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## Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act

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## BEYOND RIGHTS AND WELFARE: DEMOCRACY, DIALOGUE, AND THE ANIMAL WELFARE ACT

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Jessica Eisen\*

### ABSTRACT

*The primary frameworks through which scholars have conceptualized legal protections for animals—animal “rights” and animal “welfare”—do not account for socio-legal transformation or democratic dialogue as central dynamics of animal law. The animal “rights” approach focuses on the need for limits or boundaries preventing animal use, while the animal “welfare” approach advocates balancing harm to animals against human benefits from animal use. Both approaches rely on abstract accounts of the characteristics animals are thought to share with humans and the legal protections they are owed as a result of those traits. Neither offers sustained attention to the dynamics of legal change in democratic states, including the importance of public access to the facts of animal lives, opportunities for affective storytelling, and multi-faceted public deliberation.*

*This Article offers an alternative avenue for theorizing animal legal protections, drawing on Laurence Tribe’s articulation of law as governed by an “evolving ethic,” wherein successive shifts in legal and public consensus build upon one another in ways that are dynamic and not entirely unpredictable. Drawing on feminist, critical, and relational approaches to law and social change, this Article elaborates a vision of animal law as governed by an evolving ethic wherein legal transformation is deeply connected to the public availability of particular facts of animal use, emotional storytelling, and broader social relationships and power dynamics. The evolving ethic here proposed helps us to shift our focus from a pre-critical understanding of rights as hard boundaries to a view of rights as a product of dynamic social relationships; and to shift our focus from welfarist balancing calculations to more open-textured dialogue. By conceiving of animal law through the lens of the evolving ethic, we can break free of stale debates about the virtue of rights versus welfare and instead embrace both as tools in a dialogic toolbox deployed in a field of legal transformation that is better characterized by dynamism and dialogue than by teleological advancement toward a predefined goal.*

*The Animal Welfare Act (AWA)—the central legal regime governing the experimental use of animals in the United States, forms the central case study. The AWA regime in its current form works to foreclose public deliberation over concrete cases.*

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*The history of this same regime, however, demonstrates that affective storytelling grounded in the particular facts of animal use has been a major driver of democratic legal change protecting animals used in experiments. This Article explores the current structure and historical development of the AWA scheme, demonstrating that the evolving ethic offers insights, beyond those allowed by rights and welfare approaches, into the practical dynamics of animal law and the shortcomings of the current AWA scheme. Informed by the evolving ethic and the AWA’s history of socio-legal transformation, this Article offers AWA law reform proposals that aim to facilitate public deliberation grounded in the concrete facts of animal use—including the introduction of ethical merit review of proposed experiments, changes in the applicable rules of standing, and product labeling. While each proposed reform may yield incremental improvements in the treatment of laboratory animals in the immediate term, the core insight of the evolving ethic is that there is a distinct value in the potential of such proposals to nourish public conversations rooted in particular stories of animal use—conversations that are likely to spur new questions and new conversations, none of which can be fully determined in advance.*

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## INTRODUCTION

As the Animal Welfare Act (AWA)—the primary legal regime governing the experimental use of animals—celebrates its fiftieth anniversary, debates about animal research are in gridlock.<sup>1</sup> Public dialogue on animal experimentation exists at a high level of abstraction, with few conversations taking the form of competing arguments surrounding the same factual context. The ground for public debate over concrete cases—already shaky—seems to be at risk of vanishing with the recent, unexpected removal and selective reposting of animal welfare records from the inspecting agency’s website.<sup>2</sup>

The resulting public dialogue around animal experimentation lacks adequate foundation in the concrete facts of animal use. Proponents and opponents of animal research certainly call upon “facts” to support their arguments, but the debate rarely takes the form of competing arguments arising from the same underlying case. Instead, advocates of animal research tell stories emphasizing the benefits of animal research, like this moving personal account offered by Robert B. White, beginning with the premature birth of his granddaughter, Lauren:

We wept, our hearts torn by the growing realization that Lauren might not live. The next day she died. The best care that medicine could offer was not enough. The research on baby lambs and kittens that has given life to many premature infants such as Lauren was still in the future and would come too late for her.

In time, two grandsons, Jonathan and Bryan, were born. Premature babies, they also had to struggle for life. Our pain of uncertainty and of waiting was all to be endured twice again.

