.

228 Kelch, *supra* note 27, at 542; Ito, *supra* 30, at 404.

229 7 U.S.C. 2143 (a)(1), (a)(2)(A-B), (a)(3)(A)(B)(C)(i-iii).

230 Ito, *supra* note 30, at 404; DeCoux *supra* note 38, at 698.

231 Ito, *supra* note 30, at 404 (citing 7 U.S.C. 2143(a)(3)(C)(v) (2000)).

232 Ito, *supra* note 30, at 404 (citing 7 U.S.C. 2143(a)(3)(D)(i)-(ii)).

233 7 U.S.C. 2143(a)(3)(A); 7 U.S.C. 2143(a)(7)(B)(i).

234 7 U.S.C. 2143 (a)(3)(E).

235 7 U.S.C. 2143 (a)(3)(E).

236 DeCoux, *supra* note 38, at 700.

237 7 U.S.C. 2143 (a)(3)(E); *see generally* 7 U.S.C. 2143 (a)(1)(2)(3)(A-E)

238 *Id.*, at 700.

239 DeCoux, *supra* note 38, at 698.

240 7 U.S.C. 2143 (a)(6)(i-iii).

241 Ito, *supra* note 30, at 405.

242 7 U.S.C. 2146.

243 Int'l Primate Prot. League v. Inst. For Behavioral Research, Inc., 799 F.2d 934, 939 (4th Cir. 1986) (citing H.R. Rep. No. 91-1651, 91st Cong., 2nd Sess., reprinted in 1970 U.S. Code Cong. & Ad. News

5103, 5104 & S. Rep. No. 1281, 89th Cong., 2nd Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2635, 2637).

244 Ito, *supra* note 30, at 406.

245 Waisman, *supra* note 56, at 375; Magnotti, *supra* note 101, at 192.

246 Magnotti, *supra* note 125, at 195.

247 Magnotti, *supra* note 125, at 195-96.

248 *Id.*, at 196.

249 *Id.*, at 196-97.

250 See 9 C.F.R. § 1.1 (2001) (amended 2002); Magnotti, *supra* note 125, at 192.

251 Vanderau, *supra* note 1, at 726; Francione, *supra* note 39, at 31.

252 Waisman, *supra* note 56, at 374.

253 *Id.*

254 DeCoux, *supra* note 38, at 716.

255 For example, the Michigan law **MICH. COMP. LAWS § 750.50** provides in relevant part: 8) This section does not prohibit the lawful killing or other use of an animal, including, but not limited to, the following: (h) Scientific research pursuant to 1969 PA 224, **MCL 287.381** to **287.395**. (i) Scientific research pursuant to sections 2226, 2671, 2676, and 7333 of the public health code, 1978 PA 368, **MCL 333.2226**, **333.2671**, **333.2676**, and **333.7333**; see also N.Y. Agric. & Mkts. Law 353 (Supp. 2004) (nothing contained in the animal cruelty law shall prohibit or interfere with scientific tests, experiemnts or investigations involving living animals); Kan. Stat. Ann. 21-4310(b)(2) (Supp. 2003) (listing eight broad exceptions to the law including bona fide experiments, humane killing of animals for population control, rodeo practices and farm animals); 510 ILCS 70/10 (“Institutions operating under federal license to conduct laboratory experimentation utilizing animals for research or medical purposes are, however, exempt from the provisions of this Section”).

256 DeCoux, *supra* note 38, at 716.

257 Taub v. Maryland, 463 A.2d 819, 820 (Md. 1983).

258 NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF*, 141 (Viking Books 2007).

259 DeCoux, *supra* note 38, at 716 (citing Peter Carlson, *The Great Silver Spring Monkey Debate*, *WASH. POST MAG.*, Feb. 24, 1991, at W15).

260 *Id.*

261 *Id.* at 820.

