

William & Mary Environmental Law and Policy Review

Volume 29 (2004-2005)
Issue 3

Article 4

April 2005

In the Valley of the Dry Bones: Reuniting the Word "Standing" with its Meaning in Animal Cases

Elizabeth L. DeCoux

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Animal Law Commons](#)

Repository Citation

Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with its Meaning in Animal Cases*, 29 Wm. & Mary Envtl. L. & Pol'y Rev. 681 (2005),
<https://scholarship.law.wm.edu/wmelpr/vol29/iss3/4>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmelpr>

IN THE VALLEY OF THE DRY BONES¹: REUNITING THE WORD “STANDING” WITH ITS MEANING IN ANIMAL CASES

ELIZABETH L. DECoux*

¹ The image of “dry bones” recurs in sacred stories. La Loba in Mexico finds and rearticulates the bones of the wolf and then sings flesh and breath onto and into him. The Egyptian Goddess Isis reassembles the body parts of her husband Osiris and resurrects him. Ezekiel, Chapter 37, describes what happened when Ezekiel prophesied to the many dry bones in the valley:

[T]here was a noise, and behold a shaking, and the bones came together, bone to his bone. . . And when I beheld, lo, the sinews and the flesh came up upon them, and the skin covered them. [A]nd the breath came into them, and they lived, and stood up upon their feet. . . .

Ezekiel 37: 7-8, 10.

* Visiting Professor of Law, Florida Coastal School of Law, formerly Assistant Dean and Adjunct Instructor at the Indiana University School of Law in Indianapolis. The author is grateful to Professor Cass Sunstein for his response to her inquiry regarding this article. His work and that of Professor Laurence Tribe have been invaluable to the author. She thanks Danaya Wright, who lent her considerable talents as a nationally-recognized scholar and author to nurture this article from its inception to its submission. She, along with Carolyn Farmer and Diana Waldron, formed the trinity who midwived this work; the author offers thanks to them. For reading and wisely commenting on the article, the author thanks Rebecca Huss, Susanah Mead, George Wright, Maria Lopez, and Bill Mansfield. For finding all the right resources, the author is also indebted to Richard Humphries, Judith Anspach, and Miriam Murphy. For the opportunity to teach, which led to this article, the author thanks Susanah Mead, Norman Lefstein, Richard Hurt, Lynn McDowell, and the faculty of Indiana University School of Law-Indianapolis. The author thanks her colleagues at Florida Coastal School of Law for their insightful questions and comments. She thanks Andrea and Robin for finding the lost disk. Finally, the author is grateful to her students, who enlighten and inspire her, especially Kelly Burton Smith, who brought the *Washington Post* series to her attention. The author dedicates this article to MFD and the animal who was her companion, until he was killed and made to be food, and to DLW, who loves animals and is kind to them.

INTRODUCTION

Both the Humane Methods of Slaughter Act of 1958² ("HMSA") and the Animal Welfare Act³ ("AWA"), effective in 1966, govern the conditions of millions of animals in settings where the likelihood of suffering is great. Both were passed at the insistence of a populace angered by abuse in slaughterhouses and research laboratories, and both are routinely ignored by the industries they purport to regulate. Consequently, the cruelty which prompted passage of the laws persists decades after the statutes were enacted.

Although animals had no rights at early common law, U.S. courts began recognizing their rights in the nineteenth century.⁴ HMSA and AWA, which purport to apply some of those rights in specific industrial settings, are hollow promises because courts have not consistently recognized the standing of animals supposedly enjoying these and other protections.

Review of the law of standing reveals that, while certain recognizable rules imbue that term with content, courts considering the standing of animals have separated the term from its meaning through inconsistent decisions. Courts simply declare some animals to have standing and others to lack standing, without so much as a passing nod to the established precedent governing standing determinations. Decisions regarding the standing of animals bear no resemblance to principled application of legal rules; they are nothing more than the raw exercise of power over helpless creatures.

The solution to the problem of animal standing requires each court making such a determination to explain the rationale for the decision with reference to existing precedent. Courts performing such analyses will often find that animals have standing. If courts begin, now, to decide animal standing issues in a reasoned, principled manner, courts will be prepared to address inevitable

² 7 U.S.C. §§ 1901-1907 (2004).

³ 7 U.S.C. §§ 2131-2159 (2004).

⁴ See *infra* notes 200-05.

cases in which scientific advances blur the line between human and animal. Such a principled approach will recognize the significance of sentience.

I. OVERVIEW

Twice in this nation's history, citizens outraged⁵ at an industry's systematic torture⁶ of animals⁷ have demanded that the federal government take action. In both instances, the government passed laws that have since proven worse than useless; their very existence gives the public the impression that the institutionalized

⁵ William S. Blair, *Humane Appeals Swamp Congress: Senate Hearing on Livestock Slaughter Bill Stirs Wide Interest and Mail Deluge*, N.Y. TIMES, May 4, 1958, at 84; see also *Humane Slaughtering of Livestock: Hearings on S. 1213, S. 1497, and H.R. 8308 Before the Senate Comm. of Agric. and Forestry*, 85th Cong. 67, 29-148, 327 (1958) [hereinafter *Humane Slaughtering Hearings*] (testimony of Christine Stevens, President, Animal Welfare Institute).

⁶ "Torture" has been defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." State v. Odom, 928 S.W.2d 18 (Tenn. 1996) (murder prosecution). "Torture" has also been described as "every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief." OHIO REV. CODE ANN. § 1717.01(B) (West 2002). Acts committed against animals can constitute torture, and, for that reason, statutes have been enacted prohibiting the torture of animals. See, e.g., 510 ILL. COMP. STAT. ANN. 70/4.04 (West 1993) (prohibiting the torture of law-enforcement animals); MD. CODE ANN., CRIM. § 10-606 (2002) (prohibition against "aggravated cruelty to" and torture of animals). The word is used in this Article to mean the intentional infliction of physical or mental pain. An animal's species cannot remove the abuse of that animal from the definition of torture used in this Article, although any animal's inability to experience pain does remove abuse of that animal from the definition.

⁷ Some writers use the terms "non-human animals" and "human animals," so as not to lose sight of the fact that we humans are, ourselves, animals. See, e.g., Ani B. Satz, *The Case Against Assisted Suicide Reexamined*, 100 MICH. L. REV. 1380, 1398-99 (2002). The terms also appear on occasion in articles addressing the morality of patenting life forms. See, e.g., Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 536 (2003). In this Article, "animal" is used to mean "non-human animal," and "human" is used to mean "human animal," for the sake of brevity.

torture of animals in this country has ended when, in fact, it continues unabated. The ineffectiveness of these and similar statutes stems from a systemic failure of our government. Officials with the power to enforce the law lack the will, the resources, or both, while citizens eager to fight vigorously for animals find their every effort thwarted by adverse, unexplained rulings on the issue of standing.

The popular names of HMSA⁸ and AWA⁹ paint a peaceful picture, far removed from the blood, stench, filth, and screams of the slaughterhouse and the research laboratory. Examination of these two failed statutes leads to a broader consideration of both the place of animals in our society and the legal devices by which we can best give effect to our compassionate intentions toward them.

Among the most crucial of these legal devices is standing, an element necessary to any attempt by a guardian or guardian *ad litem* to bring a suit on behalf of an animal. To date, however, case law regarding the standing of animals is little more than a jumble of inconsistent decisions wholly lacking in rationale. This lack of rationale results from courts' willingness to use the term "standing" without any connection to the legal meaning of the word. To achieve the consistency which is a hallmark of any legitimate system of justice, courts should evaluate the standing of animals under the established principles of law associated with the term.

The need for courts to reconnect standing with its meaning is particularly critical as the legal system progresses through the twenty-first century, a span of time in which the adequacy of the justice system and the validity of the standing doctrine will be sorely tested by certain scientific advances, both extant and imminent. Jurisprudence is being transformed through these advances as dramatically and unalterably as cosmology was transformed by the knowledge that the Earth orbits the sun. Among these advances is the proposed reorganization of taxonomy, such that humans would no longer lay exclusive claim to the genus *homo* and would be joined in that genus by the chimpanzee

⁸ 7 U.S.C. §§ 1901-07 (2004).

⁹ 7 U.S.C. §§ 2131-59 (2004).

and the bonobo. Another advance is the existence, today, of the technology needed to create a chimera, a being that is neither exclusively human nor exclusively animal, but a genetic combination of the two, possessing features of each.¹⁰

These scientific changes, in concert with our consciences, call upon our courts to persevere in the work some have haltingly begun: development of a principled, legal framework within which to enfold the differences, similarities, purposes, pains, pleasures, and yearnings of animals, these “other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendour and travail of the Earth.”¹¹

This Article addresses the failure of the legal system’s efforts to protect animals and suggests an effective solution: an action brought in the animal’s name by a guardian *ad litem*. The Article traces these failures to use this tool to a single cause: the courts’ unacknowledged choice, in animal cases, to sever the word “standing” from its meaning and use the word, instead, to signify a judge’s arbitrary decision as to who can and cannot enter a court.

Part II documents the failure of HMSA and AWA and describes the suffering animals endure in spite of and sometimes because of those laws. Part III places HMSA and AWA in the context of a brief history of the rights of animals in the United States. Part IV explores the connection between those failed statutes and the law of standing, describing the inconsistent, inexplicable decisions in which courts have addressed the standing of animals. Part V moves beyond the law regarding standing and identifies some of the larger philosophical, ethical, and scientific issues that arise when serious consideration is given to the standing of animals, concluding that there is error in viewing them as the “other” whose interests and rights need not be considered. Part VI looks to the future as an era when recognizing the standing of animals will allow people to be their best and most creative selves.

¹⁰ See Jamie Shreeve, *The Other Stem Cell Debate*, N.Y. TIMES MAG., Apr. 10, 2005, at 42; see also *infra* notes 393-95 and accompanying text.

¹¹ HENRY BESTON, *THE OUTERMOST HOUSE: A YEAR OF LIFE ON THE GREAT BEACH OF CAPE COD* 25 (1928).

II. THE FAILURE OF HMSA AND AWA IN THE SLAUGHTERHOUSE AND THE RESEARCH LABORATORY

HMSA and AWA have failed. If animals could not feel pain, the failure might be of less consequence. It is well settled, however, that animals do feel pain, as established by the very scientists who experiment on animals. The primary membership organization for those who conduct research on animals is the American Association of Laboratory Animal Scientists ("AALAS"). An important publication available from AALAS is its *Guide for the Care and Use of Laboratory Animals*,¹² which includes this statement:

An integral component of veterinary medical care is prevention or alleviation of pain associated with procedural and surgical protocols. Pain is a complex experience that typically results from stimuli that damage tissue or have the potential to damage tissue. The ability to experience and respond to pain is widespread in the animal kingdom. . . . In general, unless the contrary is known or established it should be assumed that procedures that cause pain in humans also cause pain in animals.¹³

Not only do scientists recognize that animals experience pain, but articles in medical journals also regularly describe various methods of causing animals pain. At least one lengthy issue of a scholarly journal is devoted entirely to a description of methods for causing pain to animals.¹⁴

The intentional infliction of physical or mental suffering is torture. Therefore, the widespread infliction of such suffering on

¹² INSTITUTE OF LABORATORY ANIMAL RESOURCES, GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS (1996), available at <http://www.netlibrary.com/>. This book is also available for purchase from the AALAS web site at <http://www.aalas.org>.

¹³ *Id.* at 64.

¹⁴ See G.F. Gebhart, *Introduction*, 40 INST. LABORATORY ANIMAL RES. J. 95 (1999) (including four Articles in an issue entitled *Animal Models of Pain*).

animals in slaughterhouses and research laboratories, in violation of HMSA and AWA, is a crime that the citizens of a decent society have a duty to stop.

A. *The Humane Methods of Slaughter Act and the Thoroughgoing Consistency with Which the Slaughter Industry Has Ignored It*

After a false start or two, Congress, in 1958, undertook earnest consideration of a bill requiring that the slaughter of animals used for food be humane.¹⁵ The impetus for the legislation was the public's growing awareness of atrocities that were routinely committed in slaughterhouses and the public's resulting demand that the government take action.¹⁶ The Chair of the Senate Agriculture Committee, during hearings on the humane-slaughter bill, stated that "he never had 'so much pressure in all [his] twenty-two years' in Congress."¹⁷ While the bill was pending, Congress received more letters about the suffering of animals in slaughterhouses than about any other matter then under consideration.¹⁸

Also in 1958, the testimony during four days of hearings before the Senate Committee on Agriculture amply demonstrated why the public was so concerned about conditions in slaughterhouses. For example, a letter from a former meat inspector, W. P. Holcombe, was read to the Committee and entered into the record. Holcombe wrote that "[n]o member of the committee . . . is qualified to act on this legislation without first making a casual inspection of actual [slaughter] operations. Unless the inspection is made incognito, I assure you a group of legislators would be presented with a staged performance comparable to a conducted tour of Russia."¹⁹ Holcombe proceeded to describe what the

¹⁵ Blair, *supra* note 5, at 84.

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Humane Slaughtering Hearings*, *supra* note 5, at 67 (statement of Madeleine Bemelmans, President, Society for Animal Protection Legislation). There is no

committee would see if they did pay such a clandestine visit to a slaughterhouse:

a long line of helpless, healthy, fully conscious hogs, sheep, cruelly shackled and dangling from one leg, twisting, squirming and screaming in agony as they approach the executioner Perhaps a close observer might have noted a hideously gruesome elongation of that poor shackled leg as a bone snapped, or the joint pulled from its socket. . . . They reached the end of the line too soon, their agonized screams smothered as they dropped mercilessly, still conscious into a vat of scalding water.²⁰

Describing the method for preparing cattle to be shackled and hoisted, Holcombe wrote:

[a] powerful human being expertly swings a heavy sledge as the condemned creatures move past him. If they are lucky they crumple in partial consciousness. . . . Many of them [do] not, and many revive to linger in agony as they are suspended to bleed out. Quite frequently the helpless animal receives a preliminary broken snout, an ear sheared off, or an eye gouged out from a misdirected blow of the sledge.²¹

Another witness, Christine Stevens, testified that she had watched the man wielding the sledgehammer at one slaughterhouse and had seen him land as many as thirteen blows with the sledge on a single animal.²² She also described animals struggling after being shackled by a back leg and hung by a chain on a conveyer belt.²³

indication that the members of the Senate Agriculture Committee or the Congress followed Holcombe's suggestion and visited a slaughterhouse.

²⁰ *Id.* at 68.

²¹ *Id.* at 78 (statement of Christine Stevens, President, Animal Welfare Institute).

²² *Id.*

²³ *Id.*

She saw some twist so violently that they tore off a foot or broke a leg or the pelvis.²⁴

The retired inspector, Holcombe, concluded his written statement by asking, “[w]hat happiness can be derived from the profits of such sadistic cruelty. I am thinking of the advice Jesus gave his disciples: ‘For even as ye do it to the least of these, so do ye it unto Me.’”²⁵

Congress passed HMSA, and President Eisenhower signed it into law. The essence of the statute is a requirement that “animals [be] rendered insensible to pain”²⁶ before workers shackle a back leg, attach a chain to that shackle, and attach the other end of the chain to the overhead conveyer that hoists the animal and moves her inexorably to each station of the slaughter assembly to be eviscerated and skinned. The humane societies that had worked hard for HMSA’s passage, along with the legislators who had voted for it in the face of stiff opposition from the slaughter industry, likely felt a sense of accomplishment and relief that the agony of animals in slaughterhouses had ended. That sense of relief was ill-founded, however, because, by 2001—and likely decades earlier—violations of HMSA were routine.

The depth of the slaughter industry’s disregard for HMSA is apparent from a reading of the 2001 *Washington Post* series of two articles.²⁷ The articles document that Congress need not have bothered to pass HMSA. For example, HMSA requires that animals be rendered “insensible to pain” before they are hung by one leg from the conveyor mechanism.²⁸ The method used for rendering the animals insensible to pain, in most slaughterhouses,

²⁴ *Id.*

²⁵ *Humane Slaughtering Hearings*, *supra* note 5, at 78 (citation omitted).

²⁶ 7 U.S.C. § 1902 (2004).

²⁷ See Joby Warrick, ‘They Die Piece by Piece’: In Overtaxed Plants, Humane Treatment of Cattle is Often a Battle Lost, *WASH. POST*, Apr. 9, 2001, at A1 [hereinafter Warrick, *Piece by Piece*]; Joby Warrick, An Outbreak Waiting to Happen: Beef-Inspection Failures Let In a Deadly Microbe, *WASH. POST*, Apr. 10, 2001, at A1.

²⁸ Warrick, *Piece by Piece*, *supra* note 27, at A28.

is a blow to the front of the head with a captive bolt gun.²⁹ A captive bolt gun, if functioning as designed and used as intended, delivers a powerful blow to the animal between the eyes.³⁰ The *Washington Post* series demonstrates, however, that the underpaid, poorly trained, rushed³¹ slaughterhouse employees operating the captive bolt gun often do not succeed in rendering the animals "insensible to pain." In this article, slaughterhouse employees also confirm that, contrary to the requirements of the statute, many animals survive, not only alive but also conscious, at those stations of the slaughter line known as "the tail cutter, the belly ripper, and the hide puller."³²

The incidents described by these workers are not isolated. Lester Friedlander, a veterinarian and former government inspector at a Pennsylvania hamburger plant, told the *Washington Post* that such violations happen in "plants all over the United States . . . on a daily basis . . . I've seen it happen. And I've talked to other veterinarians. They feel it's out of control."³³ Conscious "cattle, dangling [upside down] by a leg from the plant's overhead chain [assembly], twist and arch their backs as though trying to right themselves."³⁴ As further confirmation that these incidents are not isolated, a veteran slaughterhouse employee stated that he had "seen thousands and thousands of cows go through the slaughter process alive . . . I've been in the side-puller where they're still alive. All the hide is stripped out down the neck there."³⁵ Another slaughterhouse worker described living cows dangling by a leg from the assembly line chain: "They move the head and the eyes and the leg like the cow wants to walk."³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ One expert compares the speed of the modern-day slaughter house killing floor to the assembly line of the candy factory in an episode of the television series *I Love Lucy*. *Id.*

³² *Id.* at A1.

³³ *Id.*

³⁴ Warrick, *Piece by Piece*, *supra* note 27, at A28.

³⁵ *Id.*

³⁶ *Id.*

Pigs fare no better. Because their skin is tougher than cows' skin, pigs are lowered into scalding water, supposedly after they are rendered "insensible to pain."³⁷ The hot water is intended to soften the pig's skin so it can be removed more easily.³⁸ Pigs, which according to HMSA should have already been rendered "insensible to pain," have been seen "squealing and kicking as they are being lowered" to drown in scalding water.³⁹

These horrors have a familiar ring. Although the articles were published in 2001, their descriptions could have been taken directly from the testimony before the Senate Committee on Agriculture and Forestry more than forty years earlier, testimony that led to enactment of a law that has been ignored as a matter of course.⁴⁰ It is not known whether W. P. Holcombe, or other citizens who worked for passage of or testified in support of the HMSA bill, were alive when the *Washington Post* published its series in 2001. Anyone who worked or voted for HMSA in 1958 must have been saddened and dismayed to read that their efforts had gone for naught.

With the atrocities exposed once more in 2001 by the *Washington Post*, Congress took some action, but again to little effect. For example, on July 9, 2001, three months after the *Washington Post* series was published, an outraged Senator Robert Byrd⁴¹ delivered a speech on the floor of the U.S. Senate in which he described the violations uncovered by the *Washington Post* and added these words: "[o]h, these are animals, yes. But they, too, feel pain."⁴² The Senator's words are reminiscent of those written by William Shakespeare for his character Shylock, who felt the sting of bigotry:

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *supra* notes 15-25 and accompanying text.