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1. Bernadette Juarez, *The Animal Welfare Act: Celebrating 50 Years of Regulatory Protection, Enforcement, and Education*, 41 ADMIN. & REG. L. NEWS 13 (2016); see *infra* notes 2–8 and accompanying text (on gridlock in animal experimentation debates); cf. *infra* note 109 and accompanying text (on related gridlock in the broader rights-welfare debate).

2. See *infra* notes 50–56 and accompanying text.

But the little boys lived. The knowledge gained through research on lambs and kittens gave them life, a gift that Lauren could not have.<sup>3</sup>

White concedes that “no reasonable person can oppose” humane treatment in laboratories, but warns of a powerful lobby of antivivisectionists who “would let my grandsons die rather than allow an animal to be used in medical research.”<sup>4</sup>

Animal advocates point to a separate family of factual examples, emphasizing the harms animals suffer in experiments, rather than the purported research benefits. Peter Singer, for example, describes a series of “maternal deprivation” and “social isolation” studies, in which animals are subjected to stressful conditions for the purpose of observing their emotional reactions:

In a 1972 paper, Harlow and Suomi say that because depression in humans has been characterized as embodying a state of “helplessness and hopelessness, sunken in a well of despair,” they designed a device “on an intuitive basis” to reproduce such a “well of despair” both physically and psychologically. They built a vertical chamber with stainless steel sides sloping inward to form a rounded bottom and placed a young monkey in it for periods of up to forty-five days. They found that after a few days of this confinement the monkeys “spend most of their time huddled in a corner of the chamber.” The confinement produced “severe and persistent psychopathological behavior of a depressive nature.” Even nine months after release the monkeys would sit clasping their arms around their bodies instead of moving around and exploring their surroundings as normal monkeys do.<sup>5</sup>

Rarely, if ever, do we see a range of arguments focused on the same experiment. There is a missing conversation between White and Singer in which they are required to debate the same case, testing the strong and weak points of each.

This lack of particularized debate is especially problematic given that public approval for the use of animals in experiments varies according to the purpose of the research, the species of animal

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3. Robert B. White & Michael W. Fox, *Contested Terrain: Beastly Questions*, 19 HASTINGS CTR. REP. 39, 39 (1989).

4. *Id.* at 40.

5. PETER SINGER, ANIMAL LIBERATION 34 (3d ed. 2002) (quoting Stephen J. Suomi & Harry F. Harlow, *Depressive Behavior in Young Monkeys Subjected to Vertical Chamber Confinement*, 80 J. COMP. PHYSIOLOGICAL PSYCHOL. 11, 11, 14 (1972)).

used, and whether or not the same results might be achieved by other means.<sup>6</sup> This should be unsurprising when one considers the vast range of activities that fall under the general rubric of animal research: military weapons development, medical research, cosmetics testing, practice surgery, and more. Animal research is conducted on species ranging from rats to birds to dogs to primates. Some experiments cause only “minimal pain or brief discomfort” for animal subjects, while others cause “acute or prolonged pain.”<sup>7</sup> In some cases, animal experimentation may be the best or only way to arrive at a particular result, while in other cases computer models and stem cell research may be equally or more effective.<sup>8</sup>

The AWA does not reflect these nuances. Instead, the regime proceeds on the assumption that any human aim can justify any animal use, without inquiry into whether the social value of the experiment warrants the harm that will be done to animal subjects. As far as the AWA is concerned, there is no legally cognizable difference between animal experiments supporting the development of a new mascara, or a longer-lasting headache remedy, or a cure for Alzheimer’s disease. The system by which proposed projects are evaluated thus excludes regulatory consideration of those concerns which most influence public opinion on the acceptability of animal use, limiting the extent to which the legal regime can serve as a useful scaffold for public deliberation. The lack of transparent discussion of concrete cases, moreover, forecloses any legal iteration of the appeals to empathy and emotion that animate the above-quoted passages by White and Singer. A restrictive standing regime,

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6. See Joakim Hagelin, Hans-Erik Carlsson & Jann Hau, *An Overview of Surveys on How People View Animal Experimentation: Some Factors that May Influence the Outcome*, 12 PUB. UNDERSTANDING SCI. 67 (2003); Linda Pifer, Kinya Shimizu & Ralph Pifer, *Public Attitudes Towards Animal Research: Some International Comparisons*, 2 SOC’Y & ANIMALS 95 (1994); Scott Plous, *Proceedings for Pain Management and Humane Endpoints*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH: ALTWEB, <http://altweb.jhsph.edu/pubs/proceedings/pain/plous.html> [https://web.archive.org/web/20180201040822/http://altweb.jhsph.edu/pubs/proceedings/pain/plous.html] (last visited Feb. 1, 2018).