262 *Id.*

263 Waisman, *supra* note 56, at 382.

264 DeCoux, *supra* note 38, at 716.

265 7 U.S.C. 2143(a)(2)(B); see generally Laboratory Primate Advocacy Group, *The Failure of Federal Animal Welfare Regulations to Promote the Well-Being of Nonhuman Primates Used in Biomedical Research*, February 8, 2005, <http://www.lpag.org/bureaucracy/failure.html>

266 Kupla-Eddy, *supra* note 220, at 85.

267 Kupla-Eddy, *supra* note 220, at 85 (citing USDA-APHIS [US Department of Agriculture-Animal and Plant Health Service]. 1989. 9 CFR Parts 1,2 and 3: Animal Welfare; Proposed Rules. Federal Register 54(49: 10822-10954 (1989)).

268 *Id.*

269 Kupla-Eddy, *supra* note 220, at 85; see also Animal Legal Defense Fund, Inc. v. Glickman, 204 F. 3d 229, 233-34 (2001) (1989 proposed rule required social grouping based on evidence that nonhuman primates are for social beings in nature and require contact with other nonhuman primates for their psychological well being).

270 *Id.*

271 *Id.*; Animal Legal Defense Fund, Inc. v. Glickman, 204 F. 3d 229, 233-34 (2001).

272 *Id.* [Emphasis added]; see also 9 C.F.R. § 3.80(b) (2005); 9 C.F.R. § 3.81(a-c) (2005); .

273 9 C.F.R. § 3.81(a-b) (2005).

274 *Id.*

275 James L. Weed and James L. Raber, *Balancing Animal Research with Animal Well-Being: Establishment of Goals and Harmonization of Approaches*, Institute for Laboratory Animal Research Journal, 119 vol.46 no.2 (2005) (“ the reduction or absence of stereotypies and injurious and aggressive behavior has been viewed as an improvement in an animal’s welfare and well-being”); Laboratory Primate Advocacy Group, *The Failure of Federal Animal Welfare Regulations to Promote the Well-Being of Nonhuman Primates Used in Biomedical Research*, February 8, 2005, <http://www.lpag.org/bureaucracy/failure.html>

276 Andrea Warniment and Linda Brent, Abnormal Behavior in a Captive Chimpanzee Colony, 3 http://www.awionline.org/Lab_animals/biblio/jo-9.htm (citing Fritz, J.; Nash, L T.; Alford, P.L; Bowen, J.A. Abnormal behaviors, with a special focus on rocking, and reproductive competence in a large sample of captive chimpanzees (*Pan troglodytes*) American Journal of Primatology 27:161-176, 1992).

277 JOSEPH ERWIN et. al., CAPTIVITY AND BEHAVIOR: PRIMATES IN BREEDING COLONIES, LABORATORIES AND ZOOS, *Strangers in a Strange Land: Abnormal Behavior and Abnormal Environments?* 1-28 (Van Nostrand Reinhold Co. 1979).

278 Viktor Reinhardt, *Arguments for Single-Caging of Rhesus Macaques: Are They Justified?* Animal Welfare Information Center Newsletter, vol.6 no.1 (Spring 1995); Southwest Foundation for Biomedical Research, *Nonhuman Primate Environmental Enhancement Plan of the Southwest National Primate Research Center*, 7 (2008).

279 *Id.*

280 NOWAK, *supra* note 51, at 143.

281 Laboratory Primate Advocacy Group, *The Failure of Federal Animal Welfare Regulations to Promote the Well-Being of Nonhuman Primates Used in Biomedical Research*, February 8, 2005, <http://www.lpag.org/bureaucracy/failure.html>

282 Nowak, *supra* note 51, at 143.

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*

287 *Id.*

288 Nowak, *supra* note 51, at 142.

289 *Id.*

290 *Id.*; Southwest Foundation for Biomedical Research, *Nonhuman Primate Environmental Enhancement Plan of the Southwest National Primate Research Center*, 7 (2008). Available at, <http://www.sfbr.org/pdf/enhancement-plan-05-2008.pdf>

291 *Id.*

292 *Id.*

293 GOTTHART BERGER, *MONKEYS AND APES*, 126, (Arco Publishing Inc., 1985).

294 *Id.*

295 *Id.*

296 *see generally* Laboratory Primate Advocacy Group, *supra* note 265; Reinhardt, *supra* note 278.