⁴¹ A Democrat from West Virginia, Byrd is regarded as the Dean of the Senate. See, e.g., Jerry Hagstrom, *Agriculture—Ag Secretary Quizzed Over Allegiances On New Labeling Law*, National Journal CongressDaily (May 9, 2003), at <http://nationaljournal.com/pubs/congressdaily/>.

⁴² 147 Cong. Rec. S7311 (statement of Senator Robert Byrd).

Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions[,] fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer . . . ? if you prick us do we not bleed? . . . if you poison us do we not die?⁴³

The only feature enumerated by Shylock that animals do not have in common with us—a lack of reciprocity for which humans should be grateful—is, “And if you wrong us, shall we not revenge?”⁴⁴

Just as Senator Byrd’s speech brings to mind the words of Shakespeare, Shylock’s questions in turn evoke the words of Nobel Laureate Isaac Bashevis Singer, a Polish Jew who fled during Adolf Hitler’s rise to power, arriving in the United States in 1935. Writing of institutionalized cruelty to animals, he issues this indictment: “In relation to [animals], all people are Nazis; for the animals it is an eternal Treblinka.”⁴⁵

With magnanimity similar to that of Singer, Pulitzer Prize winner Alice Walker does not begrudge the animals a place on the hard-fought ground she has won as an African-American woman. Rather, she writes that the “animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men.”⁴⁶

Through the efforts of Senator Byrd and others, Congress passed, as part of a 2002 farm bill, what has proven to be an

⁴³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* 73 (John Russell Brown ed., Harvard Univ. Press 1955).

⁴⁴ *Id.*

⁴⁵ Isaac Bashevis Singer, *The Letter Writer*, in *COLLECTED STORIES: GIMPEL THE FOOL TO LETTER WRITER* 750 (Ilan Stavans ed., Literary Classics of the U.S., 2004) (1968). Singer’s words inspired the title of Charles Patterson’s book, *Eternal Treblinka: Our Treatment of Animals and the Holocaust*, published by Lantern Books in 2002, with a foreword by Lucille Rosen Kaplan, Esq. CHARLES PATTERSON, *ETERNAL TREBLINKA: OUR TREATMENT OF ANIMALS AND THE HOLOCAUST* vii (2002).

⁴⁶ Alice Walker, *Preface to MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* 13, 14 (1988).

ineffective sense-of-the-Congress resolution urging full enforcement of HMSA.⁴⁷ Given Senator Byrd's outrage and the appropriation of funds for better enforcement, the industry and agency that were caught in such flagrant disregard of the law might have been expected to see the error of their ways.

To the contrary, thousands of animals continue to suffer in slaughterhouses every day. For instance, during a Senate Agriculture Appropriations Subcommittee Meeting hearing on May 8, 2003—more than two years after the *Washington Post* series—Senator Byrd criticized the Secretary of the U.S. Department of Agriculture ("USDA"), Ann Veneman, for failing to enforce HMSA at slaughterhouses.⁴⁸ "Despite the laws on the books, chronically weak enforcement and intense pressure to speed up slaughterhouse assembly lines reportedly have resulted in animals being skinned, dismembered and boiled while they are still alive and conscious," Senator Byrd told Secretary Veneman, in a sad echo of the testimony that prompted HMSA.⁴⁹ Byrd also questioned Veneman about the failure to hire additional inspectors.⁵⁰ Veneman responded that USDA "[was] still writing job descriptions for the" additional inspectors.⁵¹ Byrd noted that Congress had already appropriated "funds to hire inspectors for two years in a row and said he was 'really surprised' he had to talk to her a second time while 'the suffering of these animals is going on.'"⁵²

Confirming that atrocities continue, the U.S. General Accounting Office ("GAO") issued a report on January 30, 2004, revealing that in a twenty-eight month period surrounding the *Washington Post's* publication of the series on slaughterhouses,⁵³ there were at least 553 instances of noncompliance with federal law at U.S.

⁴⁷ Enforcement of Humane Methods of Slaughter Act of 1958, Pub. L. No. 107-171, § 10305, 116 Stat. 133, 493-94 (2002).

⁴⁸ Hagstrom, *supra* note 41.

⁴⁹ Chelsea Purvis, *Sustainable Farms Offer More Humane Option*, YALE DAILY NEWS, Nov. 18, 2003, available at <http://www.yaledailynews.com/article/functions/Printerfriendly.asp?AID=24168>.

⁵⁰ Hagstrom, *supra* note 41.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *supra* notes 27-39 and accompanying text.

slaughterhouses.⁵⁴ The report also revealed that the most prevalent type of noncompliance was allowing animals that had not been properly stunned to proceed, conscious, through the slaughter line.⁵⁵ A similarly disturbing fact documented in this report is the lack of reaction from USDA inspectors when they see *multiple* animals proceeding through the slaughter line alive and conscious; more than half the time, the inspectors, although they make a record of the violation, nevertheless allow the slaughter line to continue propelling live, conscious animals through its stations.⁵⁶ Not only do the inspectors fail to stop the line and remedy the violations, as they have the power and are in fact required to do, but they also fail to document the number of improperly stunned animals covered by a single report of a violation, making knowledge about the number of animals tortured in this manner impossible to ascertain.⁵⁷ Therefore, it is possible, though not documented, that a single report of a violation affecting multiple animals will actually reflect many hundreds of animals being skinned and boiled alive while still conscious.⁵⁸

There is additional evidence that Senator Byrd's concerns are well-founded and that, just as he told Secretary Veneman, the suffering continues. In 2003, several weeks after Senator Byrd questioned Secretary Veneman about USDA's failure, for two years in a row, to hire enough additional inspectors to enforce HMSA, a gate became blocked at a Beardstown, Illinois slaughterhouse.⁵⁹ This incident occurred during the hot summer days, and trucks transporting pigs remained lined up outside the slaughterhouse,

⁵⁴ U.S. GEN. ACCOUNTING OFFICE, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 4 (Jan. 2004), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d04247.pdf>. Violations were found at "272 facilities across the United States." *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.* at 5.

⁵⁷ *See id.* at 4.

⁵⁸ *See id.* at 4-5.

⁵⁹ Charlyn Fargo & Natalie Morris, *Excel Plant Reopens; Hogs' Heat Deaths Preceded Closure*, S. J. REG., Aug. 29, 2003, at 1.

unable to enter because of the blocked gate.⁶⁰ USDA inspectors were on-site at the slaughterhouse, but they stood by, taking no action at all. After a period of several days, during which the temperatures reached the high 90s each day, over eleven hundred pigs trapped in the transport trucks had died slow deaths from the heat.⁶¹ The USDA official responsible for managing the agency's inspectors, including those at the slaughterhouse with the blocked gate, addressed the inspectors at a USDA convention in October 2003, a few months after the heat deaths. He asked, "Is it such a stretch of the imagination . . . [w]hen animals are dying in large numbers in transporters awaiting *slaughter*—day after day—that there may be something inhumane about these losses and it is our responsibility to intervene?"⁶²

Even if USDA enforced HMSA fully and without exception, deliberate cruelty would still be a regular practice or, in some cases, an "industry standard."⁶³ For example, in 2003, the owner of a factory egg farm decided to dispose of 30,000 hens who no longer laid enough eggs.⁶⁴ To kill them, he had workers dump all 30,000 of them, alive and conscious, into a wood chipper.⁶⁵ A neighbor reported this conduct to the authorities, but no government agency took any action to stop the factory farmer or to prevent him from taking the same action in the future.⁶⁶ Laying hens are not within the coverage of HMSA. State anti-cruelty laws did apply to the hens, but the prosecutor refused to bring any charges, stating, through a spokesperson, that feeding live hens into a wood chipper is "industry standard."⁶⁷

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Elizabeth Weise, *Food Safety Chief Scolds Inspectors*, USA TODAY, Nov. 11, 2003, at A8 (emphasis added).

⁶³ Elizabeth Fitzsimmons, *Two Won't Face Cruelty Charges*, SAN DIEGO UNION TRIB., Apr. 12, 2003, at B7.

⁶⁴ Jia-Rui Chong, *Wood-Chipped Chickens Fuel Outrage*, L.A. TIMES, Nov. 22, 2003, at B1.

⁶⁵ *Id.*

⁶⁶ Fitzsimmons, *supra* note 63.

⁶⁷ *Id.*

The government that promised to stop inhumane slaughter by passage of HMSA has failed to do so in any remotely adequate way. Instead, employees of the slaughter industry skin, eviscerate, dehoove, and boil thousands of living, fully conscious animals every day as federal inspectors watch. Meanwhile, because chickens, fish, and other small animals are not even protected by HMSA, there is no documentation of the numbers of these animals that are fed into wood chippers or boiled alive simply because they no longer serve a useful purpose for humans.

B. The Animal Welfare Act, Its Illusory Nature and the Suffering of Animals

Life magazine, in its February 1966 issue, published an article entitled *Concentration Camp for Dogs*,⁶⁸ which described dealers' trafficking in dogs and cats to be used in medical experiments.⁶⁹ A photograph of a skeletal, cowering dog accompanied the article.⁷⁰ "*Life* received more mail on [that article] than any story in the history of the magazine—more letters than *Life* got on Vietnam."⁷¹

The public outcry following the publication of *Concentration Camp for Dogs* resulted in congressional hearings on proposed laws to regulate animal traffickers and research laboratories.⁷² During those hearings, lawmakers learned that dogs used in research laboratories were kept in cages, without reprieve, for three or four years, that waste was hosed out of cages with the dogs still inside, and that many dogs caught a claw or a toe in the mesh bottom of

⁶⁸ Silva, *Concentration Camp for Dogs*, LIFE, Feb. 4, 1966, at 22.

⁶⁹ Christine Stevens, Remarks at Symposium on the Animal Welfare Act: Historical Perspectives and Future Directions (Sept. 12, 1996), at <http://nal.usda.gov/awic/pubs/96symp/awasymp.htm>.

⁷⁰ *Id.*

⁷¹ *Id.* For additional information about the public outrage that prompted the passage of HMSA, see Amy Mosel, Comment, *What about Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133 (2001).

⁷² *Animal Dealer Regulation: Hearings Before the Comm. On Commerce*, 89th Cong. 29 (1966).

a cage and suffered greatly until someone noticed.⁷³ The lawmakers also learned of a case in which dogs were taken outside after surgery and tied to stakes, without shelter, behind the research laboratory.⁷⁴ While these hearings continued, the *Christian Science Monitor* published an editorial in support of the proposed laws, entitled *Must Mercy Wait?*⁷⁵

The promise of mercy, at least, came quickly. In 1966, Congress passed the Laboratory Animal Welfare Act ("LAWA").⁷⁶ While continuing the regulation of animal traffickers, amendments in 1970, 1976, 1985, and 1990 broadened the scope of its protections to include not only animals in research laboratories, but also animals to be used in zoos and pet shops.⁷⁷ Accordingly, the revisions changed the popular name to the Animal Welfare Act.

Congress states that the purpose of AWA is "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,"⁷⁸ and "to [require] the humane handling, care, treatment, and transportation of animals by . . . research facilities"⁷⁹ With this law on the books, animal advocates may have breathed a sigh of relief, just as they had in 1958 when HMSA was passed. This sense of relief was ill-founded, however, just as it had been in 1958.

A review of AWA and USDA regulations promulgated pursuant to AWA reveals that AWA's protections are largely illusory because almost all the "requirements" can be waived by the research laboratory's veterinarian or by the principal investigator. To waive the "requirements," the veterinarian or investigator needs only to place a statement in a file and in an annual

⁷³ *Id.* at 129-48.

⁷⁴ *Id.* at 138.

⁷⁵ Editorial, *Must Mercy Wait?*, CHRISTIAN SCI. MONITOR, Aug. 13, 1965.

⁷⁶ See Animal Welfare Act, 7 U.S.C. § 2131-2159 (2002). This section of this Article, exploring AWA, focuses primarily on animals in research laboratories.

⁷⁷ *Id.*

⁷⁸ *Id.* § 2131.

⁷⁹ *Id.* § 2143(a)(1).

report to USDA describing why AWA and its implementing regulations need not be followed.⁸⁰ It is difficult to view a law as regulatory when the researchers who are allegedly regulated can waive every provision of the law. Such an arrangement is particularly troubling when the individuals who can choose whether to follow the provisions of AWA are scientists, to whom the Secretary of Agriculture is likely to defer. Yet the public clearly wants the biomedical research industry regulated, or the public would not have insisted on AWA's passage.⁸¹ Exploring individual provisions of AWA, emphasizing the waiver provisions and vague terms, reveals its weaknesses.

AWA requires the Secretary of USDA to promulgate regulations "to ensure that animal pain and distress are minimized."⁸² These regulations are to include provisions regarding *adequate* veterinary care and the *appropriate* use of anesthetics, analgesics, tranquilizers, and euthanasia.⁸³

With regard to any procedure likely to cause the animal pain, the standards promulgated by the Secretary shall include the following requirements:

- (i) that a doctor of veterinary medicine is consulted in the planning of the procedure;⁸⁴ (ii) for the use of tranquilizers, analgesics, and anesthetics;⁸⁵ (iii) for pre-surgical and post-surgical care by laboratory workers, in accordance with [*appropriate*] veterinary medical and nursing standards;⁸⁶ (iv) against the use of paralytics without anesthesia;⁸⁷ and (v) that the

⁸⁰ *Id.*

⁸¹ See *supra* notes 71-72 and accompanying text.

⁸² 7 U.S.C. § 2143 (a)(3)(A) (2002).

⁸³ *Id.* § 2143(a)(3)(C).

⁸⁴ *Id.* § 2143(a)(3)(C)(i).

⁸⁵ *Id.* § 2143(a)(3)(C)(ii).

⁸⁶ *Id.* § 2143(a)(3)(C)(iii) (emphasis added).

⁸⁷ *Id.* § 2143(a)(3)(C)(iv). This requirement is included because of a particularly gruesome practice by researchers that would use paralytics on animals without anesthesia, with the result that the animal can suffer but cannot move.

withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically necessary shall continue for *only the necessary period of time*⁸⁸

With similarly significant room for interpretation, AWA mandates that the Secretary of Agriculture promulgate regulations requiring that an animal that has been used in one major procedure not be used in another, “except in cases of (i) *scientific necessity*; or (ii) other *special circumstances* as determined by the Secretary.”⁸⁹ Then, the scant protections that AWA has given with one hand, it takes away with the other. For instance, AWA immediately removes many of the protections it purports to provide by specifying that nothing can “be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the performance of actual research or experimentation by a research facility”⁹⁰ or the “design, outlines, or guidelines of actual research or experimentation,”⁹¹ except for certain enumerated sections of AWA.

The parts of the law that the Secretary may *not* enforce via regulation, rule, or order with regard to research include the requirement that a scientist weigh other options in any procedures that will probably cause pain or distress, and the requirements discussed earlier.⁹² As if the exceptions did not water down the rule enough, AWA requires the Secretary to include in the regulations “that exceptions to [the] standards may be made *only* when specified by research protocol and that any such exception shall be detailed and explained in a report outlined under paragraph (7) and filed with the Institutional Animal Committee.”⁹³ The use of the word “only” causes an ordinary reader to believe that what comes after that word will be very restrictive. Of course, what comes after the word “only” is essentially nothing—put it in the protocol and put it in the annual report.

⁸⁸ 7 U.S.C. § 2143(a)(3)(C)(v) (2002) (emphasis added).

⁸⁹ *Id.* § 2143(a)(3)(D) (emphasis added).

⁹⁰ *Id.* § 2143(a)(6)(A)(ii).

⁹¹ *Id.* § 2143(a)(6)(A)(i).

⁹² *Id.* § 2143(a)(3)(B); see *supra* notes 84-88 and accompanying text.

⁹³ 7 U.S.C. § 2143(a)(3)(E) (2002) (emphasis added).

It is quite possible that scientists, or those who prepare documents for them, have boilerplate language to be inserted in the protocol and the annual report in satisfaction of the ominous-sounding "only." The "rule" that exceptions can be made *only* when specified by research protocol is not an actual rule; it is illusory. When could an explanation for violating a standard not be included in a protocol? There is nothing to prevent a researcher from including such an explanation in every single protocol he or she writes. The researcher is not even required to obtain approval from the Institutional Animal Care and Use Committee ("IACUC") appointed by the research laboratory's chief executive. More straightforward drafting would have resulted in a provision stating: "Scientists and research facilities are not required to abide by the Animal Welfare Act or the regulations promulgated pursuant to that Act unless they want to; if they do not wish to comply, all they need to do is to say so in the file and in their annual report."

The referenced paragraph 7 in AWA specifies what must appear in the protocol and/or the annual report to USDA: (1) a statement that the provisions of AWA are being followed;⁹⁴ (2) a statement that the research facility is following "*professionally acceptable* standards governing the care, treatment, and use of animals . . . during actual research or experimentation";⁹⁵ (3) "information on procedures likely to produce pain or distress in any animal and assurances demonstrating that the principal investigator *considered* alternatives to those procedures";⁹⁶ (4) "*assurances satisfactory to the Secretary* that [the] facility is adhering to the standards described in this section";⁹⁷ and (5) "an explanation for any deviation from the standards" set by the Secretary.⁹⁸ The explanation for such deviations from the rules does not even have to be approved by the Institutional Animal Committee; it need only be filed with that committee.⁹⁹

⁹⁴ *Id.* § 2143(a)(7)(A).

⁹⁵ *Id.* § 2143(a)(7)(A) (emphasis added).

⁹⁶ *Id.* § 2143(a)(7)(i) (emphasis added).

⁹⁷ *Id.* § 2143(a)(7)(ii) (emphasis added).

⁹⁸ *Id.* § 2143(a)(7)(iii).

⁹⁹ 7 U.S.C. § 2143(3) (2002).

Further, as if this exception in this Section of AWA had not effectively excised the Act from the United States Code, AWA and the regulations promulgated pursuant to AWA are rife with further equivocations. These equivocations appear in the following descriptions, taken from AWA, of how an animal comes to find himself inside a research laboratory, and what scientists are permitted to do to him there.

Dealers who sell animals to research facilities must, with certain exceptions, be licensed.¹⁰⁰ There is an exception to the license requirement for any person who does not derive a substantial portion of his income, the meaning of substantial to be determined by the Secretary, from breeding dogs or cats on his own premises.¹⁰¹ A dealer must hold an animal for at least five business days before selling it to a research facility, unless the Secretary provides otherwise.¹⁰² A research facility may not obtain an animal for use in an experiment other than by purchasing the animal from a dealer licensed by or exempted from license by USDA or at an animal auction.¹⁰³ Research facilities, dealers and auction facilities must allow law enforcement officers onto their premises to look for lost animals.¹⁰⁴

AWA further requires the Secretary of Agriculture to establish regulations that will ensure the *minimization* of pain and distress to laboratory animals.¹⁰⁵ The regulations promulgated by the Secretary charge each research facility's IACUC with the responsibility for ensuring that any research "[b]e performed with *appropriate* sedatives, analgesics or anesthetics, *unless withholding such agents is justified for scientific reasons*, in writing, by the principal investigator and will continue for only the *necessary* period of time."¹⁰⁶

¹⁰⁰ 7 U.S.C. § 2134 (2002).

¹⁰¹ *Id.* §§ 2133, 2137.