7. COMM. ON THE USE OF ANIMALS IN RESEARCH, SCIENCE, MEDICINE, AND ANIMALS 23 (1991).

8. Advocates for animal research often argue that animal research is irreplaceable by other technologies. See, e.g., Patrick W. Concannon, *Animal Use, Animal Rights, and Animal Legislation*, in ANIMAL RESEARCH, ANIMAL RIGHTS, ANIMAL LEGISLATION 1, 10 (Patrick W. Concannon, ed., 1990). Former animal researcher Dr. John Pippin, on the other hand, argues that that research on animals is less effective than alternative technologies, particularly with respect to developing products and treatments for human use. John J. Pippin, *Animal Research in Medical Sciences: Seeking a Convergence of Science, Medicine, and Animal Law*, 54 S. TEX. L. REV. 469 (2013). Assessment of these general claims is beyond the scope of this Article, although I hope that debate of the kind that I advocate will better position all of us to consider such arguments in the context of particular cases.

lack of aggressive enforcement by public agencies, and the recent decision to restrain public access to regulatory reporting documents compound these concerns. The forms of debate that are supported by the AWA regime are both substantively limited and concealed from public view, stunting their potential role in broader democratic deliberations over animal use.

Law is particularly well-suited to the kind of case-specific adjudication that is missing from the public conversation about animal experimentation. But the AWA regime has failed to provide a forum that might channel public discussion toward the many particular social choices that comprise our collective approach to animal research. Because the resulting public debate lacks adequate grounding in concrete cases, it necessarily occurs at a level of abstraction that makes agreement both difficult to achieve and challenging to apply. Significant energy is directed toward philosophical debates about animal “rights” and animal “welfare” that magnify disagreements that may be practically irrelevant in many cases. This is not to diminish the value of the significant and thoughtful attention that has been paid to these philosophical questions. Instead, I suggest that there is a crucial dimension of this conversation that has been denied its proper forum. As a matter of public regulation and debate, the marginalization of concrete cases has meant that whatever common ground may exist under the umbrellas of competing abstractions is hidden and ignored.

This Article suggests another way forward, proposing a legal approach to human-animal relationships that foregrounds the need for informed and pragmatic public debate in democratic systems. I will argue here that the AWA regime regulates the experimental use of animals in a way that frustrates meaningful public deliberation on animal research. I will further suggest that the primary frameworks by which scholars have conceptualized efforts to strengthen protections for laboratory animals—namely animal “rights” and animal “welfare”—fail to account for debate and social change as necessary instruments of animal protection in democratic states. These approaches not only neglect the significance of changing social values in achieving justice for animals, they also leave us without the tools to articulate critical shortcomings of the current regime and invite forms of public deliberation that are limiting and distracting.

Instead, I propose an alternative approach the legal treatment of animals, including under the AWA, focusing on the relationship between social and legal change in democratic states. This focus works to highlight the importance of wide-ranging public debate

grounded in the particular facts of animal use. As the history of the AWA itself confirms, successive moments of emotive story-telling, arising from public disclosure of the particular facts of animal use, have been central to the development of animal protection law in practice. The central image is not one of “balancing” (welfare) or “boundaries” (rights), but rather of an “evolving ethic” wherein each moment of social and legal change introduces new questions, possibilities, challenges, and opportunities that are not entirely predictable in advance.<sup>9</sup> Questions about the legal treatment of animals, on this account, cannot be meaningfully addressed or even posed unless they are addressed and posed through democratic deliberation over time.

The discussion that follows accepts as a premise that the current state of law and practice with respect to laboratory animal experimentation permits and sanctions wrongful conduct, and that this is just one instance of widespread social and legal injustices suffered by animals in the United States. The argument presupposes that animal suffering matters, and that the many mass-scale, institutionalized practices by which we confine, socially isolate, injure, and kill animals present serious justice problems.<sup>10</sup> In short, this discussion assumes that there is an urgent ethical and political imperative to use law, alongside other strategies, to provoke change in the *status quo* treatment of animals in this country.