297 Reinhardt, *supra* note 278; NATIONAL RESEARCH COUNCIL, *THE PSYCHOLOGICAL WELL-BEING OF NONHUMAN PRIMATES*, 99, (National Academy Press 1998).

298 Erwin, *supra* note 277, 6-13.

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300 Andrea Warniment and Linda Brent, *Abnormal Behavior in a Captive Chimpanzee Colony*, 3 http://www.awionline.org/Lab_animals/biblio/jo-9.htm (citing Capitano, J.P. Behavioral pathology. pp.

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303 Erwin, *supra* note 277, at 25.

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309 New York University School of Medicine Primate Enrichment Management Plan, *Policy of Environmental Enrichment for Nonhuman Primates*, 1, 13, (2003). Available at <http://www.med.nyu.edu/dlar/assets/environment.pdf>

310 *Id.*, at 6.

311 Laboratory Primate Advocacy Group, *supra* note 265.

312 Kupla-Eddy, *supra* note 220, at 86.

313 Kupla-Eddy, *supra* note 220, at 90.

314 Kupla-Eddy, *supra* note 220, at 90 (citing USDA-APHIS [US Department of Agriculture-Animal and Plant Health Service]. 1991. 9 CFR Part 3: Animal Welfare Standards; Final Rule. Federal Register 56(32) 6426-6505 (1991).

315 Animal Legal Defense Fund, Inc. v. Glickman, 204 F. 3d 229 (D.C. Cir. 2001) (1989 proposed rule required social grouping based on evidence that nonhuman primates are social beings in nature and require contact with other nonhuman primates for their psychological well being).

316 *Id.*, at 235.

317 Kupla-Eddy, *supra* note 220, at 86.

318 Kupla-Eddy, *supra* note 220, at 86.

319 David Favre, *Integrating Animal Interests Into Our Legal System*, 10 *Animal L.* 87-88 (2004).

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321 *Id.*

322 *Id.*

323 *Id.*

324 see e.g., Kupla-Eddy, *supra* note 220, at 87-8; DeCoux, *supra* note 38, at 704-5; Laboratory Primate Advocacy Group, *The Failure of Federal Animal Welfare Regulations to Promote the Well-Being of Nonhuman Primates Used in Biomedical Research*, February 8, 2005, <http://www.lpag.org/bureaucracy/failure.html>

325 9 C.F.R. § 3.81(b)(2005)

326 9 C.F.R. § 3.81(b)(2005)

327 Kupla-Eddy, *supra* note 220, at 88 (APHIS inspectors report that provisions have few solid criteria with which to judge if plan is in compliance with law or not); see also DeCoux, *supra* note 38, at 705.

328 Laboratory Primate Advocacy Group, *supra* note 265.

329 DeCoux, *supra* note 38, at 704-5.

330 Laboratory Primate Advocacy Group, *supra* note 265.

331 *Id.*

332 *Id.*

333 *Id.*

334 9 C.F.R. § 3.81(c)(1-3)(2005).

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336 *Id.*

337 Laboratory Primate Advocacy Group, *supra* note 265.

338 *Id.*

339 *Id.*

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341 Kupla-Eddy, *supra* note 220, at 88.

342 Kupla-Eddy, *supra* note 220, at 86.

343 Kupla-Eddy, *supra* note 220, at 88.

344 Kupla-Eddy, *supra* note 220, at 89.

345 9 C.F.R. 3.80 (b)(2)(i).

346 9 C.F.R. 3.80 (b)(2)(i); Laboratory Primate Advocacy Group, *supra* note 265.

347 Laboratory Primate Advocacy Group, *supra* note 265.

348 Favre, *supra* note 6, at 358.

349 9 C.F.R. 3.80 (b)(2)(iii).