¹⁰² *Id.* § 2135.

¹⁰³ *Id.* § 2137.

¹⁰⁴ *Id.* § 2147.

¹⁰⁵ *Id.* § 2143(a)(3)(A).

¹⁰⁶ 9 C.F.R. § 2.31 (d)(1)(iv)(A) (emphasis added).

IACUC is appointed by the chief executive of each research facility;¹⁰⁷ it must consist of at least three members, at least one of whom is a veterinarian, and at least one of whom represents the community's concerns about animal welfare.¹⁰⁸ The community member should have no ties to the research facility other than his service on the committee.¹⁰⁹ All members must have an adequate ability to evaluate the proposals the committee considers, with particular attention to the treatment and care of animals.¹¹⁰

Twice a year IACUC must inspect facilities where animals are kept, along with the areas in which studies are conducted, to review the condition of the animals and the manner in which animals' pain is addressed.¹¹¹ After each inspection, IACUC files a report with the research facility, identifying any violations found during the inspection.¹¹² If the research facility fails to correct the deficiencies after receiving the report and being given an opportunity to remedy the deficiencies, IACUC shall report the violations to USDA.¹¹³

A federal agency that funds research and becomes aware of violations at a research facility of AWA or its regulations shall suspend the facility's funding for the research, although the research facility has the option to appeal.¹¹⁴ The Secretary of Agriculture is authorized to seek an injunction to prohibit violations of AWA.¹¹⁵ The Secretary lacks not only the authority to intervene in the design of a project,¹¹⁶ but also the ability to stop

¹⁰⁷ *Id.* § 2.31 (b)(1).

¹⁰⁸ *Id.* § 2.31(b)(3). The "community" member is not elected, so he is not literally representative of the concerns of the community. He is appointed by the executive officer of the research laboratory. *Id.*

¹⁰⁹ *Id.* § 2.31(b)(3)(ii).

¹¹⁰ 7 U.S.C. § 2143(b)(1) (2002).

¹¹¹ *Id.* § 2143(b)(3). Although not completely clear, it appears from this regulation that the institution need not allow IACUC members to see the animal facilities any more often than twice per year, even though some members likely work at the institution.

¹¹² *Id.* § 2143(b)(4)(A).

¹¹³ *Id.* § 2143(b)(3).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 7 U.S.C. § 2143(a)(6)(A)(i) (2002).

research as it progresses;¹¹⁷ the Secretary can, however, temporarily suspend a facility's license for violations, with routes of appeal and review open to both the Secretary and the research facility.¹¹⁸ The research facility must train all individuals who work with animals, including scientists, on such topics as *humane* practices in research, eliminating or reducing pain, and methods for reporting any deficiencies in the facility's compliance with AWA and its regulations.¹¹⁹

The regulations promulgated by the Secretary that purport to relate to the humane handling, care, and treatment of animals are voluminous. Regardless of their quantity, the focus of these regulations on specific types of food and certain means of ventilation makes them so much sound and fury. The regulations signify nothing, given their failure to establish specific, enforceable requirements to stop the suffering of animals in laboratories. For instance, the pressing issues that have concerned animal welfare organizations for a number of years include exercise for dogs and psychological stimulation for non-human primates. The current standards in the Code of Federal Regulations provide, for example, that an enclosure for dogs must be at least six inches taller than the height of the tallest dog in the enclosure.¹²⁰ A dog should have at least the amount of floor space provided for in this calculation: the length in inches from the base of the dog's tail to the tip of the nose, plus six inches, squared.¹²¹ That figure is the minimum square inches for that dog's enclosure.¹²²

Thus, a small dog that would measure ten inches from the base of the tail to the tip of the nose would be allowed roughly 1.8 square feet of floor space. Furthermore, a dog is viewed as having sufficient exercise if he is allowed in a pen that is twice the minimum for his floor space.¹²³ For instance, a greyhound measuring twenty-five inches from the base of the tail to the tip of the

¹¹⁷ *Id.* § 2143(a)(6)(A)(iii).

¹¹⁸ *Id.* § 2149.

¹¹⁹ *Id.* § 2143(d).

¹²⁰ 9 C.F.R. § 3.6(c)(1)(iii) (2004).

¹²¹ *Id.* § 3.6(c)(1)(i).

¹²² *Id.*

¹²³ *Id.* § 3.8(a).

nose has adequate space for his exercise needs if he is in a cage twice the allowable minimum living space for a dog his size. A greyhound would therefore have "adequate" space for exercise if he were kept his entire life in a space smaller than a three by five foot bathroom.¹²⁴

The regulations relating to social grouping for non-human primates require only that the social needs of the primates be addressed according to "*current standards*," as directed by the attending veterinarian.¹²⁵ Where the public has called for a solution, Congress has largely delegated responsibility to USDA, and USDA has called for a veterinarian's application of an unspecified standard.¹²⁶ Such a veterinarian is dependent, for his or her salary, on the research facility that is supposedly subject to these "rules."¹²⁷

The regulations further state that the environment of non-human primates must be enriched by making available to the primates the means of expressing activities that are typical to their species.¹²⁸ Examples of these means are perches, swings, mirrors, and even "interaction" with humans who feed them and clean their cages.¹²⁹ Federal regulations allow workers to clean the cages by hosing them out while the primates are still in them, so long as the enclosure is not so tiny that the primate would be

¹²⁴ A greyhound measuring twenty-five inches from the base of the tail to the tip of the nose would be allowed 961 square inches of space for living ($(25 + 6)^2 = 961$ square inches of floor space for living quarters). 961 square inches is roughly 6.7 square feet. When that size is doubled, for the exercise space, the greyhound is considered, by the terms of AWA and its implementing regulations, to have adequate space for exercise if the dog has access to a space measuring 13.4 square feet, which is less than the size of a three by five foot bathroom (fifteen square feet). The inadequacy of such a provision, given the dog's lot, is all too obvious. Even an ideal provision about exercise, giving a greyhound acres on which to run, would not alter the dog's suffering when the dog is subjected to inescapable electric shock.

¹²⁵ 9 C.F.R. § 3.81(a) (2004) (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* § 3.81(b).

¹²⁹ *Id.*

wetted, harmed, or distressed.¹³⁰ A research facility could consider a non-human primate to be receiving adequate psychological stimulation because a human “interacted” with the primate by making her move to one side of her cage to avoid the blast of a hose.

The regulations do not include specifications as to the quantity of articles for psychological enrichment, nor do they specify whether each cage must have such articles, or merely the primate area as a whole.¹³¹ This lack of specificity makes the regulation largely ineffective. For example, in an area where thirty primates live in individual cages, personnel at the laboratory might place a single, small mirror at a point visible from each of the thirty cages and consider the facility in compliance with the “must”¹³² of this regulation.

Several provisions throughout AWA impose significant documentation and record-keeping requirements on each research facility.¹³³ Despite detailed record-keeping and AWA, animals suffer. Moreover, Congress has made even the minimal protections of AWA inapplicable to rats, birds, and mice by excluding them from the definition of “animal.”¹³⁴ Rats, birds, and mice constitute more than ninety percent of the animals used in research.¹³⁵

Catherine Dell’Orto, a veterinarian and post-doctoral fellow at Columbia University, complained to university officials in 2001 that animals used in surgical experiments at Columbia were not given relief from pain after they awoke from anesthetic.¹³⁹ Specifically, she reported that baboons were anesthetized and then

¹³⁰ *Id.* § 3.84(a).

¹³¹ *See* 9 C.F.R. § 3.84(a) (2004).

¹³² *Id.*

¹³³ *See* 9 C.F.R. § 2.35 (2004) (noting the various records that each animal research facility must maintain).

¹³⁴ *See* 7 U.S.C. § 2132(g) (2002). “The term animal means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal . . . but such term excludes birds, rats, . . . and mice” *Id.*

¹³⁵ Siri Carpenter, *Of Mice (and Rats and Birds) and Amendments*, 32 MONITOR ON PSYCHOL. (2001), available at <http://www.apa.org/monitor/feb01/mice.html>.

¹³⁹ Associated Press, *Columbia Still Entangled in Lab Probe*, Oct. 12, 2003 [hereinafter *Entangled in Lab Probe*].

subjected to surgeries in which an eyeball was removed.¹⁴⁰ A clamp was then placed inside each animal's eye socket to cut the flow of an artery, and subsequently the animals were returned to their cages without painkillers.¹⁴¹ Awakening from anesthesia without any analgesics, the baboons suffered prolonged deaths with no relief from pain when they should have been euthanized given their condition.¹⁴² Dell'Orto reported that she was shunned by her Columbia colleagues after registering her complaints, and she now has a private veterinary practice.¹⁴³

At Louisiana State University, neurosurgeon Michael Carey conducted experiments over a period of years in which hundreds of anesthetized cats were shot in the head.¹⁴⁴ Carey did not provide painkillers to the cats who survived, claiming that after being shot in the head "none appeared to be in any pain."¹⁴⁵ At Congress's urging, the U.S. General Accounting Office ("GAO") investigated the \$2 million experiment and Louisiana State University suspended the experiment.¹⁴⁶ At the conclusion of its review, GAO asked the U.S. Army to decide whether the experiments should continue.¹⁴⁷ The Army decided that the experiments should end, a decision about which "Carey was furious."¹⁴⁸

The scope and variety of institutional animal abuses that exist despite AWA are staggering. The *ILAR Journal* published an article which discussed different methods of producing pain in animals.¹⁴⁹ Scientists documented that some researchers place a

¹⁴⁰ *Id.*

¹⁴¹ Brendan Pierson, *PETA Files Suit Against Columbia U. Experiments on Baboons*, COLUM. DAILY SPECTATOR, Mar. 8, 2004.

¹⁴² *Entangled in Lab Probe*, *supra* note 139.

¹⁴³ *Id.*

¹⁴⁴ *Editorial: Needless Cruelty*, L.A. DAILY NEWS, Oct. 11, 1989.

¹⁴⁵ *Id.* Carey was relying on the idea that the tissue of the brain itself has no pain sensors. The projectiles fired into the cats' brains passed through skin and bone before reaching the brain. *Id.*

¹⁴⁶ *Army Halts Experiments With Cats*, BATON ROUGE MORNING ADVOC., Apr. 17, 1991, at B1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See T.J. Ness, *Models of Visceral Nociception*, 40 ILAR J. 119 (1999), available at http://www.dels.nas.edu/ilar/jour_online/40_3/40_3models.asp.

“noxious stimulus”¹⁵⁰ inside an animal’s body and watch to see if the animal writhes in pain.¹⁵¹ The “writhing test”¹⁵² “consists of injection [into the abdominal cavity] of a chemical irritant followed by subsequent counting of ‘writhes’—characteristic contraction of abdominal muscles accompanied by a hind limb extensor motion.”¹⁵³ Experimenters have conducted “writhing tests” on rats, mice, guinea pigs, dogs, cats, and primates—all of them anaesthetized.¹⁵⁴ Once the painful or irritating substance has been placed inside the animal’s body cavity, the scientists conducting the experiment count how often the animal writhes in pain over a five-minute period.¹⁵⁵ The experimenter records the number and continues the five-minute tally over the course of either thirty or sixty minutes.¹⁵⁶ A 0 to 3 scale measures the writhing, and the highest score is given when the animal contracts his abdominal muscles and then follows that contraction with stretching his body and extending his back legs.¹⁵⁷ One of the substances that may be injected into the animal’s abdominal cavity during the writhing test is acetic acid, the pure form of the chemical which, in its much more dilute state, gives vinegar its sour taste and smell.¹⁵⁸ Acetic acid makes up less than 10 percent of vinegar.¹⁵⁹ Undiluted, acetic acid is corrosive and can burn the skin.¹⁶⁰ The *ILAR Journal* article mentions a “significant ethical concern” that this type of experiment leaves the unanesthetized cat, ape, dog, rat, or other animal

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* Use of these painful tests continues to be implemented. See, e.g., *A Role of ASIC3 in the Modulation of High Intensity Pain Stimuli*, PROC. OF THE NAT’L ACAD. OF SCI. 8992 (2002), available at <http://www.pnas.org/cgi/content/abstract/99/13/8992>. One possible justification scientists might offer for this inhumane treatment of animals is the testing of painkillers.

¹⁵³ Ness, *supra* note 149, at 120.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Acetic Acid*, Wikipedia Encyclopedia, at http://en.wikipedia.org/wiki/Acetic_acid (last modified Feb. 1, 2005).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

writhing in pain for thirty or sixty minutes without any type of analgesic.¹⁶¹

Other experimenters cause pain by distending the colons and rectums of unanesthetized, conscious rabbits and horses, using a catheter to inflate a balloon placed in the animal's colon or rectum.¹⁶² Scientists surgically implant the balloon in the colon or rectum permanently, so the rabbits and horses cannot rid themselves of it.¹⁶³ When the experimenter stretches a horse's colon or rectum by inflating the balloon, the horse sweats, kicks, paws, and moves its head.¹⁶⁴ When the experimenter inflates the balloon in the unanesthetized dog's colon, the dog lifts its head and changes posture, stretches its back legs, and breathes faster or slower.¹⁶⁵

Experimenters may also distend the gall bladders of primates, dogs, cats, and ferrets.¹⁶⁶ For other studies, scientists induce artificial kidney stones in rats.¹⁶⁷ The rats, like all animals described in Ness's *ILAR Journal* article, are given no anesthetic or painkiller as they live with an artificial kidney stone for several days.¹⁶⁸ Over the course of the several days necessary for the rat to pass the stone, it may have as many as sixty episodes in which it writhes in pain—a period of writhing may last for up to forty-five minutes.¹⁶⁹

In another test, experimenters will surgically insert a tube into the urinary bladder of a rat.¹⁷⁰ The next day, without administering a painkiller, a preparation containing the solvent xylene (which is used in paint thinners and gasoline) is dripped through the tube into the rat's bladder.¹⁷¹ The rat immediately reacts by

¹⁶¹ Ness, *supra* note 149, at 125.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Ness, *supra* note 149, at 125.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

licking its abdomen and perineum, turning its head, stretching its legs back, crying out, salivating, and defecating.¹⁷²

In a variation on the previous experiment, scientists introduce a chemotherapy agent into the bladders of conscious rats, with no analgesia, and rate their behavior.¹⁷³ "Beginning approximately 1 hour after systemic administration, and continuing for approximately 4 *hours* unanesthetized rats demonstrate alterations in normal behavior [on this scale]: 1 = normal behavior; 2 = lacrimation [shedding tears]; 3 = piloerection [goose bumps]; 4 = rounded-back posture with alertness; 5 = rounded-back posture with immobility; and 6 = transient 'crises' [no description of 'crises' given]."¹⁷⁴ Other irritants introduced into the bladders of conscious animals include mustard oil and turpentine oil.¹⁷⁵

Other scientists cause animals to suffer by manipulating the animals' sex organs. An experiment on a female rat consists of scientists inserting a balloon into the rat's uterus and inflating it until the pressure starves the uterine tissue of oxygen, a painful phenomenon known as ischemia.¹⁷⁶ In an experiment on a male rat, experimenters compress the rat's testicles.¹⁷⁷ Scientists also squeeze the testicles of primates to cause pain.¹⁷⁸ Ness also notes that stimulating the cervix of a female rat can produce "reproductive behaviors" such as arching her back and moving her tail to permit penetration by the male, but that stimulating the cervix of an anestrous female rat at "high intensities" produces "escape behavior."¹⁷⁹

Scientists attempt to induce in animals the pain of pancreatitis, a "model that utilizes a prolonged, inescapable stimulus to mimic what is considered to be one of the most severe human pains."¹⁸⁰ At the conclusion of this list of methods, Ness warns that

¹⁷² *Id.* at 124.

¹⁷³ Ness, *supra* note 149, at 124.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Ness, *supra* note 149, at 125.

¹⁸⁰ *Id.* at 126.

anesthesia has a negative effect on the usefulness of such tests because it stops the pain.¹⁸¹ "The effect of anesthesia on responses to visceral stimuli has significant ethical ramifications since it suggests that all studies [of visceral pain] should perhaps be performed in unanesthetized animals."¹⁸²

Another article, describing many of these same methods of causing pain to animals, offers an additional approach: electrical shock applied to the dental pulp of conscious, unanesthetized cats and dogs.¹⁸³ Experimenters drill holes through a tooth and then run an electrical wire through the cavity into the pulp of the tooth delivering the electrical shock to the pulp of the unanesthetized cat or dog.¹⁸⁴

Martin Seligman also experimented on dogs by shocking them. His lengthy career of experiments and publications on the topic

¹⁸¹ Ness also notes that this point raises an ethical issue. *Id.* at 120.

¹⁸² *Id.* (emphasis added).

¹⁸³ See Daniel Le Bars et al., *Animal Models of Nociception*, 53 PHARMACOLOGICAL REV. 597 (2001). Experimenters also take unanesthetized dogs and block the coronary arteries to deprive their hearts of blood, and cause a heart attack. Ness, *supra* note 149, at 126.

¹⁸⁴ The ancient Cartesian notion that animals cannot experience pain is debunked by the very scientists who use animals as "models" of pain. In fact, the Cartesian view of animal pain, that the screams of a dog—as each of his four paws is nailed to a board so his veins can be cut open—are like the grindings of metal in a broken machine, have been thoroughly and completely discredited by science. Moreover, Descartes' view that animals are unable to feel pain has never been mentioned in any reported court opinion except to describe the demise of the notion.

Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, mere property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members.

Bueckner v. Hamel, 886 S.W.2d 368, 377-78 (Tex. App. 1994). Discredited Cartesian notions about animals must take their rightful place in our discussions: they are relics.

began in 1967 with *Failure to Escape Traumatic Shock*.¹⁸⁵ Seligman placed dogs in harnesses, rendering them completely immobile, and then subjected some to uncontrollable, inescapable electric shock at a level of six milliamperes.¹⁸⁶ The effect of this level of electricity delivered to a female human is described as causing “[p]ainful shock [and] loss of muscular control.”¹⁸⁷

A recent experiment using Seligman’s concept of inescapable, uncontrollable electric shock involved rendering rats immobile and then delivering electrical shock to their tails over a one-hour period.¹⁸⁸ The rats received one shock per minute, with each shock lasting five seconds.¹⁸⁹ In addition, the experiment utilized another method of inducing helplessness, anxiety, or despair. Rats were dropped into water too deep for them to stand and denied any method of escape or any ledge or corner on which to rest.¹⁹⁰ They were left to flail for fifteen minutes until they gave up, thus demonstrating behavioral despair, an “animal model of depression.”¹⁹¹

Among the many disturbing aspects of these painful experiments is the animal’s inability to comprehend why he is experiencing the pain, why he cannot stop the pain, and why no one will help him. When a baboon, experimented on at Columbia University, wakes up in a cage, an eye missing and a metal clamp stuck in the socket, he lies in the cage without painkillers until he dies, never understanding what has happened or why, and perhaps never losing hope that one of the humans in the laboratory will realize he is suffering and come help him.

¹⁸⁵ Martin Seligman, *Failure to Escape Traumatic Shock*, 74 J. OF EXPERIMENTAL PSYCHOL. 1 (1967).

¹⁸⁶ *Id.* at 1-9.

¹⁸⁷ *Controlling Electrical Hazards*, OCCUPATIONAL HEALTH & SAFETY ADMIN. 12, available at <http://www.osha.gov/Publications/osh3075.pdf> (last visited Apr. 8, 2005).