Importantly, this argument also acknowledges that this view of animal use represents a minority position. The social and legal context in which the present argument is advanced is one in which there are virtually no restrictions on the treatment and killing of animals for such less-weighty purposes as decorative fur trim or especially delicious pâté. I advance these proposals not out of optimism as to the results that public debate will yield, but out of the conviction that such debate is a prerequisite for meaningful change. If social and legal norms surrounding animal use are to

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9. This image of an “evolving ethic” is borrowed from Laurence Tribe, as elaborated *infra* notes 113–117 and accompanying text.

10. My use of the word “justice” is intended to evoke a field of social and moral obligation which ought to be given expression and force through law. I believe that “justice” best captures what I value in both the rights and welfare positions (discussed below), while leaving open other possibilities for considering the ways we relate to other animals through law. By invoking the term “justice” it is not my intention to wade into debates about the scope of “justice” as a philosophical term of art, including the question of whether particular philosophical constructions of the term “justice” should be understood to apply to animals. For philosophical treatments of whether animals are owed obligations of justice, see, for example, ROBERT GARNER, *A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NONIDEAL WORLD* (2013); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 325–407 (2006); JOHN RAWLS, *A THEORY OF JUSTICE* 512 (6th prtg. 1971); TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 163–74 (1983).

shift, it will be over decades, not years, in fits and starts, and through progress and retreat. And if the public is not to be convinced, there is no hope for serious reform. Public debate may not be a sufficient condition for reform,<sup>11</sup> but it is unquestionably a necessary one in a democratic context.

This Article will first offer a description of the current AWA regime (Part II), with a particular emphasis on the ways in which the present regulatory system acts to frustrate and conceal deliberation over concrete cases. Part III will sketch the most common critical postures toward the AWA regime—the “animal rights” and “animal welfare” approaches—arguing that neither of these offers sustained attention to the institutional and practical dynamics of social and democratic legal change. In Part IV, I offer and develop an alternative approach, casting animal law as the product of an evolving ethic, driven by democratic deliberation and successive shifts in public consensus. Drawing on feminist, critical, and relational theory, and illustrative examples from the history of the AWA regime, this section will elaborate an approach to the legal treatment of animal experimentation that emphasizes the role of affective appeals grounded in particular fact, political contexts, and experiences of animal use. The evolving ethic here proposed helps us to shift our focus from rights as apolitical boundaries to rights as a product of dynamic social relationships; and to shift our focus from calculated balancing to more open-textured dialogue. This section also demonstrates that by conceiving of animal law through the lens of the evolving ethic, we can break free of stale debates about the virtue of rights versus welfare, and instead embrace both as tools in a dialogic toolbox deployed in a field of legal transformation that is better characterized by dynamism and dialogue than by teleological advancement toward a predefined goal. Part V will return to the AWA regulatory regime and offer some concrete law reform proposals that are commended by the evolving ethic developed in the preceding section. Part VI will consider objections, particularly objections that the proposed focus on public debate is either misguided or misleading.

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11. In fact, I suspect that change in this area will most likely hinge on changes in the wider material context, particularly the availability of accepted non-animal alternatives for product testing. See Pippin, *supra* note 8, at 504–09, 511. Of course, public debate, efforts at developing alternatives, and the scientific community’s receptivity to those alternatives, are deeply interconnected. Another potential, though perhaps less likely, source of change in material context might arise from shifts in the perceived economic imperative to develop new consumer products at current rates. See Jessica Eisen, Roxanne Mykitiuk & Dayna Scott, *Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice* 51 U.B.C. L. REV. 1, 14, n.43–44 (2018).

## I. THE ANIMAL WELFARE ACT REGIME

While a complex regulatory structure surrounds animal experimentation (particularly with respect to federally-funded research), the AWA regime is the core source of protection for laboratory animals in the United States.<sup>12</sup> The AWA applies to most institutions that conduct animal research, covering nearly all facilities that either purchase or transport live animals, or receive federal funding.<sup>13</sup> It is the only source of federal regulation of animal treatment in laboratories that do not receive federal funding, including the majority of corporate facilities.<sup>14</sup> In most states, anti-cruelty laws provide blanket exemptions for animal research, leaving the AWA as the sole source of mandatory oversight.<sup>15</sup> The AWA is also of particular interest to the present inquiry because it has been the focal point for national legislative reform efforts and sustained scholarly attention.<sup>16</sup>