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351 Magnotti, *supra* note 125, at 201-2; See ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEPT' OF AGRIC., AUDIT REPORT: APHIS ANIMAL CARE PROGRAM: INSPECTION AND ENFORCEMENT ACTIVITIES, i (2005). Available at, <http://www.usda.gov/oig/webdocs/33002-03-SF.pdf>

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353 *Id.*, at 4, 6.

354 *Id.*, at 5.

355 Congressman George E. Brown, Jr., *30 Years of the Animal Welfare Act*, Animal Welfare Information Center Newsletter, 23, Vol. 8 No. 1 (Spring 1997).

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357 *Id.*

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361 *Id.*

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364 *Id.*

365 *Id.*

366 *Id.*

367 DeCoux, *supra* note 38, at 683.

368 Ito, *supra* note 30, at 403.

369 See e.g., Citizens to End Animal Suffering and Exploitation, Inc. 836 F. Supp. 45 *supra* note 412 and accompanying text.

370 Hogan, *supra* note 58, at 522; Ferry Pass United Methodist Church v. Carnesi, 537 U.S. 1190 (2003); United Nuclear Corp. v. Nat'l Labor Relations Bd. 340 F.2d 133 (1st Cir. 1965).

371 Hogan, *supra* note 58, at 522 (“animals are qualitatively different from other nonhuman entities that have standing to sue”).

372 Richard L. Cupp, A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status 60 SMU L. Rev. 3, 18 (Winter 2007).

373 *Id.*, at 18.

374 *Id.*, at 27.

375 Hogan, *supra* note 58, at 475.

376 Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Env'tl. Aff. L. Rev. 471, 475, 489 (1996).

377 *Id.*, at 489.

378 Wise, *supra* note 376, at 475, 502; see also Kelch, *supra* note 27, at 534.

379 *Id.*, at 492.

380 *Id.*

381 *Id.*, at 495 (the laws were called the *lex Aquilia* and were intended to replace or at least supplement the existing Twelve Tables).

382 *Id.*, at 488; see also Kelch, *supra* note 27, at 534 (“the Old Testament reflects the idea that humans have a central place in the Universe and top the natural hierarchy”).

383 Genesis 1:24-26.

384 Wise, *supra* note 376, at 498.

385 *Id.*, at 525-6.

386 *Id.*, at 529.

387 *Id.*, at 535.

388 *Id.*, at 541.

389 Knox v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 425 N.E.2d 393, 396 (Mass. App. Ct. 1981) (quoting Commonwealth v. Higgins, 178 N.E. 536, 538 (Mass. 1931)); see also Bland v. People, 76 P. 359, 361 (Colo. 1904) (court upholds constitutionality of law prohibiting ownership of horses with docked tails, holding that "seeing the disfigured and mutilated animals tends to corrupt public morals"); Miller v. State, 63 S.E. 571,573 (Ga. Ct. App. 1909) (court found that defendant did not violate the anticruelty statute for shooting the neighbor's dog in front of the neighbor's wife, stating that the little animals, however worthless they may be, have a way of endearing themselves, especially to the woman and children of the family); see also Wise, *supra* note 376, at 471, 541-43 (1996).

390 Stephens v. State, 3 So. 458, 458-59 (Miss. 1888); see also Wise, *supra* note 376, at 542.

391 Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721, 754 (Winter 1994); Kelch, *supra* note 27, at 540; see also Wise, *supra* note 376, at 539-43.

392 Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp., 626 F.Supp. 278, 280 (D. Mass. 1986) (stating that cruelty to animal statutes target acts that dull humanitarian feelings); Knox v. Massachusetts S.P.C.A., 425 N.E.2d 393, 409 (Mass. App. Ct. 1981) (stating that statutes are directed against acts that tend to dull humanitarian feelings); Peck v. Dunn, 574 P.2d 367, 369 (Utah 1978) (in holding that cockfighting violated the anticruelty statute, the court noted that legislation against [cruelty] is justified for the purpose of regulating morals and promoting the good order and general welfare of society).