¹⁸⁸ Karl J. Kaiyala et al., *5-HT_{1b} Receptor MRNA Levels in Dorsal Raphe Nucleus: Inverse Association with Anxiety Behavior in the Elevated Plus Maze*, 75 PHARMACOLOGY, BIOCHEMISTRY & BEHAVIOR 769-76 (2003).

¹⁸⁹ *Id.* at 770.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 769.

The criminal law is instructive in this context. When society judges a human's conduct to be so reprehensible that he or she should be punished by death, certain standards of civil society apply. For instance, society refuses to administer capital punishment if a prisoner's mental incapacity renders the prisoner incapable of understanding the punishment¹⁹² and why he or she has been singled out to suffer the punishment.¹⁹³ Society will not drag a person from his or her cell, strap the person to a table, and start the lethal drip if the person is incapable of understanding the reason for the punishment. The Constitution and societal conscience place constraints upon playing out such a Kafkaesque scene with humans. Why allow the same to be done to animals?

At least two responses to this information are possible. One proposes that such prisoners, although so reprehensible that they have been sentenced to death, are nevertheless human and should therefore never be compared to animals. The other imagines the imagined questions that Isaac Bashevis Singer and Shylock might ask if they knew of these experiments on conscious animals: Hath not a dog senses, affections, passions, hurt with the same weapons, subject to the same diseases, warmed and cooled as humans by the same winter and summer? If you keep him alone in a cage for years, is he not lonely? If you torture him, does he not suffer?¹⁹⁴

In the final analysis, laws must be measured by what they promise and provide. Current laws permit scientists to deliberately cause pain in dogs, cats, primates, rats, guinea pigs, horses, and other animals without providing painkillers. Scientists cause this pain by inflating surgically implanted balloons to distend the animals' colons and rectums, burning them, or squeezing their testicles, and then watch as the powerless animals writhe in pain.¹⁹⁵ If all this can be done under the auspices of a statute entitled the "Animal Welfare Act," what might scientists do under the governance of a provision entitled the "Neutrality to Animals

¹⁹² See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Smith v. Armontrout*, 857 F.2d 1228, 1230 (8th Cir. 1988).

¹⁹³ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989); *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in judgment).

¹⁹⁴ See *supra* notes 43-45.

¹⁹⁵ See *supra* notes 162-79.

Law?" If injecting corrosive acid into the body cavity of an unanesthetized dog and watching him writhe in pain for an hour is welfare, then for what wrongs does our law reserve the word "cruelty?"

III. A BRIEF HISTORY OF THE LEGAL RIGHTS OF ANIMALS IN THE UNITED STATES

A. *The Early Common Law Approach, in which Animals Were Treated as Property*

At early common law, animals had no rights and were treated exclusively as property.¹⁹⁶ They had no inherent value, and the only harm to animals with which the law was concerned was the harm that could reduce the animal's value to its human owner.¹⁹⁷ As long as the prohibition against diminishing an animal's value was honored, an owner could torment the animal in any way he or she pleased.¹⁹⁸ This model of animals as chattel, to be dealt with as the owner saw fit, failed to recognize that animals can and do suffer pain. As the recognition of animals as sentient beings became more commonplace, recognition of their rights followed close behind.

B. *The Recognition of the Rights of Animals in the Nineteenth and Twentieth Centuries*

In contrast to the state of affairs under early common law, courts and legal scholars in the United States began to recognize substantive rights for animals as early as the nineteenth century.¹⁹⁹ Thus, animals are no strangers to U.S. courts, nor is the vindication of their rights a novel concept. In 1897, the Louisiana

¹⁹⁶ See, e.g., *State v. Karstendiek, et al.*, 22 So. 845 (La. 1897).

¹⁹⁷ See Elaine L. Hughes & Christine Meyer, *Animal Welfare Law in Canada and Europe*, 6 ANIMAL L. 23, 25 (2000) (citing Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOCIAL RESEARCH 539 (1995)).

¹⁹⁸ *Id.*

¹⁹⁹ See *infra* notes 200-05. See generally, Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003).

Supreme Court heard the appeal of two men convicted of cruelty to animals.²⁰⁰ Rejecting the appellants' argument that a statute prohibiting cruelty to animals interfered with their property rights in the animals they owned, the court held that

[t]he statute relating to animals is based on "the theory, unknown to the common law, that animals have rights, which, like those of human beings, are to be protected. A horse, under its master's hands, stands in a relation to the master analogous to that of a child to a parent." Reasoning from that basis, we feel certain that the ordinance and the statute do not interfere with the private right of property as claimed.²⁰¹

That decision was no fluke of Louisiana civil law. The following year, although reversing a cruelty conviction for failure to show the requisite proof of intent, the Mississippi Supreme Court stated that the purpose of such statutes was to remedy the common law's failure to recognize the rights of animals.²⁰² The court further explained that

[t]o disregard the rights and feelings of equals is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless is mean and cowardly. Human beings have at least some means of protecting themselves . . . but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve for these considerations alone, kindly treatment.²⁰³

²⁰⁰ *Karstendiek*, 22 So. at 845.

²⁰¹ *Id.* at 847 (citation omitted).

²⁰² *Stephens v. State*, 3 So. 458 (Miss. 1887).

²⁰³ *Id.* at 459.

Similarly, a Texas appellate court, upholding a conviction for killing a dog, recognized without hesitation that animals have rights.²⁰⁴ The court stated that “[b]esides, the dog has rights, which it seems to us should not be jeopardized on slight provocation.”²⁰⁵

More recently, Professor Sunstein has written that federal statutes, especially AWA, provide an “incipient bill of rights for animals.”²⁰⁶ As discussed herein, however, such rights mean little, and could, in fact, conceal the abuse the laws were intended to stop, unless the animals have standing to enforce those rights. Until courts uniformly recognize animal standing, the industries that claim to be regulated by HMSA and AWA will ignore or waive the dictates of those laws, placating the public by pointing to the very laws the industries ignore and waive.

C. *HMSA and AWA Do More Harm Than Good*

For at least two reasons, animals would fare better if HMSA and AWA had never been passed. First, one of the laws has been held to preempt state anti-cruelty statutes.²⁰⁷ Second, the enactment of these two statutes quelled the public outcry that arose when the routine torture committed in slaughterhouses and research laboratories came to light.²⁰⁸ The government, along with the biomedical research and slaughter industries, passed these laws to pacify a populace that refused to stand by while animals were tortured. Ironically, the public’s dire concern about the treatment of animals has been quieted even as the torture continues, because the public believed the most basic promise of our government: that a *law* is something to be obeyed and enforced.

²⁰⁴ *Brookreson v. State*, 93 S.W. 725 (Tex. Crim. App. 1906).

²⁰⁵ *Id.*

²⁰⁶ Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) [hereinafter Sunstein, *Tribute*].

²⁰⁷ See *infra* notes 209-14 and accompanying text.

²⁰⁸ See *infra* note 215-20 and accompanying text.

At least one court has been willing to protect lawbreakers from prosecution under state anti-cruelty statutes by ruling that these illusory federal laws preempt state cruelty statutes.²⁰⁹ Though neither the word "preemption" nor the concept of preemption appears in AWA, a Maryland appellate court used the doctrine to reverse and render a trial court's conviction of Edward Taub on charges of cruelty to animals.²¹⁰ Taub conducted medical experiments on monkeys and when Maryland authorities raided his laboratory, they found seventeen monkeys, "each in a small cage that hadn't been cleaned for days."²¹¹ Worse still, "[s]everal of the monkeys had bitten off fingers, and some had chewed into their limbs, leaving raw, open wounds the size of silver dollars, wounds that were covered with filthy bandages or not covered at all."²¹² Although Taub was convicted of multiple counts of cruelty, the Maryland Court of Appeals vacated his conviction because of the existence of AWA,²¹³ ignoring the fact that AWA contains no provisions for the criminal prosecution of a person who tortures animals in a research laboratory.²¹⁴ The Maryland court apparently believed that a person performing experiments on animals can do anything to animals with impunity.

No case has gone to the Maryland court to test how far this immunity goes. Can a researcher crucify unanesthetized chimpanzees and leave them on their crosses for days until they die of thirst to test endurance? Can a researcher flay a conscious, feeling dog alive, a square inch of skin a day, to determine how long he will live? Or can he leave a rat in a tiny walled cage for weeks to see how long it takes the animal to suffocate on his own accumulating feces? These examples are not to be scoffed at, with a respected state appellate court having implied that those who experiment on animals enjoy absolute immunity from laws prohibiting cruelty to animals.

²⁰⁹ *Taub v. State*, 463 A.2d 819 (Md. 1983).

²¹⁰ *Id.*

²¹¹ Peter Carlson, *The Great Silver Spring Monkey Debate*, WASH. POST MAG., Feb. 24, 1991, at W15.

²¹² *Id.*

²¹³ *Taub*, 463 A.2d at 821-22.

²¹⁴ Animal Welfare Act, 7 U.S.C. § 2131-2159 (2002).

Not only do the statutes allegedly preempt, they also placate the public. One example of this effect is this question and following answer from the Foundation for Biomedical Research²¹⁵ ("FBR") web site:

[Question:] *Aren't the animals in laboratories suffering and in pain?*

[Answer:] The use of animals in research and testing is strictly controlled, particularly regarding potential pain. Federal laws, the Animal Welfare Act and the Public Health Service Act,^[216] regulate the alleviation and elimination of pain, as well as such aspects of animal care as caging, feeding, exercise of dogs and the psychological well-being of primates. Further, each institution must establish an animal care and use committee that includes an outside member of the public as well as a veterinarian. This committee oversees, inspects and monitors every potential experiment to help ensure optimal animal care. The scientific community advocates the highest quality of animal care and treatment for two key reasons. First, the use of animals in research is a privilege, and those animals that are helping us unlock the mysteries of disease deserve our respect and the best possible care. Second, a well-treated animal will provide more reliable scientific results, which is the goal of all researchers.²¹⁷

²¹⁵ The Foundation for Biomedical Research is a public relations arm of the biomedical research industry, which is organized to persuade the public that biomedical research is necessary and humane. See *About the Foundation for Biomedical Research*, Foundation for Biomedical Research, at <http://www.fbresearch.org/about/> (last visited Apr. 8, 2005).

²¹⁶ The Public Health Service Act provides for the Director of the National Institutes of Health, in funding research, to enforce rules similar to the provisions of AWA. See 42 U.S.C. § 283(e) (2002).

²¹⁷ *Frequently Asked Questions About Animal Research*, Foundation for Biomedical Research, at <http://www.fbresearch.org/animal-research-faq.htm> (last visited Apr. 8, 2005).

FBR's description of experiments on animals as "strictly controlled, particularly regarding potential pain" is breathtaking, given that AWA expressly and specifically prohibits the Secretary of Agriculture from promulgating research-related rules if those rules touch upon the "requiremen[t]" for consulting a veterinarian in designing painful procedures, or touch upon the "requiremen[t]" for using tranquilizers, analgesics and anesthetics in painful research.²¹⁸ It is stunning for FBR to claim that experiments on animals are "strictly controlled," given the sieve-like law which allows the scientists allegedly being regulated to waive any and all regulations, including those about painful experiments, by placing a statement of explanation in the file and annual report to USDA.²¹⁹ Thus, AWA, which is largely illusory, is a useful tool for the public relations arm of the biomedical research industry, allowing the industry to claim there are "strict controls" on experiments when there are in fact no such controls in the statute.

Just as FBR points to AWA provisions to eliminate citizens' concerns that animals are suffering in medical research laboratories, meatpacking industry group American Meat Institute ("AMI") uses HMSA to assure the public that animals are treated well. The AMI includes the following information regarding animal welfare in a press kit available on its web site:

The U.S. meat industry is one of the most heavily regulated industries in the nation The Humane Methods of Slaughter Act of 1978 dictates strict animal handling and slaughtering practices for packing plants. . . . Key requirements under the Act specify . . . that livestock must be rendered insensible to pain prior to slaughter. The Act details the methods that must be used to stun animals.²²⁰

²¹⁸ 7 U.S.C. § 2143(6)(ii) (2002).

²¹⁹ *Id.* § 2143(3).

²²⁰ *Overview: Animal Welfare in Packing Plants*, American Meat Institute, 1 (Dec. 2004), available at http://www.meatami.com/content/presscenter/factsheets_Infokits/OverviewAnimalWelfareinPackingPlants.pdf.

What is worse, there are other, entirely unregulated areas of human conduct and commerce in which animals are subjected to systematic torture. One is the factory farm, where intensive confinement methods condemn animals to lives of unrelenting anguish. For example, U.S. poultry farmers continue to use battery cages, crowding so many chickens into one cage that birds cannot stretch their wings or move freely.²²¹ The lives of cage-raised chickens are miserable, and their deaths can be worse. Workers at one U.S. poultry slaughter plant were caught on videotape torturing living, conscious birds for sport by ripping off their beaks, spitting tobacco juice into their mouths and eyes, and squeezing the birds so hard that they expelled feces.²²² A long history of regulatory efforts regarding humane treatment has ended where it began — in failure. It is clear that other, more powerful methods for ending the torture of animals must come to the forefront.

D. The Fair and Just Use of the Judicial Doctrine of Standing

Efforts to protect animals have failed. The common law offered them no protection. State statutes promising to punish cruelty are rarely enforced and sometimes held to be preempted by federal law.²²³ Federal laws offering minimal protections are riddled with exclusions, routinely ignored, and in the case of AWA, rendered almost useless because the power to regulate is in the hands of the regulated.²²⁴ The last ray of hope for these tormented creatures is the principled application of the legal doctrine of standing. If the promise of this doctrine is to hold true, courts must follow their own standards. Judicial rules of standing apply whether the plaintiff is rich or poor, two-legged or four-legged. If “[t]he humblest citizen in all the land, when clad in the armor of a righteous

²²¹ Michael Pollan, *An Animal's Place*, N.Y. TIMES, Nov. 10, 2002, at Sect. 6.

²²² Associated Press, *KFC Supplier Fires 11 After Video of Chicken Abuse* (July 21, 2004), available at http://www.usatoday.com/money/industries/food/2004-07-21-kfc-supplier_x.htm.

²²³ See *supra* Part III.C.

²²⁴ See *supra* Part II.B.

cause, is stronger than all the hosts of error,"²²⁵ then surely courts clothed with the power and dignity of the Nation and her states can face down powerful industries and order them to stop torturing helpless animals for profit.

One appropriate means to stop the torture of animals, not only in slaughterhouses and research laboratories but in other settings as well, already exists. That method is a legal action brought by the animal's guardian or next friend to vindicate the animal's interests and rights. Despite courts' recognition of the standing of animals for more than thirty years,²²⁶ court decisions holding that animals have or lack standing contain no hint of the rationale relied upon to reach such conclusions. The cases are hopelessly inconsistent; they rarely mention, much less apply, the established rules of standing.²²⁷ Developing a sound, principled basis for deciding such cases must begin with an analysis of the rather amorphous concept of standing. When courts employ the rules of standing, rather than severing the word from its meaning, not only can the failures of HMSA and AWA largely be remedied, but animals falling outside the purview of federal legislation may have a chance to avoid the factory farm and the wood chipper.

IV. DANGEROUS TERRAIN: THE LAW OF STANDING

Standing is a terrain in which a traveler can become lost, unless he begins his journey by looking out over the vista and locating several landmarks that will serve as reference points during the exploration. Certain distinctions serve as those landmarks. First, there is the distinction between standing and other rules of justiciability. Standing is one of several concepts used to determine whether a given case is justiciable, i.e., whether a court action is the proper vehicle for resolving the matter. Other

²²⁵ William Jennings Bryan, *The Cross of Gold: Speech delivered before the National Democratic Convention at Chicago* 17 (July 9, 1896) (Univ. of Nebraska Press, 1996).

²²⁶ See *infra* notes 257-63 and accompanying text.

²²⁷ See *infra* Part IV.C.

justiciability doctrines include mootness,²²⁸ ripeness,²²⁹ political question,²³⁰ and advisory opinion.²³¹ Any claimant, in order to be heard, must leap all of the justiciability hurdles applicable to her case, including standing. The line between standing and the other justiciability doctrines is not always a bright one.

Second, there is the distinction between federal courts and state courts. Most decisions involving standing are federal court decisions because, like the federal courts themselves, constitutional standing is a creature of Article III of the Constitution.²³² Although state courts may have their own state constitutional, statutory, and common law limitations specifying who may bring suit, state courts are not bound by the rules of standing arising from the Constitution, because they owe neither their existence nor their jurisdiction to Article III.

Third is the distinction between constitutional standing and prudential standing. Article III standing, also known as constitutional standing, is not the only doctrine of standing applied by federal courts. A claimant who meets the requirements of constitutional standing may nevertheless find the path barred by judge-made law regarding prudential standing. Constitutional standing and prudential standing are two different standards against which a claimant's case is measured, and prudential standing is the more exacting of the two. Prudential standing is also the only standing that can be waived, by the court or the legislature.²³³

²²⁸ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

²²⁹ *Nat'l Park Hospitality Ass'n. v. Dep't of Interior*, 538 U.S. 803 (2003) (holding that concessionaires' objections to administrative regulations relating to national parks' business relationships with concessionaires were not ripe for judicial determination, where those objections constituted general objections to the regulations, rather than a specific, well-defined dispute).

²³⁰ *Nixon v. United States*, 506 U.S. 224 (1993) (deciding that impeached federal judge's challenge to Senate's rules for conducting impeachment was nonjusticiable political question). The prohibition against considering political questions arises not only with regard to constitutional standing, but also with regard to prudential standing. *See Allen v. Wright*, 468 U.S. 737, 751 (1990).

²³¹ *United States v. Freuhauf*, 365 U.S. 146, 157 (1961) (declining to interpret a federal statute where there had been no "adversary argument exploring every aspect of" the matter).

²³² *See, e.g., Kowalski v. Tesmer*, 125 S. Ct. 564, 567 (2004).

²³³ *See infra* part IV.B.

Fourth, there is the distinction between statutory claims and common law claims. Although most standing litigation involves a case brought pursuant to statute, a party who brings a common law claim must also establish that he or she has standing.²³⁴ A grasp of these basic distinctions is important to understanding the following, more detailed analysis of the law of standing.

A. *Constitutional Standing*

Federal courts in the United States have the power to issue rulings only in the context of an actual dispute between identified parties.²³⁵ This limitation on the courts' authority to decide cases arises from the explicit language of Article III of the Constitution, which provides that courts may act only where there is a "case or controversy."²³⁶

²³⁴ See *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 831 (1999) (deciding whether class member with "exposure-only" claims in mass tort has suffered injury-in-fact); *Eastland Partners Ltd. Partners v. Vill. Green Mgmt. Co.*, 342 F.3d 620 (6th Cir. 2003) (deciding that a partnership had standing to assert a breach of contract claim because it had suffered an injury-in-fact).

²³⁵ See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (deciding that considerations of prudential standing preclude courts from considering a claim by a party whose standing depends on issues of family law that are in dispute); see also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (holding that a U.S. Senator who planned to run ads critical of his opponent in the future, and who had done so in the past, demonstrated no injury-in-fact and thus had no standing to challenge federal statute limiting the availability of political contributions that could be used to pay for such ads); *Allen v. Wright*, 468 U.S. 737 (1984) (holding that parents of black children in public schools did not have standing to sue Internal Revenue Service for inadequately enforcing the prohibition against tax-exempt status for private schools that discriminated on the basis of race); *Fed. Communications Comm'n v. Nat'l Broad. Co.*, 319 U.S. 239 (1943) (holding that one aggrieved by a decision of the FCC has standing to bring an action against the FCC).