The AWA's contested and non-intuitive definition of animals provides in relevant part:

*Animal* means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warm-blooded animal, which is being used, or is intended for use for research, teaching, testing, [or] experimentation . . . . This term excludes birds, rats of the genus *Rattus*, and mice of the genus

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12. See CHERYL RAE NYBERG, MARIA A. PORTA & CAROL BOAST, *LABORATORY ANIMAL WELFARE: A GUIDE TO REFERENCE TOOLS, LEGAL MATERIALS, ORGANIZATIONS, FEDERAL AGENCIES* 119–20 (1994).

13. 7 U.S.C. § 2132(e) (2012); William A. Reppy Jr., *Do State Anti-Cruelty Laws Apply to Animals Used in Scientific Research?*, Conference Paper at Animals & Bioengineering—A Consideration of Law, Ethics and Science Conference (Nov. 9, 2007), [http://scholarship.law.duke.edu/faculty\\_scholarship/1812](http://scholarship.law.duke.edu/faculty_scholarship/1812). As discussed below, the AWA does not cover rats, mice, birds, farm animals, and/or cold-blooded animals. See *infra* note 17 and accompanying text. Federally owned facilities are also exempt from registration and inspection requirements. 9 C.F.R. § 2.30 (a)(1), § 2.30 .

14. Cf. NYBERG, PORTA & BOAST, *supra* note 12, at 119–20 (identifying the AWA, its amendments and regulations as being among the sources of law “of greatest importance and applicability to the greatest number of investigators”). Other significant sources of law canvassed includes a multi-agency statement of principles and other rules applying to government agencies and federally-funded research, as well as laws that affect laboratories but do not govern animal welfare. *Id.*

15. These exclusions are a matter of state discretion. The AWA expressly provides that states may choose to legislate additional protections. 7 U.S.C. § 2143(a)(8) (2012); see also 7 U.S.C. § 2145(b) (2012) (authorizing USDA to cooperate with state and local officials in enforcing their own laws). For a survey of research exemptions in state anti-cruelty laws, see Reppy, *supra* note 13, at 9–20.

16. See Christine Stevens, *Laboratory Animal Welfare*, in *ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1990* 66, 77–84 (Animal Welfare Inst. ed., 4th ed. 1990), for a discussion of legislative reform efforts targeting the AWA scheme.

*Mus*, bred for use in research; horses not used for research purposes; and other farm animals, such as, but not limited to, livestock or poultry used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.<sup>17</sup>

Animals, so defined, are protected by minimum standards relating to housing, transportation, handling, and care.<sup>18</sup> Notably, laboratory rats—the archetypical research animal—receive no protection whatsoever under the AWA.<sup>19</sup> For those animals who are covered, all AWA regulations are subject to the overriding caveat that they are not to affect the “design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility.”<sup>20</sup>

Enforcement of the AWA and its regulations are supported by two main pillars of oversight. First, research institutions are required to maintain Institutional Animal Care and Use Committees (Committees) tasked with reviewing research protocols and inspecting facilities.<sup>21</sup> Second, the United States Department of Agriculture (USDA) is empowered to gather information, conduct inspections, document violations of the Act, and penalize the violators. Procedural limits prevent non-governmental actors from suing to require enforcement of the AWA when the USDA and Committee systems fail to ensure minimum requirements are met. As this section will detail, each of these features of the regime—the Committee system, USDA enforcement, and obstacles to private standing—impact not only substantive animal protection, but also the depth of public debate that is supportable by the AWA scheme. In each case, aspects of the current regime work to frustrate informed public deliberation grounded in concrete cases.

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17. 9 C.F.R. § 1.1 (2017). For more on the history of this definition, which originally focused exclusively on primates and species commonly used as companion animals, see TADLOCK COWAN, CONG. RESEARCH SERV., RS22493, THE ANIMAL WELFARE ACT: BACKGROUND AND SELECTED ANIMAL WELFARE LEGISLATION (2016), <https://fas.org/sgp/cts/misc/RS22493.pdf>; GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 190–99, 224–25 (1995); James Rachels, *Drawing Lines*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 162 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

18. 9 C.F.R. §§ 3.1–.142 (2017).