393 Francione, *supra* note 391, at 731.

394 Kelch, *supra* note 27, at 541.

395 Francione, *supra* note 391, at 744-5.

396 *Id.* at 767.

397 Favre, *supra* note 6, at 346; Francione, *supra* note 391, at 739-40.

398 Francione, *supra* note 391, at 740.

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400 *Id.*

401 *Id.*

402 Wise, *supra* note 376, at 543 (citing Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 Cal. L. Rev. 779, 782 (1988)).

403 *Id.*

404 *Id.*, at 544; see also Bueckner, 886 S.W. 2d at 377 ("We now know that mammals share with us a great many emotive and cognitive characteristics and that the higher primates are very similar to humans neurologically and genetically").

405 *Id.*, at 475.

406 *Id.*, at 545.

407 Bueckner, 886 S.W. 2d at 377-78.

408 Kelch, *supra* note 27, at 532.

409 Magnotti, *supra* note 11, at 459.

410 See Morgan v. Kroupa 702 A.2d 630, 633 (Vt. 1997) “modern courts have recognized that pets generally do not fit neatly within traditional property principles...Instead, courts must fashion and apply rules that recognize their unique status”; see also Rabideau v. City of Racine 627 N.W.2d 795 (2001) “We are uncomfortable with the law’s cold characterization of a dog...as mere property...A companion dog is not a fungible item, equivalent to other items of personal property...a living room sofa or dining room furniture.” See also Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. Hawaii L. Rev. 481-524 (discussion of tort cases allowing recovery of non-economic damages for negligence toward pet).

411 Corso v. Crawford Dog And Cat hospital, Inc., 415 N.Y.S. 2d 182, 183 (1979).

412 Bueckner v. Hamel, 886 S.W. 2d 368, 376-8 (Tex. Ct. App. 1994).

413 Ernest Waintraub, *Are Sperm Cells a Form of Property? A Biological Inquiry Into the Legal Status of the Sperm Cell*, Health Law Journal, 1, 5 vol.2(1) (2007) (Arguing that the current accepted view of sperm as something having intermediate status, between property and sperm, is consistent with the biological makeup and evolution of the sperm cell).

414 Davis v. Davis 842 S.W.2d 588 (Tenn. 1992).

415 *Id.*, at 596.

416 *Id.*, at 596 (At the opposite extreme is the view that the embryo has a [property] status, With the consent of those who have decision-making authority over the preembryo, no limits should be imposed on actions taken with preembryos”).

417 Davis, 842 S.W.2d at 593-4; See also Waintraub, *supra* note 413, at 3-4 (pre-embryos are 4-8 cells in their entirety. Any one cell can be separated from the aggregate and develop into a complete adult. The collection of cells therefore not developmentally individual).

418 Davis, 842 S.W.2d at 596.

419 Davis, 842 S.W.2d at 597.

420 *Id.* at 596.

421 *Id.*

422 Hecht v. Superior Court of Los Angeles County, 20 Cal. Rptr. 2d 275, 277-78 (Cal. Ct. App. 1993).

423 Hecht, 20 Cal. Rptr. 2d at 281, 283.

424 Kelch, *supra* note 27, at 581.

425 *Id.*, at 539.

426 Francione, *supra* note 39, at 49.

427 See generally Davis, 842 S.W.2d at 596-97.

428 See Sunstein, *supra* note 102, at 394.

429 Sunstein, *supra* note 102, at 394.

430 Bueckner, 886 S.W. 2d at 376-8; see also Waisman, *supra* note 56, at 376 (citing Jack H. Botting & Adrian R. Morrison, *Animal Research is Vital to Medicine*, Scientific American (Feb. 1997) animal testing is essential to developing new vaccines and new medicines that save human lives. Vaccines such as diphtheria, tetanus and rabies, insulin to treat diabetes, and the development of penicillin have all been possible through animal models).