²³⁶ The constitutional provision referred to in the phrase "case or controversy" reads as follows:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public

This limitation on the power of the courts is known as standing.²³⁷ Although constitutional standing is a limitation on the jurisdiction of the court, it is almost always expressed as a failing in the plaintiff's case, so that the reason given for dismissing the case is not the court's lack of jurisdiction, but the plaintiff's lack of standing.²³⁸ Article III creates no rights, because standing is not a constitutional right. Standing is the effect, from the claimant's perspective, of Article III's definition of the jurisdiction of the federal courts. The fact that Article III creates no rights is momentous in cases involving animals. A court recognizing the standing of an animal is not creating a new right; it is merely deciding to decide whether the animal has rights that have been violated.

In determining whether a claimant has standing, courts use certain settled legal principles. To establish²³⁹ standing to sue, a claimant must meet three requirements, referred to as the

Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST., art. III.

²³⁷ An early use of the term "standing" in federal courts appeared in *Brent v. Bank of Washington*, which stated that if a party could assert only a legal claim, then he would have "no standing in equity." 35 U.S. 596, 613 (1836).

²³⁸ See, e.g., *McConnell* 540 U.S. at 93; *Selective Service Sys. v. Midwest Pub. Int. Group*, 468 U.S. 841 (1984); *Chenoweth v. Clinton*, 181 F.3d 112 (D.D.C. 1999).

²³⁹ The party invoking the court's jurisdiction has not only the burden of going forward but also the burden of persuasion (sometimes referred to as the risk of non-persuasion) with regard to each of the three elements. *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 528 U.S. 167, 198 (2000). The quantum and type of proof that must be brought forward by the party invoking the court's jurisdiction depends on the stage of the proceedings at which standing is challenged or otherwise reviewed. The proof that will suffice for the claimant to survive a motion to dismiss is less than the proof that will suffice for opposing a motion for summary judgment on the issue of standing. See *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997); *Lewis v. Casey*, 518 U.S. 343, 354 (1996).

"irreducible constitutional minimum"²⁴⁰ needed to invoke the power of the federal courts. First, the claimant must show that she has suffered an injury-in-fact. Such an injury-in-fact must be "actual or imminent," "concrete," and "distinct and palpable."²⁴¹ Next, the claimant must establish causation, i.e., she must show that the defendant's conduct of which she complains led to her injury. Put another way, she must show that her injury is "fairly traceable" to the defendant's conduct.²⁴² Third, she must demonstrate redressibility; that is, she must show that a ruling in her favor will likely provide her with relief from the injury of which she complains.²⁴³ A conscious cow on her way to the belly-ripper can satisfy this three-part standard.

B. Prudential Standing

Standing which emanates from Article III's "case or controversy" requirement is jurisdictional, so that in its absence, the court has no power to hear the matter. The closely related doctrine of prudential standing is a means whereby the federal courts impose their own limitations on the cases they will consider, declining to hear cases they have the power to hear where it would be unwise, as a matter of policy, to do so.²⁴⁴ Because prudential standing does not arise from the Constitution, Congress has the power to eliminate the federal judiciary's self-imposed limits and require that the actions arising from the statute at issue be heard by the courts, so long as the constitutional minimum is met.²⁴⁵

Prudential standing consists of three major principles. First, when the claimant brings suit pursuant to a statute, prudential considerations regarding standing—if not eliminated by Congress—may require that the claimant be "within the zone of

²⁴⁰ *McConnell*, 540 U.S. at 225 (quoting *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

²⁴¹ *Id.* at 225 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

²⁴² *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999); *Allen v. Wright*, 468 U.S. 737, 751 (1990).

²⁴³ *See, e.g., McConnell*, 540 U.S. at 225-26.

²⁴⁴ *Nat'l Credit Union Admin. v. First Nat'l Bank et al.*, 522 U.S. 479 (1998).

²⁴⁵ *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998).

interests" the statute was intended to protect.²⁴⁶ If the claimant is not, he lacks standing, and his claim may be dismissed. Second, the plaintiff must not be allowed to use the courts to seek relief from a generalized grievance he shares with the populace at large.²⁴⁷ Third, a plaintiff may not seek to vindicate an injury to a third party.²⁴⁸ Of course, and of great importance with regard to animals, the prohibition against such *jus tertii* standing does not preclude a guardian or next friend from bringing an action on behalf of another, so long as an adequate reason is offered for the real party's inability to proceed and the guardian or "next friend" [is] truly dedicated to the best interests of the one she represents.²⁴⁹

Just as courts can use the judge-made doctrine of prudential standing to raise the bar and contract the class of claimants with standing, Congress can include in a statute a private suit provision²⁵⁰ that eliminates considerations of prudential standing and lowers the bar to the irreducible constitutional minimum.²⁵¹

Although standing is a doctrine much-criticized for vagueness and inconsistency,²⁵² its rough contours are certainly recognizable. A claimant may not bring suit unless he can demonstrate the irreducible constitutional minimum of injury-in-fact, causation,

²⁴⁶ *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990); *see also* *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that considerations of prudential standing preclude divorced father from asserting his daughter's right not to be required to participate in the recitation of the Pledge of Allegiance, when the father's interests and the daughter's may be in conflict).

²⁵⁰ Such actions are sometimes referred to as "citizen suits." *See, e.g.* *S. Florida. Mgmt. Dist. v. Miccosukee*, 541 U.S. 95, 99 (2004). The term is a misnomer, however, because a claimant need not be a citizen in order to bring such a suit. *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716 (D.D.C. 1988) (involving an alien bringing suit pursuant to the Administrative Procedure Act ("APA")). Therefore, they are referred to, in this Article, as "private suits."

²⁵¹ *See Bennett v. Spear*, 520 U.S. 154, 155-56 (1997).

²⁵² *See, e.g., Mark Bobrowski, The Zoning Act's "Person Aggrieved" Standard: From Barvenin to Marashian*, 18 W. NEW ENG. L. REV. 385 (1996).

and redressibility. Even if he can make such a showing, the court may nevertheless refuse him entry by relying on principles of prudential standing.

Congress, by statute, can eliminate prudential standing and thus preclude the courts from using the doctrine of prudential standing when considering actions based on a specific statute. The court can choose to waive prudential standing in a particular case. Although this is a very spare statement of a subtly nuanced doctrine, it serves to demonstrate that there is at least an identifiable jurisprudence of standing, such that there is no need or justification for inconsistent, *ipse dixit*²⁵³ rulings regarding the standing of animals.

C. Severing the Word from Its Meaning in Cases Involving Animals

Court decisions relating to the standing of animals²⁵⁴ are wildly inconsistent and lacking in articulated rationale. Instead of applying the rules of standing to the claims brought by animals and their guardians, courts simply issue unexplained rulings to the effect that the animals have or lack standing. They treat standing not as a rule of law to be used in a principled way, but instead as a shibboleth.²⁵⁵

²⁵³ "[I]pse dixit" literally means "he himself said it." The phrase is used to refer to "[s]omething asserted but not proved." BLACK'S LAW DICTIONARY 828 (6th ed. 1990).

²⁵⁴ This Article addresses solely the question of the standing of animals.

²⁵⁵ A shibboleth is a password of sorts, used by Old Testament warriors to identify the enemy:

And the Gileadites took the passages of Jordan before the Ephraimites: and it was so, that when those Ephraimites which were escaped said, Let me go over; that the men of Gilead said unto him, *Art thou an Ephraimite?* If he said, *Nay*; . . . Then said they unto him, *Say now Shibboleth:* and he said *Sibboleth:* for he could not frame to pronounce *it* right. Then they took him, and slew him at the passages of Jordan. . . .

Judges 12:5-7.

Transforming the jurisprudence of animal standing from shibboleth into rationale begins with a review of U.S. cases involving animals as parties. Because no meaningful rationale or framework for these disparate decisions exists, they are presented here in two general groupings: Cases granting standing to animals without an explanation and cases denying animals standing without an explanation. Reflecting poorly on the U.S. judiciary, the unifying feature of these several cases is the absence of any principled application of rules regarding injury-in-fact, redressibility, causation, or prudential standing.²⁵⁶

What must have seemed at the time to be the foundational animal rights decision came in 1974, when Helen E. Jones came into court "as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States."²⁵⁷ Jones and other animal advocates sued the Secretary of Agriculture, seeking relief on the animals' behalf from the provisions of HMSA that allow ritual slaughter.²⁵⁸ The plaintiffs claimed that traditional ritual slaughter was cruel and that allowing it as an exception to HMSA violated the Establishment Clause of the First Amendment.²⁵⁹

After considering "standing [which was] vigorously contested in the briefs and upon the argument,"²⁶⁰ the court concluded that the Secretary of Agriculture's assertion that the plaintiffs lacked standing "present[ed] no serious obstacle to a consideration of the merits."²⁶¹ Reviewing established precedent regarding such concepts as injury to conservational interests and injury to moral principles, the Court, although ultimately ruling against the plaintiffs on the merits, concluded without hesitation that they had

²⁵⁶ See *infra* Part IV.C.

²⁵⁷ Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974).

²⁵⁸ *Id.* at 1285-86.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1287.

²⁶¹ *Id.* at 1287-88. *But see* Int'l Primate Prot. League et al. v. Inst. for Behavioral Res., Inc., 799 F.2d 934 (4th Cir. 1986) (denying human plaintiffs' assertion of their own financial and aesthetic standing, but failing to address whether the animals themselves had experienced a redressible injury-in-fact caused by the defendants' conduct).

standing.²⁶² Not only did the district court hear the claims of "Helen Jones as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the U.S.," but indeed the U.S. Supreme Court, without opinion, affirmed the ruling of the district court.²⁶³ More than ten years later, in a case that did not involve animals, the U.S. Court of International Trade relied on *Jones* in rejecting a challenge to standing.²⁶⁴

The *Jones* court necessarily recognized the standing of the animals awaiting slaughter when it allowed Helen Jones to proceed as their guardian and next friend. The court failed, however, to provide a thorough explanation for the decision or to address explicitly any constitutional or prudential standing requirements.²⁶⁵ It is possible that the court failed to expressly address the standing of the animals because their standing was so obvious.²⁶⁶ Of course animals in the slaughterhouses were suffering appalling torture caused by the inactions of the Secretary of Agriculture, just as they are today, and of course a victory against him would have redressed that suffering, to some extent.

²⁶² *Jones*, 374 F. Supp. at 1289.

²⁶³ *Jones v. Butz*, 419 U.S. 806 (1974). The decision was not a denial of a petition for writ of certiorari; it was an affirmance, without opinion, of the lower court's decision. *Id.*

²⁶⁴ Suffice it to note for now that in *Jones v. Butz*, a case challenging the act of August 27, 1958 to establish federal policy as to the use of humane methods of slaughter of livestock, the courts sustained the standing of the plaintiffs, apparently including that of the first named as "the next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States."

Earth Island Inst. v. Christopher, 890 F. Supp. 1085, 1093 (1995) (citations omitted).

²⁶⁵ See *Jones*, 374 F. Supp. at 1287-89.

²⁶⁶ Professor Craig has addressed the separation of powers issues arising from citizen suits brought to protect the environment. See Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-In-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001). In a system that recognizes the standing of animals, separation of powers issues would seldom arise, because the animals suffer injury and can establish constitutional standing.

The conclusion that animals have standing, coupled with the lack of explanation for that conclusion, continued in three cases decided after *Jones*. The next case involved the Palila²⁶⁷ (*Loxioides Bailleui*), a small, light-breasted bird with a yellow head and blue wings, found only on the big island of Hawaii.²⁶⁸ Lawyers for the Sierra Club Legal Defense Fund brought suit on the Palila's behalf in 1988 because the Palila is an endangered species. The Hawaii Department of Land and Natural Resources allowed sheep to live on the Palila's only habitat, thus endangering that habitat. The U.S. District Court for the District of Hawaii ordered removal of the sheep.²⁶⁹ In affirming that decision, the U.S. Court of Appeals for the Ninth Circuit held

[a]s an endangered species under the Endangered Species Act . . . , the bird . . . , a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right. The Palila . . . has earned the right to be capitalized since it is a party to this proceeding²⁷⁰

In fact, the first time the Ninth Circuit reviewed the much-litigated matter, it did not even mention the other plaintiffs (the Sierra Club, the National Audubon Society, and Alan Ziegler) and instead simply discussed the party interested, directly and tangibly, in the outcome: "In 1978 the Sierra Club and others brought an action under the [Endangered Species] Act on behalf of the Palila" Although it recognized the Palila's standing, the court conducted no examination of the facts pursuant to the irreducible constitutional minimum, nor any analysis as to whether the Palila met that standard. If the court had applied the three-part test, the court likely would have focused on the possible

²⁶⁷ *Palila v. Hawaii Dep't of Land & Nat. Res.*, 649 F. Supp. 1070 (D. Haw. 1986).

²⁶⁸ See *Threatened and Endangered Animals in the Hawaiian Islands: Palila*, U.S. Fish & Wildlife Service, at <http://www.fws.gov/pacificislands/wesa/palila.htm> (last visited Apr. 8, 2005).

²⁶⁹ *Palila*, 649 F. Supp. at 1071.

²⁷⁰ *Palila v. Hawaii Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) (citation omitted).

extinction of a species and death of an individual bird. Both extinction and death are injuries caused by the defendants' act in allowing sheep to live on the Palila's habitat and eat its only food, and requiring the defendants to relocate those sheep would redress the Palila's injuries. Therefore, if the court had applied the three-part test to the facts in this case, the outcome would have been the same: the Palila has standing.

The next animal whose standing was recognized without any explanation was the Northern Spotted Owl.²⁷¹ In 1988, the Northern Spotted Owl brought an action asserting that the Secretary of the Interior's failure to list it as a threatened species was arbitrary and capricious, and the Secretary should be required to reconsider the determination, and, if he persisted in the non-listing, give reasons therefore.²⁷² The Owl prevailed.²⁷³ Encouraged by the result, the Owl's representatives sued again in 1991 to require the Secretary to designate and thereby protect its critical habitat.²⁷⁴ In both cases, the lawyers' assertions on behalf of the Northern Spotted Owl were sufficient to allege standing.²⁷⁵ The Owl suffered injury because of the Secretary's failure to list it as threatened, and later because of the Secretary's failure to designate its critical habitat. These injuries were redressed by successful court action which granted the Northern Spotted Owl standing.

In 1990, an enigmatic decision hinting at rationale came from the U.S. Court of Appeals for the Ninth Circuit. The puzzling decision involving the Mount Graham Red Squirrel did not fall neatly into either category described above; it was neither an unexplained decision that an animal has standing, nor an unexplained decision that an animal lacks standing.²⁷⁶ Although plaintiff environmental groups were found to have standing, and the university seeking to build an observatory on the Red

²⁷¹ Northern Spotted Owl et al. v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

²⁷² *Id.* at 479-83.

²⁷³ *Id.* at 483.

²⁷⁴ Northern Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991).

²⁷⁵ *Hodel*, 716 F. Supp. at 483; *Lujan*, 758 F. Supp. at 629-30.

²⁷⁶ Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1990).

Squirrel's habitat ultimately prevailed,²⁷⁷ the following footnote appeared in the opinion: "No party has mentioned and, notwithstanding our normal rules, we do not consider, the standing of the first-named party to bring this action."²⁷⁸ Concluding this footnote, the court referenced Justice Douglas's famous dissent in which he argued that the mountains and the rivers themselves have standing.²⁷⁹ Denying that it considered the squirrel's standing, the Ninth Circuit then remanded the case, reasoning that "the Red Squirrel's chances for a fair hearing may have been considerably reduced" by the prestige of the university seeking to build the "observatory and [by] other parochial interests."²⁸⁰ The court, in confusing language, implied a significant rule about the standing of animals: when a decision affects an animal protected by law, that animal deserves a fair hearing.

The court granted standing to another endangered animal, the Marbled Murrelet, though still without any analysis of whether the animal established the irreducible constitutional minimum of injury-in-fact, causation, and redressibility, along with any applicable requirements of prudential standing.²⁸¹ Given the lack of explanation in the opinions, an observer could conclude that these rulings depended on reading tea leaves rather than law. The Marbled Murrelet, a small seabird, brought suit along with others against a lumber company to prohibit the taking of the Marbled Murrelet's habitat.²⁸² In granting the injunctive relief, the court held that "as a protected species under the ESA, the marbled murrelet has standing to sue 'in its own rights.'"²⁸³

As described above, these rulings were issued in favor of animals whose guardians or lawyers asserted the animals had

²⁷⁷ *Mt. Graham Red Squirrel v. Espy*, 786 F.2d 1568 (9th Cir. 1992).

²⁷⁸ *Id.* at 1448, n.13.

²⁷⁹ *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 741-52 (1972) (Douglas, J., dissenting)).

²⁸⁰ *Madigan*, 954 F.2d at 1463.

²⁸¹ *Marbled Murrelet, Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995).

²⁸² *Id.*

²⁸³ *Id.* at 1346 (quoting *Palila v. Hawaii Dep't of Land & Nat. Res.*, 649 F. Supp. 1070, 1107 (D. Haw. 1986)).

standing. Although recognizing the animals' standing, the courts did not articulate the reasons for their decisions, thus leaving the law regarding the standing of animals sufficiently unclear so as to allow room for equally unexplained decisions reaching the opposite result. The first such case, decided in 1991, involved a Hawaiian crow species known as the 'Alala.²⁸⁴ The district court denied the 'Alala standing, relying not on the principles of constitutional and prudential standing, but on an erroneous interpretation of the private suit provision of the Endangered Species Act ("ESA").²⁸⁵ The court made no reference to the irreducible constitutional minimum and this omission was essential to its ruling; if the court had reviewed questions of injury-in-fact, causation, and redressibility, it would have necessarily reached the opposite conclusion. At the time of the legal proceedings, the 'Alala had seen its numbers diminish to the point that only twenty-one birds existed anywhere on Earth.²⁸⁶ Eleven of those were in a captive breeding program.²⁸⁷ Of the ten living in the wild, it was believed that nine lived on land owned by the defendants, the McCandless.²⁸⁸ EPA crafted a plan to save the 'Alala.²⁸⁹ The McCandless defendants, however, refused to allow environmental officials on their property to take actions necessary to the plan.²⁹⁰ In the face of the defendants' objections, the government did not pursue legal action to require the defendants to allow access to their property.²⁹¹ The 'Alala and others sued to require the government to take legal action and proceed with the plan to save the 'Alala from extinction.²⁹² Extinction of the species or death of a bird contributing to extinction is an injury-in-fact. Death and

²⁸⁴ *Hawaiian Crow ('Alala) v. Lujan*, 906 F. Supp. 549 (D. Haw. 1991).

²⁸⁵ See *infra* notes 294-95.

²⁸⁶ *Hawaiian Crow*, 906 F. Supp. at 551.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Hawaiian Crow*, 906 F. Supp. at 551.

extinction are distinct and palpable injuries.²⁹³ With only twenty-one birds remaining on the face of the Earth, extinction was imminent. The cause of the impending death of individual birds and the cause of extinction were wrongs of the government's failing to pursue entry onto the defendants' land and the refusal of the defendants to allow the government onto the land where nine of the remaining twenty-one birds were believed to live, in order to carry out the plan to save the bird from extinction. A court decision in favor of the 'Alala would have redressed the wrongs, effectuated the plan to save the birds, and saved the 'Alala from death and extinction. That the irreducible constitutional minimum existed is beyond peradventure.²⁹⁴ The court did not analyze the case under established rules of standing, and instead relied on an erroneous interpretation of ESA. The court interpreted the private suit provision of ESA and, in particular, the term "person," as contracting rather than expanding the class of plaintiffs who have standing to sue pursuant to ESA.²⁹⁵

The 'Alala's constitutional standing, particularly with regard to imminent harm, is seen more starkly in hindsight. Because of the erroneous ruling denying the 'Alala standing, the number of them alive in the wild has diminished precipitously. At the time of the court's decision, there were ten 'Alala left in the wild on earth. Now, the 'Alala is extinct in the wild.²⁹⁶

Despite its failure to analyze the facts of the case pursuant to the three-part test of injury-in-fact, causation, and redressibility, the *Hawaiian Crow* court's ruling influenced the decision in

²⁹³ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 225 (2003); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

²⁹⁴ Concerns about prudential standing were not at issue, as described in the text following notes 214.