431 Int'l Primate Prot. League, 799 F.2d at 939-40.

432 Sunstein, *supra* note 102, at 394.

433 Vanderau, *supra* note 1, at 722.

434 *Id.*, at 734.

435 *Id.*

436 Sunstein, *supra* note 102, at 394.

437 Hogan, *supra* note 58, at 517-18.

438 DeCoux, *supra* note 38, at 749; see also Hogan, *supra* note 58, at 467-68 (referencing Bauchman v. West High School 132 F.3d 542 (10th Cir. 1997) (Jewish student sued high school, school board and various individuals for being forced to sing Christian songs at school in violation of first amendment right. Students mother brought claim on her behalf but was not required to plead a direct personal injury).

439 In the Matter of Baby "K" 16 F.3d 590 (4th Cir. 1994); In Re Martin 538 N.W.2d 399 (1995).

440 Magnotti, *supra* note 11, at 479.

441 *Id.*, at 743; Hogan, *supra* note 58, at 516.

442 Darian M. Ibrahim, *The Anticruelty Statute: A Study In Animal Welfare*, 1 J. Animal L. & Ethics 175, 179 (May 2006).

443 *Id.*, at 178.

444 *Id.*, at 177.

445 Joseph Lubinski, *Introduction to Animal Rights*, Animal Legal and Historical Center, 2004, <http://www.animallaw.info/articles/ddusjlubinski2002.htm>; see also Francione, *supra* note 20, at 232-33.

446 Ibrahim, *supra* note 442, at 177; Lubinski, *supra* note 445; see also Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 Animal L. 77, 80 (2002) ("whilst animals remain property they cannot

have the full entitlement of rights, and especially the right to be free from exploitation, that animal rights advocates insist they should have”); see also Francione, *supra* note 2, at 44 (it is morally acceptable to kill a wild animal who is just about to attack a friend) <http://law.bepress.com/rutgersnewarklwps/fp/art21>

447 Francione, *supra* note 39, at 32, 40-41; see also Ibrahim, *supra* note 442, at 177.

448 Francione, *supra* note 2, at 41; see e.g., David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. Env'tl. Aff. L. Rev. 747, 752 (1995) (arguing that extending legal rights to animals is detrimental to human rights).

449 *Bueckner*, 886 S.W. 2d at 377 (“We now know that mammals share with us a great many emotive and cognitive characteristics and that the higher primates are very similar to humans neurologically and genetically”).

450 See e.g., Richard L. Cupp, A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status 60 SMU L. Rev. 3, 27 (“recognition of animal rights would reflect a fundamental shift in how we value human life and human rights, making both less precious”) (Winter 2007).

451 See *supra* note 392, and accompanying text.

452 See *supra* note 167, and accompanying text.

453 Waisman, *supra* note 56, at 529 (citing Daniel Hellman & Nathan Blackman, *Enuresis, Firesetting, and Cruelty to Animals: A Triad Predictive of Adult Crime*, 122 Am. J. Psychiatry, 1431-35 (1966) study showing 75 percent of inmates had early records of animal cruelty) (citing Alan R. Felthous & Stephen R. Keller, *Violence Against Animal and People: Is Aggression Against Living Creatures Generalized?*, 14 Bull. Am. Acad. Psychiatry Law §1 (1986) study where criminals were interviewed and the results showed an association between childhood cruelty to animals and later aggressive behavior against people); (citing Luke Carter et. al., *Cruelty to Animals and Other Crimes: A Study By the MSPCA and Northeastern University* (1997) showing that 70 percent of people who committed violent crimes against animals also had criminal records for violent, property, drug, or disorderly conduct crimes)); see also Vanderau, *supra* note 169, at 738 (“Violations of animal cruelty statutes have a correlation to crime. In areas where animal humane officers and police have compared numbers, the correlation between domestic violence and violations of cruelty to animal statutes is anywhere from 50 to 100 percent. Authorities use abuse of animals to determine a propensity to violence against humans. There has long been a suggestion that serial killers begin by torturing and killing animals”).