²⁹⁵ *Hawaiian Crow*, 906 F. Supp. at 551-53.

²⁹⁶ See *Draft Revised Recovery Plan for the 'Alala (corvus hawaiiensis)*, U.S. Fish & Wildlife Serv. (Dec. 22, 2003), available at <http://www.epa.gov/fedrgstr/EPA-SPECIES/2003/December/Day-22/e31467.htm>; Email from Barbara A. Maxfield, External Affairs Chief, U.S. Fish & Wildlife Service, to Elizabeth DeCoux, Visiting Professor of Law, Florida Coastal School of Law (Apr. 13, 2005) (on file with author).

*Citizens to End Animal Suffering and Exploitation v. New England Aquarium.*²⁹⁷ The case involved an aquarium's desire to rid itself of a dolphin named Kama that "did not fit into the social climate at the Aquarium."²⁹⁸ The Aquarium gave Kama to the Navy for use in SONAR tests. Relying on *Hawaiian Crow* and its misplaced reference to the private suit provision of ESA, the U.S. District Court for the District of Massachusetts concluded that Kama lacked standing to challenge the Aquarium's decision to deliver it to the Navy for testing.²⁹⁹ The court did not provide sufficient information in its opinion about the environment at the New England Aquarium or the Navy test site, nor sufficient information about Kama's life at either place, to allow after-the-fact consideration of whether moving Kama constituted an injury-in-fact.³⁰⁰ A guardian *ad litem*, dedicated to the interests of Kama, could have solved this issue and provided the necessary information, likely leading to the conclusion that Kama had standing.³⁰¹

The next unexplained decision came in a case involving the Loggerhead Turtle.³⁰² The Loggerhead and the Green Turtle, along with two humans, sued the County Council of Volusia County, Florida, seeking an injunction banning private vehicles from the beach, because light from the vehicles affected the turtles' ability to find the ocean.³⁰³ In issuing the injunction, the U.S. District Court for the Middle District of Florida held that a "species protected under the ESA has standing to sue 'in its own right' to

²⁹⁷ 836 F. Supp. 45 (D. Mass. 1993).

²⁹⁸ *Id.* at 46.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 45-59.

³⁰¹ This reference to the need for a guardian *ad litem* does not reflect negatively on the desire and ability of C.E.A.S.E., the Animal Legal Defense Fund, and the Progressive Animal Welfare Society to advocate for Kama's best interests; however, because no guardian *ad litem* was appointed and the court did not provide sufficient information about the two settings in its opinion, after-the-fact analysis of constitutional standing cannot be undertaken with any degree of success in this case.

³⁰² *Loggerhead Turtle, et al. v. County Council of Volusia County, Florida*, 896 F. Supp. 1170 (M.D. Fla. 1995).

³⁰³ *Id.* at 1172.

enforce the provisions of the Act.³⁰⁴ Indeed, grizzly bears joined a mountain range in an effort to stop mineral exploration in northwest Montana.³⁰⁵ Although the court ultimately ruled against the wilderness and the grizzlies, it did not expressly and specifically deny their standing.³⁰⁶

In 2003, animals lost again in *Cetacean Community v. President of the United States*.³⁰⁷ The court specifically relied on *Hawaiian Crow's* flawed interpretation of ESA in concluding that the cetaceans lacked standing.³⁰⁸ The court did not apply the law to the facts to determine whether the Cetacean Community could satisfy the irreducible constitutional minimum of injury-in-fact, causation, and redressibility.³⁰⁹ Instead, the court declared that the animals lacked standing. Hindsight confirms what would have resulted if the court had applied the three-part test for standing. Roughly eighty species of whales, dolphins, and porpoises, referred

³⁰⁴ *Id.* at 1177 (quoting *Marbled Murrelet, Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995)).

³⁰⁵ *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears et al. v. Peterson*, 510 F. Supp. 1186 (D.D.C. 1981). The status of the wilderness itself as a party to the case is evocative of Justice Douglas's famous dissent in *Sierra Club v. Morton*. "The voice of the inanimate object . . . should not be stilled." *Sierra Club v. Morton*, 405 U.S. 727, 749 (1972). The values advanced by Justice Douglas in his dissent are different from the values that have caused the courts to accord substantive rights to animals and recognize that they have standing, through their guardians, to vindicate those rights. He writes of inanimate objects, and sentience is not his concern. He offers the observation that "[t]he problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokes[persons] before they are destroyed." *Id.* at 745.

³⁰⁶ *Cabinet Mountains*, 510 F. Supp. at 1189-91; *see also*, *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461 (3rd Cir. 1997) (declining to determine whether animal plaintiffs had standing, because standing of other parties rendered such a determination unnecessary; also noting in dicta that it "is far from clear" that animals have standing); *Strahan v. Linnon*, 967 F. Supp. 581, 615-18 (D. Mass. 1997) (deciding that human plaintiff cannot bring suit on behalf of animals, because animals lack standing); *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (holding that animals have no standing to sue).

³⁰⁷ 249 F. Supp. 2d 1206 (D. Haw. 2003).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1214.

to collectively in the complaint as the Cetacean Community,³¹⁰ asked the court to prohibit the Navy from testing a SONAR-emitting device. The plaintiffs alleged the device caused a direct threat to their well-being.³¹¹ They offered an example of an injury that had occurred three years earlier, an injury similar to the injury they sought to prevent. Six whales died in the Bahamas in March of 2000 after becoming beached in an area where the Navy was using SONAR.³¹² The Navy acknowledged at the time of these deaths that the presence of its SONAR was a factor in the whales' deaths.³¹³ Again, the existence of the irreducible constitutional minimum is self-evident. If the Navy indeed tests this SONAR, the mammals may become confused, and some may become beached and die. These facts demonstrate an injury-in-fact that is palpable, concrete, distinct, and imminent. The injury will be caused by the defendant's use of the SONAR, and a ruling favorable to the plaintiffs will put an end to the SONAR use, redressing the wrong done to the plaintiffs.

The plaintiffs more than adequately established the irreducible constitutional minimum. Nevertheless, the court concluded they lacked standing.³¹⁴ As was the case with the 'Alala, hindsight provides a clear answer to the question of standing. The *Seattle Post-Intelligencer* reports that dead porpoises were found beached or floating in the area of the Navy's testing directly after the tests were conducted that the Cetacean Community tried unsuccessfully to stop.³¹⁵

On appeal of *Cetacean Community*, the Ninth Circuit acknowledged that animals are capable of suffering an Article III injury, but then failed to evaluate the facts of the case in light of the

³¹⁰ *Id.* at 1208 n.1.

³¹¹ *Id.* at 1208.

³¹² *Navy Did Research, Should Get OK for New SONAR*, VIRGINIAN-PILOT, Apr. 21, 2002, at J4.

³¹³ *Id.*

³¹⁴ *Cetacean Cmty.*, 249 F. Supp. 2d at 1209-11.

³¹⁵ Robert McClure, *Sonar Tied to Whale Deaths*, SEATTLE POST-INTELLIGENCER, Oct. 9, 2003, available at http://seattlepi.nwsource.com/local/143166_whales09.html.

irreducible constitutional minimum.³¹⁶ Instead, the Court erroneously concluded that only Congress could confer standing on animals.³¹⁷

Each of these cases involved allegations of a claimant within the zone of interests of the statute, who had suffered her own, particularized, non-generalized injury-in-fact, caused by the defendants' violation of the law, and redressable by a favorable court ruling.

The above-described decisions are inconsistent, with some courts recognizing an animal's standing and others not, and no court holding up the facts of the case to the law of standing, to see if there is a fit. These *ipse dixit* decisions are unfair. They have no place in a society that honors the rule of law. They damage our jurisprudence regarding animals and our jurisprudence as a whole. The courts should uniformly adopt a principled, reasoned rationale for making standing determinations in cases involving animals.

The decisions regarding the standing of animals are, for the most part, devoid of rationale or content. The courts that wish to allow animals to be parties state that animals have standing. In contrast, the courts that wish to prevent animals from being parties state that they lack standing. The decisions are nothing more than an exercise of raw power over helpless creatures.

The current state of the law is parallel to an amusement park's rule that a person must be at least five feet tall to ride the Monster Coaster. Instead of allowing individuals to stand next to a measuring stick, however, the amusement park manager simply pronounces which people are five feet tall and which are not. A six foot man approaches, and the manager says, "You are over five feet," so the man is allowed to ride the Monster Coaster. Then a four-foot tall child approaches, and the manager inexplicably declares, "You are over five feet," and the child climbs into the car. Next, another six-foot tall person approaches, and the manager declares, *ipse dixit*, "You are below five feet in height." The person protests, but the manager is in charge of who can ride and who cannot, and refuses to use the measuring stick. He uses the language of measurement, but not the measurement itself.

³¹⁶ Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).

³¹⁷ *Id.* at 1176.

Decisions made by measuring the potential riders against a measuring stick would be valid. Similarly, a determination as to whether any animal has standing is valid if the facts of the case are measured against the yardstick of the established jurisprudence of standing. In *Cetacean Community*, the Ninth Circuit went so far as to pick up the measuring stick by enumerating the three elements of constitutional standing. However, the court did not hold the measuring stick next to the amusement park guest to determine whether he was tall enough to ride; that is, the court did not apply the elements of standing to the facts presented by the plaintiffs to determine whether the plaintiffs had standing.³¹⁸

D. Speaking Flesh onto Bone in Actions Arising from Statutes: The Endangered Species Act Does Not Repeal the Constitution

Professor Sunstein has examined whether animals have rights and whether they have standing. He concludes that animals have certain rights but lack the standing to ask a court to vindicate those rights.³¹⁹ Professor Sunstein may reach too narrow a conclusion because of the presupposition on which his analysis is based: that the only way a claimant can have standing is for Congress to confer it. Professor Sunstein writes that "[i]f Congress has not given standing to animals, the issue is at an end."³²⁰ Many court decisions regarding the standing of animals, including most cited in this Article, involve a federal statute.³²¹ Entry into federal court, however, does not depend exclusively on the choice of the Congress, but first and foremost on the Constitution. Otherwise, there could be no common law actions in state and federal courts. A claimant who has no cause of action cannot come into court, but the existence of that cause of action pursuant to case law or statute is a separate question from whether the claimant has standing to bring such an action. The standing issue depends on the Constitution. There are four primary ways that any claimant can make her

³¹⁸ *Id.* at 1174-77.

³¹⁹ Sunstein, *Tribute*, *supra* note 206, at 1333.

³²⁰ *Id.* at 1359.

³²¹ See *supra* notes 257-317.

way into federal court. First, a claimant can have a common law right of action and the standing to bring such an action in the absence of any congressional enactment.³²² Second, a claimant can bring an action pursuant to an express private suit provision of a federal statute.³²³ Third, a claimant arguably within the zone of interests protected can challenge agency action or inaction under APA, if no other court remedy is available.³²⁴ Fourth, a court can recognize, and a claimant can bring, a private right of action implied in a federal statute.³²⁵

This fourth avenue deserves special attention, because it holds much promise for courts deciding cases involving the torture from which two industries derive their profits. Cases involving the concept of an implied right of action based on federal statute are so numerous that the United States Supreme Court has referred to them as “legion.”³²⁶ To bring an implied private action, the claimant must establish that Congress unambiguously intended the statute to benefit the plaintiff, that the protection provided by the statute is not so vague that enforcement would strain the competence of the judiciary, and that the statute is unambiguously binding on the [defendant].³²⁷ Both HMSA and AWA were enacted specifically to protect animals. Although AWA in particular suffers from vagueness at some points, neither law is so impossible to interpret that it would strain the competence of the judiciary.³²⁸

³²² If Professor Sunstein’s approach is taken to be universal, it conflicts with court decisions examining the standing of claimants who bring suit pursuant to the common law. *See Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999) (deciding whether class member with “exposure-only” claims in mass tort has suffered an injury-in-fact); *In re Brown*, 342 F.3d 620 (6th Cir. 2003) (deciding whether a partnership had suffered an injury-in-fact traceable to the management company’s actions).

³²³ *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997).

³²⁴ *Walsh v. U.S. Dep’t of Veterans Affairs*, 400 F.3d 535, 537 (7th Cir. 2005).

³²⁵ *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³²⁶ *Alexander*, 532 U.S. at 287; *see also Jackson v. Board of Education*, 125 S. Ct. 1497 (2005); *Gonzaga Univ.*, 536 U.S. at 273.

³²⁷ *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

³²⁸ *See Humane Methods of Slaughter Act*, 7 U.S.C. §§ 1901-1907 (2002); *Animal*

The statutes are unambiguously binding, respectively, on the owners and employees of slaughterhouses, and on research laboratories and their employees.³²⁹ Thus, there is no impediment to concluding that an implied cause of action exists. Consideration of the suffering of animals in slaughterhouses and research laboratories, which cause that suffering, and how the suffering can be stopped, makes clear that animals who suffer because of HMSA and AWA violations have standing. Given the existence of a cause of action, and the animals' standing to sue, courts have the power to end the torture that for decades has belied our claim to be a compassionate people.

There is no compelling reason to conclude, as Professor Sunstein has, that words like "person" and "individual" in such statutes as ESA and the Administrative Procedure Act ("APA") necessarily exclude animals. As described in subsequent sections of this Article, both U.S. law and social norms treat animals as "individuals," which is one of the terms used to define the "person" who may bring suit pursuant to laws such as ESA or APA.

Standing is not confined to the private suit provisions of federal statutes. The starting point for determining whether a cause of action exists is a statute or common law. The starting point for determining whether a claimant has standing, in contrast, is the Constitution. Examination of the "case" and "controversy" provisions of Article III reveals that nothing in the determination of the irreducible constitutional minimum depends on species.³³⁰ There is no barrier to Article III standing for animals, for the simple reason that Article III raises no such barrier. Courts should look to statutes and common law to determine the existence

Welfare Act, 7 U.S.C. §§ 2131-2159 (2002).

³²⁹ See 7 U.S.C. §§ 1901-1902; 7 U.S.C. §§ 2137, 2140, 2143.

³³⁰ There appears to have been no litigation related to whether an animal is a citizen, a determination that would be necessary in cases where jurisdiction is based on diversity of citizenship. In cases arising under federal statute, whether the cause of action is express or implied, an animal's guardian can clear the standing hurdle by establishing that the animal has suffered an injury-in-fact, caused by the defendant's violation, redressible by a favorable court decision and that any applicable standards of prudential standing have been satisfied.

of a cause of action; then, if a cause of action exists, courts should look to the Constitution and to prudential rules to determine whether any particular claimant, including an animal in a proper case, has standing to bring that action.

Some of the confusion found in the case law and the commentaries regarding animal standing arises in part from conflating two distinct questions: whether a cause of action exists and whether a particular plaintiff has standing to assert such a cause of action. The courts should address the existence of a cause of action first for two reasons. First, the standing question cannot be answered without reference to the substantive law under which the claimant seeks relief. Second, the existence *vel non* of the cause of action can be resolved without resort to the Constitution, thus obviating in some cases the need to resolve a constitutional question. If no cause of action exists, no one can sue. If a cause of action exists, the court should then make the determinations regarding constitutional standing by considering whether the plaintiff can establish injury-in-fact, causation, and redressibility. If the plaintiff overcomes these hurdles as well as any applicable issues of prudential standing, the court should allow him to proceed, because Article III knows nothing of species.

The reason that decisions about animal standing lack any hint of rhyme or reason is that the judges making these decisions very rarely give any consideration to the actual principles of standing. Instead, they play the part of the amusement park manager, telling the six-foot tall man, "You are under five feet, so you cannot ride." Three district courts and one court of appeals have denied standing to animals who appeared capable of making the requisite showing of injury-in-fact, causation, and redressibility. These cases, *Hawaiian Crow*,³³¹ *C.E.A.S.E.*,³³² and *Cetacean*

³³¹ *Hawaiian Crow* ('Alala) v. Lujan, 906 F. Supp. 549 (D. Haw. 1991); see also *supra* notes 284-96 and accompanying text.

³³² *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993); see also *supra* notes 297-301 and accompanying text.

Community,³³³ were wrongly decided, for at least three reasons. First, the courts' use of the private suit provision of ESA is wrong-headed and utterly without precedent. No court—other than these three—has used a private suit provision to deny standing to a claimant who meets all standing requirements, both constitutional and, if applicable, prudential.³³⁴ Second, there can be no more appropriate use of a statute's private suit provision than to protect the very class of creatures whose suffering Congress specifically intended to relieve. Third, use of the private suit provision of the Endangered Species Act to deprive a litigant of standing is particularly inappropriate given the U.S. Supreme Court's decision in *Bennett v. Spear*,³³⁵ which established that the private suit provision in ESA (relied on or referred to in all three decisions) enlarges, rather than contracts, the class of claimants with standing to sue pursuant to the Act.³³⁶

The U.S. Supreme Court has recognized that the private suit provision of ESA, relied on or referred to by each court in the *Hawaiian Crow/C.E.A.S.E./Cetacean Community* trilogy, has the effect of enlarging the class of claimants with standing, rather than contracting it, as the respective courts erroneously held.³³⁷ In *Bennett*, the Court came to this conclusion by eliminating concerns of prudential standing and setting the bar of standing at the most generous level possible: the irreducible constitutional minimum.³³⁸ The Court concluded that ranchers and others who were not within the zone of interests protected by ESA could sue nevertheless, because Congress had eliminated consideration of prudential standing factors (such as the zone of interests test) when it enacted the private suit provision of ESA.³³⁹ The Court held that

³³³ *Cetacean Community v. President of the United States*, 249 F. Supp. 2d 1206 (D. Haw. 2003), *aff'd*, 386 F.3d 1169 (9th Cir. 2004); *see also supra* notes 307-17 and accompanying text.

³³⁴ *See infra* note 346 and accompanying text.

³³⁵ 520 U.S. 154 (1997).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* at 162.

³³⁹ *Id.* at 163.

the conclusion of expanded standing [under ESA] follows *a fortiori* from [the] decision in *Trafficante v. Metropolitan Life Ins. Co.*, which held that standing was expanded to the full extent permitted under Article III by [the provision] of the Civil Rights Act of 1968 that authorized “[a]ny person who claims to have been injured by a discriminatory housing practice” to sue for violations of the Act.³⁴⁰

Bennett leaves no doubt as to how far a private suit provision expands standing: “to the full extent permitted under Article III.”³⁴¹ Nothing in Article III even hints that an animal who can establish the elements of constitutional standing loses that standing by virtue of his species. Article III requires injury-in-fact, causation, and redressibility—not opposable thumbs.

Although *Bennett* does not expressly overrule or even mention *Hawaiian Crow* or *C.E.A.S.E.*, it does establish that the private suit provision of ESA expands the class of claimants who have standing to sue under that Act by eliminating considerations of prudential standing and moving the bar as low as it can go: the irreducible constitutional minimum.

As previously noted, neither *Hawaiian Crow* nor *C.E.A.S.E.* nor *Cetacean Community* included any analysis by the court as to whether the animals met the irreducible constitutional minimum. Reviewing the facts of those cases confirms that the ‘Alala in *Hawaiian Crow* and the marine mammals in *Cetacean Community* satisfied those requirements.³⁴² In fact, the precise harm that *Hawaiian Crow* asked the court to prevent in fact occurred. Since the decision, the ‘Alala has become extinct in the wild.³⁴³ Similarly, because the court failed to recognize the standing of the marine

³⁴⁰ *Id.* at 163-64.

³⁴¹ *Bennett*, 520 U.S. at 165 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)).

³⁴² The *C.E.A.S.E.* opinion does not include sufficient factual information to support a thorough analysis of the facts in light of the requirements of constitutional standing.

³⁴³ See *supra* note 296 and accompanying text.

mammal claimants to challenge the Navy's SONAR testing in *Cetacean Community*, dead marine mammals were found floating or beached after the testing.³⁴⁴ These three decisions are wrong, not only because they fly in the face of precedent, but also because they reject an animal's claim to standing for no other reason than his status as an animal—an approach for which no support can be found in Article III. A court ruling on standing should explain how the law of standing, when applied to the facts of the case, results in a conclusion that the animal has or lacks standing; arbitrary decisions have no place in a nation governed by the rule of law.³⁴⁵ The significance of the error in *Hawaiian Crow*, *C.E.A.S.E.*, and *Cetacean Community* is best seen in light of the history of private suit provisions and the courts' interpretation of such provisions. Private suit provisions have always involved Congress's effort to enlarge the class of claimants who have standing to bring suit. Never before has a court purported to use a private suit provision or APA to deny standing to a claimant who meets the irreducible constitutional minimum as judged under the substantive law.³⁴⁶ A

³⁴⁴ See *supra* note 315 and accompanying text.

³⁴⁵ One commentator concludes that animals lack standing because, *inter alia*, they are property. Fiona M. St. John-Parsons, Comment, *Four Legs Good, Two Legs Bad?: The Issue of Standing in Animal Defense Fund, Inc. v. Glickman and its Implications for the Animal Rights Movement*, 65 BROOK. L. REV. 895 (1999). In contrast, the suggestion made in this Article is that no legitimate determination can be made that animals are property or not, except in a proceeding where the animals' interests are represented by their guardian.

³⁴⁶ Any sensible person hesitates to assert that something has "never" happened. Still, review of scores upon scores of decisions under the following private suit provisions confirms that no court except the three errant courts described in this Article has ever used a private suit provision to deny Article III standing to a party who can establish the irreducible constitutional minimum under ESA, Clean Water Act, or Clean Air Act. APA allows suit for judicial review of agency action under certain circumstances. A claimant must assert the substantive rights provided for in the Act, and therefore cannot seek for example, judicial review of an action taken by his neighbor, instead of the agency. Administrative Procedure Act, 5 U.S.C. § 702 (2000). Claimants asserting substantive rights created by the APA, like claimants asserting rights under the previously mentioned statutes, do not lose Article III standing by virtue of the private suit provision itself. No claimant who has Article III standing loses it by virtue of a private suit provision. See, e.g., *Bennett*, 520 U.S. at 154.

private suit provision should not be used to shut the courthouse door on a party whom the Constitution would usher in, because private suit provisions always entail an effort to enlarge, not to contract, the class of claimants with standing. ESA does not repeal the Constitution.

The U.S. Supreme Court has used these words to describe the party with the strongest claim to enforce a federal statute:

When the suit is one challenging the legality of governmental action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.³⁴⁷

In the face of this ruling from the highest court in the land, federal courts nevertheless continue to ignore the redressible injuries of animals.

Our federal courts are capable of granting justice to animals. Yet, they contort their own rules and the law in a futile effort to avoid, for as long as possible, the undeniably difficult and ultimately unavoidable work of addressing wrongs done to animals.

The sequence of questions necessary to reach a principled conclusion regarding standing is as follows: (1) Does the cause of action the plaintiff seeks to bring exist—is it recognized?; (2) Can the plaintiff satisfy the requirements of Article III standing?; (3) If so, are there applicable rules of prudential standing, not waived by the court, that prohibit the plaintiff from bringing the action?; and (4) If so, has Congress, by means of a private suit provision, eliminated those considerations of prudential standing and “reset” the standing threshold at limits of Article III?

³⁴⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

E. Speaking Flesh onto Bone in a Specialized Statutory Context: Right of Action Implied Under Federal Statute

When society, through statutory law, creates protections directed specifically to protect animals, standing is a necessary adjunct to the substantive protection. Without it, the law will be ignored, as is the case with HMSA and AWA. Standing is not an elite status to be conferred only grudgingly. Rather, standing is the only way to give effect to laws that protect individuals who have no political power. A society that creates laws intended to protect animals but then denies those animals standing is like a parent who chooses to make a large bequest to a child but fails to draft a will to effectuate that intent. With regard to politically powerless groups like animals, a law is merely a suggestion unless members of the powerless group protected by the law have standing to use those laws in court for their own protection. Whenever the government points with pride to such statutes as HMSA and AWA without consistently recognizing the standing of animals to sue under those statutes, it deceives the public into believing the benign purposes expressed in the popular names are actually given effect, when in fact the industries ignore the law. With both HMSA and AWA, a cycle has been repeated twice, beginning with journalistic exposé, then public outrage prompting new laws, followed by industry's failure to change, and back to journalistic exposé. While the public believes the new laws protect the animals, the torture continues unabated. Nothing has changed. Ending their agony requires the clear, reasoned, uniform, and unequivocal recognition that animals have interests and rights, and that their guardians have standing to bring suit in order to protect those rights.

It is inconsistent with existing jurisprudence to deny standing to those for whom the protections of a statute were specifically intended. According to the U.S. Supreme Court, in order to sue pursuant to an implied right of action in a federal statute, a plaintiff must show: that Congress intended the statute to benefit the plaintiff; that the protection provided by the statute is not so

vague that enforcement would strain the competence of the judiciary; and that the statute is unambiguously binding on the defendant.³⁴⁸ Congress intended HMSA to protect animals in slaughterhouses. Congress stated that

[it] finds that the use of humane methods in the slaughter of livestock prevents needless suffering [and accomplishes other desirable purposes]. It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.³⁴⁹

The statute is unambiguously binding on slaughterhouses, and the actions to be taken by slaughterhouse operators are clear. They must render the animal insensible to pain before she is shackled, hoisted, and hung by a chain, and sent to the stations of the slaughter line.³⁵⁰ The Act meets the requirements for an implied cause of action and is thus consistent with *Blessing* and with other decisions that recognize an implied right of action pursuant to federal statute,³⁵¹ and with this Article's recommendations that an implied cause of action exists whenever a statute was intended specifically, even if not exclusively, to protect animals.

The purpose of AWA is, *inter alia*, "to insure that . . . animals intended for use in research facilities and for exhibition purposes and as pets are provided humane care and treatment"³⁵² However, certain AWA provisions make the law illusory by taking away the very protections that AWA purports to grant.³⁵³ Equity requires that the protective provisions be given effect and that the "take-away" provisions be given no effect. Once courts remedy the

³⁴⁸ *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

³⁴⁹ Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1907 (2002).

³⁵⁰ *See id.* § 1902.

³⁵¹ *See, e.g. Barnes v. Gorman*, 536 U.S. 181 (2002).

³⁵² Animal Welfare Act, 7 U.S.C. §§ 2131-1259 (2002).

³⁵³ *See supra* notes 89-91 and accompanying text.

illusory nature of the law, certain AWA provisions and the implementing regulations may provide protections to animals. These include prohibitions against certain painful experiments and requirements for anesthesia and painkillers. AWA makes clear that it is the scientist and the research laboratory, among others, who must abide by AWA.³⁵⁴ Where certain requirements, such as "humane treatment," are not clearly defined, the triers of law and fact must interpret them.

Our law is best judged, not by how we treat the powerful and wealthy, but, as former meat inspector Holcombe wrote to Congress in 1958, how we treat the "least of these" among us.³⁵⁵ Animals' lack of power is not an excuse to treat them ill; rather, it is a call to "the better angels of our nature"³⁵⁶ to protect the most vulnerable in our midst.

F. Speaking Flesh onto Bone in Other Types of Actions

Although this Article has focused on the private suit provision and the implied right of action under federal statute, there is no reason why an animal's guardian cannot bring a common law action under state or federal law, if a cause of action exists and the animal has standing. Whether such a cause of action exists for anyone is a separate and distinct question from whether animals have standing to bring such an action. Whether an animal has standing to bring any type of action is a determination to be made in each individual case, based upon applicable rules of constitutional and prudential standing.³⁵⁷

³⁵⁴ 7 U.S.C. § 2132(e).

³⁵⁵ See *supra* note 25 and accompanying text.

³⁵⁶ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) ¶ 35, available at <http://www.bartleby.com/124/pres31.html>.

³⁵⁷ See *supra* Part IV.A-B.

V. THE CONNECTION BETWEEN SENTIENCE AND STANDING

Some judges have described animals as “uniquely incapable of defending their own interests in court.”³⁵⁸ Yet animals are not unique in their inability to defend their interests in court. Virtually every type of personal property is incapable of defending its interests in court. A ship is incapable of defending its own interests in court, as is money against which the government has filed a forfeiture action. A desk is incapable of defending its own interests (regular dusting? well-organized drawers?) in court. Chalk is incapable of defending its own interests in court.

These judges’ description of animals omits an important qualifier. Animals are not unique in their inability to defend their own interests in court. Animals are unique *among sentient beings* in their inability to defend their own interests in court.

These judges’ description is incomplete in another respect. Animals are not unique in their inability to defend their own interests in court. A person in a coma is incapable of defending his own interests in court. He cannot speak or feed himself, much less ascend the witness stand and plead his case. A six-month old child is incapable of defending her interests in court. If she has a life-threatening but treatable disease, which her parents refuse to have treated because of their religious beliefs, the child cannot express her preferences; she cannot testify; she cannot seek relief. Yet, the court will consider the interests of the comatose man and the six-month old child through the device of appointing a guardian *ad litem*—a person to come to court and represent the best interests of the person who cannot defend his own interests without help. Many courts do not recognize guardians or guardians *ad litem* who seek access to the courts in order to protect an animal’s best interests. Thus, animals are unique among sentient beings in both their ability to defend their interests in court, and the failure of most courts to allow the animal’s guardian to proceed on behalf of the animal.

³⁵⁸ Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 238 (D.C. Cir. 1998) (quoting Animal Welfare Inst. V. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977)).

As described in Part IV, court decisions regarding the standing of animals are wildly inconsistent because of the courts' refusal to analyze the facts of the case pursuant to the established jurisprudence of standing. Little sense can be made by comparing the court decisions regarding the standing of animals. Another perspective from which to view standing is to compare animals to other potential or actual claimants. Patterns found in such a comparison may lead to a principled jurisprudence of animal standing.

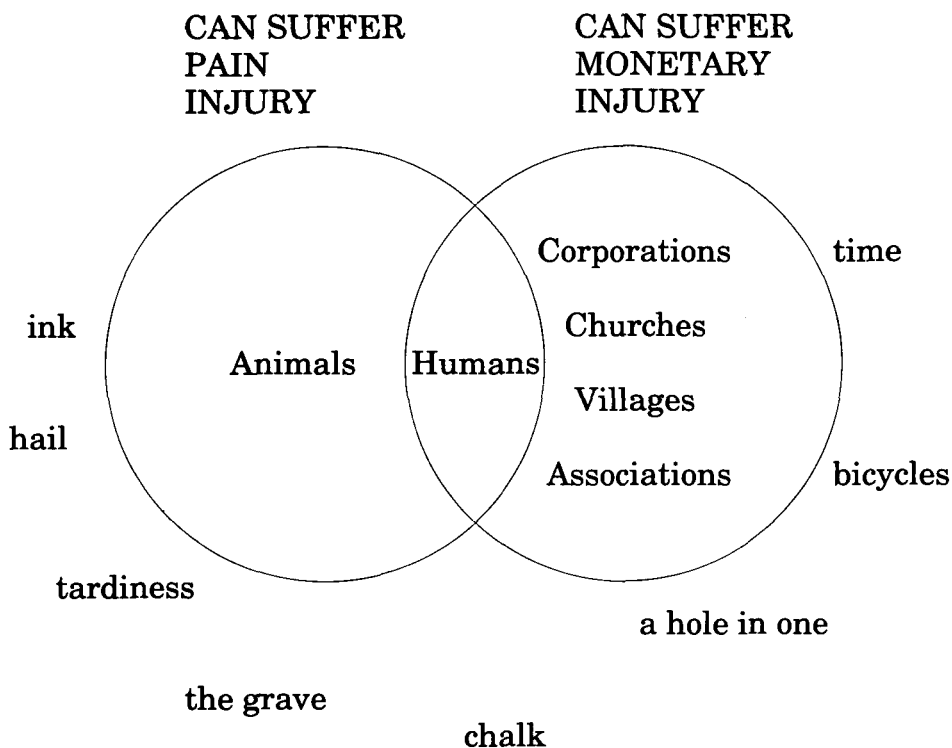
A vast array of persons and entities have been allowed to bring an action in U.S. state and federal courts, including humans, churches,³⁵⁹ corporations,³⁶⁰ and others. Much larger is the class of entities and things that have never had suit brought on their behalf. These non-plaintiffs, no more lifeless than a corporation, include ink, tardiness, the grave, hail, chalk, time, bicycles, a hole in one, and thousands of others. In cases where courts refuse to recognize the standing of animals, they are not shutting the courthouse door on an utterly unimaginable plaintiff, because this putative plaintiff can suffer.

One type of injury our courts can redress is referred to as the pain injury. It is the type of injury that could make the claimant call out, "Stop it! That hurts!" The pain injury would include mental suffering, physical suffering, injury, and death. The other type of injury our courts recognize is the monetary injury—a wrong which causes loss of wages, destruction of property, and other such injuries. The two types of injuries can both occur in the same transaction, and they can both be recovered in the same action, where appropriate. For example, a boy whose mother is killed through negligence will suffer the pain injury of missing her and the monetary injury of losing her income.

Analysis of the legal standing of animals requires a review of these two types of injuries and who can, and cannot, experience them. The following diagram shows who can suffer which type of injury.

³⁵⁹ *Ferry Pass United Methodist Church v. Carnesi*, 537 U.S. 1190 (2003).

³⁶⁰ *United Nuclear Corp. v. Nat'l Labor Relations Bd.* 340 F.2d 133 (1st Cir. 1965).



The circle on the left is the set of potential plaintiffs who can suffer a pain injury. The circle on the right is the set of potential plaintiffs who can suffer a monetary injury. Humans are the only litigants who can experience both the pain injury and the monetary injury and are therefore pictured in the intersection of both sets. To the right of humans are some of the potential plaintiffs who can suffer only the monetary injury: corporations, churches, etc. To the left of humans is the only potential plaintiff who shares with the human the ability to suffer the pain injury.

Outside of the sets are things that will never be a plaintiff: ink, tardiness, hail, time, a hole in one, bicycles, chalk, and the grave. As seen in this context, animals are not the plaintiffs whom we can never imagine coming into court. The plaintiffs we can never imagine coming into court are those who are outside the sets—the ones who are incapable of suffering either the monetary

injury or the pain injury. Animals, by contrast, suffer one of the injuries our courts can remedy: the pain injury.

To the right of humans in the diagram are those potential plaintiffs who are connected to us because we own them, or they hold our money, or they advocate for a political position with which we agree. We are connected to them by financial and political ties, and they cannot suffer the pain injury. To the left of humans in the diagram are the only other potential plaintiffs, besides humans, who can suffer the pain injury. Although courts readily and uniformly recognize the standing of the non-humans who can suffer the monetary injury, some courts are unwilling to recognize the standing of the only non-humans who can suffer the pain injury—animals. Even though only animals join us in susceptibility to the pain injury, some courts hesitate to hear the causes of these, our companions in the knowledge of life and death, flesh and blood. Animals are unique in their status as penniless, powerless sufferers. They are the only creatures in whom the fates have melded the capacity for anguish with the lifelong ability to escape their tormentors.³⁶¹ For this reason, they need the protection of our courts.

Courts construing statutes to determine whether an animal's guardian can sue pursuant to a statute need not become entangled in parsing definitions of "person" or "individual." Both our law and our societal norms establish that an animal is an individual. Our courts routinely recognize that animals are individuals. For example, courts acknowledge that the protection of a species can be different from the protection of an individual animal,³⁶² that a section of the Clean Water Act does not differentiate between harm to individual animals and harm to the species as a whole,³⁶³ that Congress has given the Department of the Interior the discretion

³⁶¹ The animals in the two settings considered in this Article, slaughterhouses and research laboratories, are unable to escape their tormentors. So are the dogs in puppy mills and the chickens on the factory farm. Some animals do have the capacity to escape those who would injure or kill them. For example, some wild animals being hunted may escape.

³⁶² See, e.g., *Sierra Club-Black Hills Group v. U.S. Forest Serv.*, 259 F.3d 1281, 1288 n.5 (10th Cir. 2001).

³⁶³ See *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

whether to focus more on a reintroduced population or on individual animals,³⁶⁴ the well-established fact that individual animals can and do lose ESA protection simply by moving about the landscape,³⁶⁵ that the Navy's use of SONAR in peacetime is acceptable because the Navy took into consideration the possible effect on individual animals,³⁶⁶ and that it may seem "obvious that it can never be to the advantage of an individual animal to be killed."³⁶⁷

Animals are individuals who suffer. Therefore, courts should uniformly recognize their standing.

VI. ANIMALS, STANDING, AND THE COURTS IN THE 21ST CENTURY

We have entered a century in which we can no longer ignore the suffering and the standing of animals. As we craft a principled jurisprudence to address their pain, ancient teaching offers a starting point.

A. *The Animal / Human Dichotomy: A Chasm Too Great?*

Jesus of Nazareth told the story of a rich man, clothed in the finest linen, and the beggar Lazarus,³⁶⁸ full of sores, who sat at the gate and asked for the crumbs that fell from the rich man's table.³⁶⁹ Both died, with the beggar borne by angels to the comforts of heaven and the rich man consigned to the miseries of hell. In torment, the rich man "lift[ed] up his eyes"³⁷⁰ and saw the Old Testament figure Abraham, father of the faithful, far away. The rich man cried out, "Father Abraham, have mercy on me, and send

³⁶⁴ See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000).

³⁶⁵ See *id.* at 1235.

³⁶⁶ *Natural Res. Def. Council v. Evans*, 279 F. Supp.2d 1129 (N.D. Cal. 2003).

³⁶⁷ *Comm. For Humane Legislation v. Richardson*, 414 F. Supp. 297, 310 n.30 (D.D.C. 1976).

³⁶⁸ Lazarus is not to be confused with the Lazarus whom Jesus is said to have raised from the dead.

³⁶⁹ *Luke* 16:19-31.

³⁷⁰ *Id.* at 16:23.

Lazarus, that he may dip the tip of his finger in water, and cool my tongue; for I am tormented in this flame."³⁷¹ Abraham refused this plea. "[B]etween us and you there is a great gulf fixed: so that they which would pass from hence to you cannot; neither can they pass to us, that *would come* from thence."³⁷² We use our laws to fix such chasms. We look at another being, who is both like us in some ways and different in others, and use our law to fix a chasm between us. We require little in the way of justification or fairness; we simply fix the chasm. In our history as a nation, chasms separating us from other sentient beings have always ultimately been bridged. The only exception that remains is the chasm between the human animal and the non-human animal.

Africans were brought to this country against their will and forced into lives of slavery.³⁷³ To perpetuate that system, to treat them as property, we used the law to make them "other," to fix a vast chasm between us and them. By our laws we created a system under which the African "had no rights that the white man was bound to respect."³⁷⁴ We later bridged that chasm and filled it in, though imperfectly, with laws and enactments including the Emancipation Proclamation,³⁷⁵ the post-Civil War Amendments to the Constitution,³⁷⁶ and the Civil Rights Act of 1964.³⁷⁷

After the bombing of Pearl Harbor and the entry of the United States into World War II, citizens not of Japanese descent looked at Japanese citizens and legal residents and chose to view them as "other." We fixed a chasm between ourselves and them. By means of an Executive Order, we had them, though they were guilty of nothing but being different, rounded up and placed in internment

³⁷¹ *Id.* at 16:24.

³⁷² *Id.* at 16:26.

³⁷³ In drawing this analogy with respectful intent, mindful of its imperfections, one remembers the words of the Pulitzer Prize winning African American woman Alice Walker, author of, among other works, *The Color Purple*: "The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men." Walker, *supra* note 46, at 14.

³⁷⁴ *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856).

³⁷⁵ Issued January 1, 1863, by President Abraham Lincoln, declaring all persons held as slaves in the states of the Confederacy to be free.

³⁷⁶ U.S. CONST. amend. XIII, XIV, & XV.

³⁷⁷ Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000(h)(6) (2002).

camp. ³⁷⁸ By 1988, we no longer saw Japanese within the United States as “other;” at least not to the extent that we had after Pearl Harbor. Congress passed a law providing reparations for those individuals who were interned, along with an apology made by the President on behalf of the nation, and an acknowledgment of the injustice of our acts. ³⁷⁹ Again, at least to an extent, we bridged the chasm.

Upon the founding of this nation, we considered women sufficiently “other” that most women were not allowed to vote until 1920. ³⁸⁰ Many other examples exist, both in this country and elsewhere, of using the law to create a chasm between us and those whose needs may not be considered very important. In some cases, this artificial chasm is made so large that we cannot dip our finger in the water to cool their tongues as they burn in the fires of hell. Among the most prominent international examples is the Nazi Holocaust, which used a well-planned public relations program to persuade the German people that humans such as Jews, Gypsies, and homosexuals were “other.” ³⁸¹

A basic, oft-quoted maxim of law and ethics is that fairness requires like cases to be treated alike. ³⁸² The difficulty lies in deciding which characteristics matter in determining “likeness.” Rational ability cannot be the crucial factor in determining likeness or difference between animals and humans. Humans with low intelligence and animals who communicate using sign language or specialized keyboards demonstrate that a distinction based on rationality is invalid. ³⁸³ Certainly, humans and some animals share a degree of intelligence and the capacity to communicate. ³⁸⁴ We ignore the suffering of animals and define them as “other” so we can use them—their flesh our food, their labor our

³⁷⁸ Exec. Order No. 9066, 7 F.R. 1407, Feb. 19, 1942 (authorizing the internment of Japanese Americans).

³⁷⁹ Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

³⁸⁰ U.S. CONST. amend. XIX (granting women the right to vote).

³⁸¹ *Genocide in the 20th Century*, The History Place, at <http://www.historyplace.com/worldhistory/genocide/holocaust.htm> (last visited Apr. 8, 2005).

³⁸² See, e.g., *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

³⁸³ See generally E. SUE SAVAGE-RUMBAUGH, *APE LANGUAGE* (Columbia University Press 1986).

³⁸⁴ *Id.*

luxury, their writhing our funding. To bridge that chasm we must see that the difference that matters is not rationality, communication or usefulness; it is, as nineteenth century philosopher Jeremy Bentham understood, the ability to suffer.³⁸⁵ In this frailty—this capacity for anguish, humans and animals are bound together in a kinship deeper, older, and more powerful than history, science, or law.

The ability to suffer is the principal characteristic for purposes of animal standing for two reasons. First, suffering is the appropriate measure for standing determinations because case law amply demonstrates that a showing of physical injury or suffering can constitute injury-in-fact. Physical proximity to a danger,³⁸⁶ the threat to physical well-being posed by airborne pollutants,³⁸⁷ and exposure to harmful emissions³⁸⁸ are all among the physical injuries, actual or imminent, that courts have recognized as adequate. Any animal that suffers has established an injury-in-fact and, thus, has standing if the other two elements exist.³⁸⁹ Second, the history of our laws, culture, and religions demonstrates that the guiding principle on which our society is based—the first thing required of each member of that society—is that we hurt no one. Whatever strain of spirituality or humanism is considered, the primary principles are that we do no harm and that we show compassion.³⁹⁰

³⁸⁵ Bentham wrote the words that would become a rallying cry for the animal rights movement: "The question is not Can they speak, nor Can they reason, but Can they suffer." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XVII (1781), available at <http://www.constitution.org/jb/pml.htm>.

³⁸⁶ *Baur v. Veneman*, 352 F.3d 625, 632-33 (2d Cir. 2003) (involving human exposure to downed cows in stockyards).

³⁸⁷ *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1016 (9th Cir. 2003).

³⁸⁸ *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002).

³⁸⁹ See *supra* notes 240-43 and accompanying text.

³⁹⁰ Ahisma, the ethic of non-harm, formed the basis for Mohandas Gandhi's theory of non-violence. It is a central tenet of the eastern religion Jainism. VI THE NEW SCHAFF-HERZOG ENCYCLOPEDIA OF RELIGIOUS KNOWLEDGE 86 (Samuel M. Jackson ed., 1949).

Hinduism, in one of its holy texts, teaches this prayer: "... May I regard all beings with the eye of a friend. With the eye of a friend do we regard one another!" *The Yajur Veda* 36:18 (Devi Chand trans., 1965).

What, then, is our reaction, through our law, when we see³⁹¹ a living, conscious cow, hanging upside down by one shackled leg from the slaughter line that moves her toward the “belly ripper?” What is our response when we *see* that cow move her head and her

The definitive ethical precept of Wicca is, “If it harm none, do as you will.” MARGOT ADLER, *DRAWING DOWN THE MOON* 101 (1986).

Some Old Testament passages can be read as reflecting compassion for animals. For example, God told Adam and Eve, “Behold, I have given you every herb bearing seed, which *is* upon the face of all the earth, and every tree, in the which *is* the fruit of a tree, yielding seed; to you it shall be for meat.” *Genesis* 1:9. Ancient Hebrew compassion for animals is also found in the command “not [to] muzzle the ox when he tread[s] out *the corn*.” *Deuteronomy* 25:4. It is also reflected in the Old Testament wisdom that a “righteous *man* regardeth the life of his beast: but the tender mercies of the wicked *are* cruel.” *Proverbs* 12:10.

Jesus taught that we should love our neighbor as ourselves, a precept derived from Old Testament law. A religious lawyer hoping to trick Jesus posed to him the question asked by many of us who are tempted to view someone different as “other.” He asked, “who is my neighbour?” Jesus answered by telling the story of a man on a dangerous journey who fell among thieves and was robbed, beaten, stripped of his clothing and left half dead. *Luke* 10:30. Two religious leaders of his own faith saw him as he lay on the road, turned their backs on his suffering, passed him by, and went on their way. *Luke* 10:31-32. Then a despised Samaritan came upon the injured man,

and when he saw him, he had compassion on him, and went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him. And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.

Luke 10:33-35.

For the atheist and the humanist, scientific facts establish that these animals feel pain, the highest human response to which is compassion.

³⁹¹ Seeing is what enabled the good Samaritan to be filled with compassion. One difficulty we face is the inability actually to see these animals, with our own eyes. Some whistleblowers’ video exists, such as the slaughterhouse video on the *Washington Post’s* Web site, but we are left, for the most part, to see these animals in our mind’s eye. We thereby lose the ability of the Good Samaritan to *see* the sufferer and be moved with compassion, unless we can see the animal and its situation through words.

leg, in an effort to get away from the slaughter line? One choice is to view the cow as "other," because she does not look like us. Another choice is to *see* the cow, with compassion, and to help her. Our law will vary, depending on the choice we make.

When we *see* a pig trapped in a transport truck outside a slaughterhouse in Illinois for several days with temperatures in the high nineties, what is our response? What do we want this tool, our law, to do in that dusty field on that hot day? Will we bridge the chasm between the pig and us and dip our finger in the water and cool her tongue? And having cooled her tongue, will we leave her there to be sent down the slaughter line where she will kick and squeal as she is lowered into scalding water that will fill her lungs and drown her? Or will we look on her with compassion and help her?

When we *see* a dog hanging in an immobilizing harness and subjected to uncontrollable, inescapable electric shocks at a level that would make a grown woman lose control of her muscles, what will we do? Will we, like the Good Samaritan, be moved with compassion and use our legal system to take the dog in and care for him?

Our legal system, particularly through the inadequacies and failures of HMSA, AWA, and our standing decisions, has allowed suffering to go on behind closed doors. Most judges, law professors, lawyers, and lay people, like the good Samaritan, would be "moved with compassion" to stop this suffering, if they saw it in person, on a dusty road in Israel or in Illinois. Reading or hearing the suffering described are the only available means to *see* the acts taking place. They are the only basis upon which we can decide whether to be moved with compassion or to refuse a drop of water because of the great chasm that we have fixed between humans and animals.

B. Is There a Chasm? The Expanding Genus Homo, the Human/Animal Chimera, and Bridging the Chasm Between Humans and Animals

The chasm we are tempted to fix between animals and ourselves is not so wide or so permanent as we sometimes think. Courts insisting on that chasm, clinging to a strict animal/human dichotomy, are on a collision course with science and ethics.

When the poet Thomas Hardy learned of the sinking of the Titanic, he contemplated the iceberg that had been forming in the Atlantic even as the ship was being built, and he wrote of their destiny:

And as the smart ship grew
In stature, grace, and hue,
In shadowy silent distance grew the Iceberg too.

Alien they seemed to be:
No mortal eye could see
The intimate welding of their later history,

Or sign that they were bent
By paths coincident
On being anon twin halves of one august event,

Till the Spinner of the Years
Says, "NOW!" and each one hears,
And consummation comes, and jars two hemispheres.³⁹²

Courts that have not addressed the rights and standing of animals may be heading towards an encounter with science that similarly will "jar two hemispheres." For example, technology exists today to produce an animal/human hybrid, also known as an animal/human chimera, based on the name of an ancient mythical

³⁹² Thomas Hardy, *The Convergence of the Twain*, in *THE COMPLETE POEMS OF THOMAS HARDY* 307 (James Gibson ed., 1976).

creature, a she-monster, which breathes fire and comprises goat, lion, and serpent.³⁹³ In 1998, scientists reported that they had created a cow/human hybrid through cell division.³⁹⁴ However, it was destroyed while still in the embryo stage.³⁹⁵

A court insisting on a stark human/animal dichotomy would face a difficult decision when presented with a human/monkey chimera. Many courts recognize both the standing and the substantive rights of animals. How will courts that do not recognize those rights and that standing respond when a human/chimpanzee chimera walks up to the witness stand, takes the oath, and asks the court to prevent the corporation that created him from subjecting him to painful experiments?

Bioethicist Ruth Faden of Johns Hopkins University believes that "[t]he big worry is the blurring between humans and nonhumans in such a way that the new creatures would challenge us as to whether they would be treated like humans."³⁹⁶ She dispenses with that problem by saying that, "any number of policies could head that off." It seems that Dr. Faden views the "problem" as how to draft the right policy to make sure the issue is "headed off;" to make certain the chimera on the witness stand will hear that his case is dismissed, see the gavel come down and

³⁹³ See Maryann Mott, *Animal-Human Hybrids Spark Controversy*, NAT'L GEOGRAPHIC NEWS (Jan. 25, 2005), available at http://news.nationalgeographic.com/news/2005/01/0125_0501f25_chimeras.html.

³⁹⁴ David Longtin & Duane C. Kraemer, *Cloning Red Herrings: Why Concerns About Human-Animal Experiments are Overblown*, 111 POL'Y REV. (2002), available at http://www.policyreview.org/FEB02/longtin_print.html. In addition, Chinese scientists created a human/rabbit chimera, from which they took embryonic stem cells. Karby Leggett, *China Has Tightened Genetic Regulations: Rules Ban Human Cloning; Moves Could Quiet Critics of Freewheeling Research*, ASIAN WALL ST. J., Oct. 13, 2003, available at http://www.channelnewsasia.com/cna/finance/markets/2003/031013_china2.htm. It is not completely clear which type of clones the cow/human and the rabbit/human were. There are two types of clones, one of which has the potential to grow into a full-grown being with characteristics of both beings.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

be hustled off to the laboratory again. Given what she says, the bioethicist appears to believe that the existence of an animal/human chimera would not call on scientists and courts to consider in earnest what rights must be afforded to such a creature. She appears instead to believe that the problem is how to make sure that question is answered the way she wants it answered, regardless of the feelings and suffering of this creature on the witness stand, this Caliban who never asked to live.

As the Titanic is described in Hardy's poem,³⁹⁷ courts which have not recognized the legal rights and standing of animals may find themselves on a collision course with the advances of science in the form of the animal/human chimera. The suggestion for a principled and consistent approach to the law of standing for animals is offered as a means to avoid such a collision. A venerable maxim says "hard cases make bad law."³⁹⁸ Courts could suddenly find themselves having to scramble, unprepared, to weigh a scientist's assertion of the right to "head off" any pesky claims an human/animal chimera might make, against the claims of the chimera himself. In such a situation, courts would also have to contend with the multitude of *amici* that may ask to express their views, while the court tries to avoid such embarrassing computations as those that were used many decades ago to determine who was mulatto and who was not.³⁹⁹ For this reason, a principled approach to the law of standing should be applied by all courts.

The chimera may not be the only non-human who may challenge the anthropocentrism of our courts in coming years. Also approaching the bar of justice is the chimpanzee. The National Academy of Sciences recently reported that human DNA is 99.4 percent identical to chimpanzee DNA and that the two species

³⁹⁷ See *supra* note 392 and accompanying text.

³⁹⁸ See, e.g., *Mitchell v. Vulture Min. & Mill. Co.*, 55 P.2d 636, 643 (1936) (Lockwood, C.J., dissenting).

³⁹⁹ See, e.g., *McGoodwin v. Shelby*, 206 S.W. 625 (Ky. App. 1918).

share a common ancestor.⁴⁰⁰ They also concluded that the chimpanzee, rather than branching off from this common ancestor at a time significantly earlier than the human, branched off at very nearly the same time as the human.⁴⁰¹ Based on these conclusions, the scientists recommended that our current taxonomy be changed, so that the genus *homo*, which has been reserved exclusively for humans, be expanded so that it will include *homo sapiens* (human), *homo troglodytes* (common chimpanzee) and *homo paniscus* (bonobo chimpanzee).⁴⁰²

These scientific findings will likely be cited in support of the Great Ape Project's *Declaration on Great Apes*.⁴⁰³ The proponents of the *Declaration on Great Apes* support certain basic rights for humans, chimpanzees, bonobos, gorillas, and orangutans.⁴⁰⁴ These include the right to life, the protection of individual liberty, and the prohibition against torture.⁴⁰⁵

Only by recognizing that Article III presents no obstacle to the standing of animals can our courts apply meaning to the concept of standing. Such an act of recreation will have a dual salutary effect. It will give effect to the compassionate purposes of laws like HMSA and AWA, and allow the animal standing jurisprudence to develop before the courts are faced with the case of the chimera or the chimpanzee.

CONCLUSION

A just system treats like cases alike. The rules of standing require an injury-in-fact, causation, and redressibility. Any properly motivated guardian capable of establishing standing should have the opportunity to come into court and make a claim on behalf of any animal capable of feeling pain.

⁴⁰⁰ Wildman et al., *Implications of Natural Selection in Shaping 99.4% Nonsynonymous DNA Identity Between Humans and Chimpanzees: Enlarging Genus Homo*, 100 PROC. NAT'L ACAD. SCI. 7181 (2003).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Declaration on Great Apes*, Great Ape Project, at <http://www.greatapeproject.org/declaration.html> (last visited Apr. 8, 2005).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

Our world is changing. Judges have an unprecedented opportunity to stand in the Valley of the Dry Bones and, by the power of their words, speak the flesh of meaning onto the dry dead bones of the word “standing.” Scientific advances inevitably require adjustments to our legal system’s treatment of animals. Hardy’s poem described an unplanned, tragic encounter between two great forces.⁴⁰⁶ However, T.S. Eliot illustrates a far different meeting in these lines from Part 5 of *Little Gidding*, in *The Four Quartets*:

We die with the dying:
See, they depart, and we go with them.
We are born with the dead:
See, they return, and bring us with them.
The moment of the rose and the moment of the yew-tree
Are of equal duration. A people without history
Is not redeemed from time, for history is a pattern
Of timeless moments. So, while the light fails
On a winter’s afternoon, in a secluded chapel
History is now and England.⁴⁰⁷

From that recognition of unity, of a perpetual cycle of death and rebirth, of the wholeness of all time and all places, Eliot hears, and would have us hear, a series of evocative voices: the Love, the Calling, and the waterfall.⁴⁰⁸ The last voice Eliot has us hear is young and hidden and human: the children half heard between two waves of the sea.⁴⁰⁹ We are called to go back to the place where we first began this eternal cycle of beginning and ending. This time, however, we are invited to recognize the place.

⁴⁰⁶ Hardy, *supra* note 392, at 307. The description “unplanned” is from the perspective of the ship’s passengers, though not from the perspective of the Spinner of Years.

⁴⁰⁷ T.S. Eliot, *Little Gidding*, in T.S. ELIOT, *FOUR QUARTETS* 58 (1943).

⁴⁰⁸ *Id.* at 59.

⁴⁰⁹ *Id.*

With the drawing of this Love and the voice of this Calling
We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
Through the unknown, unremembered gate
When the last of earth left to discover
Is that which was the beginning;
At the source of the longest river
The voice of the hidden waterfall
And the children in the apple-tree
Not known, because not looked for
But heard, half-heard, in the stillness
Between two waves of the sea.
Quick now, here, now, always—
A condition of complete simplicity
(Costing not less than everything)
And all shall be well and
All manner of thing shall be well
When the tongues of flame are in-folded
Into the crowned knot of fire
And the fire and the rose are one.⁴¹⁰

To this point in our experience, our compassion for animals cannot find the way. We are weary with well-doing, from the pointless, repetitious cycle of routine violations, exposé, public outcry, congressional action, and back to routine violations. We are weary with giving it all we have and learning that all we have has not yet done the job. We feed live chickens into a wood chipper; we pour paint thinner into the bladders of conscious rats; we subject living, breathing, sensate animals to inescapable electric shock. Our courts have divorced standing from its meaning, with the result that they, like some Calvinist God, send certain animals to the hell of the laboratory and the slaughterhouse, while allowing others the protections of the courts—all without any explanation whatsoever. Our only hope is to find the last of Earth left to

⁴¹⁰ *Id.*

discover, at the source of the longest river, and know the place for the first time. When we enfold the “other” as the rose enfolds the flame, we find ourselves and find simplicity. Those who would rob the law of its heart—its knowledge of pain and pleasure, its bent toward compassion—risk Hardy’s collision between machine and ice. We are free to choose the rose and flame instead—to bring into the circle of our compassion animals, who, as we, suffer anguish and who, as we, look to our courts as the last hope to assuage that anguish.