19. For discussions of this exclusion and related advocacy efforts, see the sources cited *supra* note 17.

20. 7 U.S.C. § 2143(a)(6).

21. These committees are usually shorthanded with the acronym IACUC (Institutional Animal Care and Use Committee), but as a matter of style and ease of reference for those less familiar with the AWA context, I have preferred to simply use the title-cased word “Committee” when referring to IACUCs or the IACUC system.

*A. Constrained and Confidential Committees*

Each research facility is required to keep a Committee, “for the purpose of evaluating the care, treatment, housing, and use of animals, and for certifying compliance with the Act by the research facility.”<sup>22</sup> Committee members are appointed by the facility’s Chief Executive Officer (CEO) and must include at least three members, including a veterinarian, and an external member who has no formal affiliation with the facility.<sup>23</sup> The Committee is required to inspect facilities at least twice per year and to produce reports documenting regulatory violations, other prescribed concerns, and the views of any committee members dissenting in the report.<sup>24</sup> In cases where facilities fail to correct regulatory violations brought to their attention by a Committee, the Committee is required to report those continuing violations to the USDA.<sup>25</sup> The Committee is empowered to refuse permission for proposed research, or to suspend research activities that contravene the regulations.<sup>26</sup> While the Committees may play some role as a self-check mechanism within each research facility, their usefulness in contributing to public debates around animal experimentation are sharply limited by the Committees’ constrained mandates, and the fact that their reports are often unavailable for public consideration. In short, the Committee system leaves no room for meaningful internal deliberation over the justification for a given experiment, and creates obstacles to more public iterations of such conversations.

As many commentators have observed, the Committee system of oversight does not include any form of “ethical merit review.”<sup>27</sup> The prescribed review process does not permit Committees to question a project’s purported research objectives or to balance them against anticipated harms to animal research subjects. The AWA regulations are clear that, except as expressly required under the AWA, Committees are not permitted to “prescribe methods or set standards for the design, performance, or conduct of actual research or experimentation.”<sup>28</sup> While the regulations go on to set various standards—relating, for example, to pain relief, animal care, and

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22. 9 C.F.R. § 1.1.

23. 7 U.S.C. § 2143(b)(1); 9 C.F.R. § 2.31(a)–(b) (2017).

24. 7 U.S.C. § 2143(b)(3)–(b)(4)(A); 9 C.F.R. § 2.31(c)(2)–(3).

25. 7 U.S.C. § 2143(b)(4)(C).

26. 9 C.F.R. § 2.31(c)(6)–(8).

27. See, e.g., Mimi Brody, *Animal Research: A Call for Legislative Reform Requiring Ethical Merit Review*, 13 HARV. ENVTL. L. REV. 423, 424 (1989); Rebecca Dresser, *Assessing Harm and Justification in Animal Research: Federal Policy Opens the Laboratory Door*, 40 RUTGERS L. REV. 723, 743 (1987).

28. 9 C.F.R. § 2.31(a).

repetitive surgeries on a single animal—all standards are subject to an overriding exception in cases where “acceptable justification for a departure is presented in writing.”<sup>29</sup> As Gary Francione explains, “once the researcher justifies such a departure on scientific grounds, the [Committee] is without authority to interfere. . . . [T]he [Committee] cannot, under both the AWA and the regulations, make any ethical judgment about the experiment and cannot evaluate the scientific merit or design of the experiment.”<sup>30</sup>

Mimi Brody echoes this concern that important ethical judgments are absent from AWA analysis: “The existing federal scheme accepts, as a sweeping premise rather than as a judgment to be made on a case-by-case basis, that the anticipated benefits of animal research outweigh the ethical cost.”<sup>31</sup> As Brody explains, even if a Committee member at a cosmetics company were inclined to challenge the social or moral value of a research project (an unlikely scenario given that the CEO appoints Committee members), the AWA scheme creates no space for such an argument.<sup>32</sup> This “virtual silence on the issue of justification”<sup>33</sup> means that the most difficult and contentious problems posed by animal research are not given a forum in the Committee system. There is no place for questions about whether the research in question meets either a minimum standard of usefulness or a proportionate standard of usefulness with reference to animal suffering or expected scientific benefits. The substantial discretion accorded to researchers, combined with the CEO Committee appointment power, ensures that Committees will not grapple with questions about whether a particular research protocol is worthwhile with reference to any criteria beyond the stated objectives of the researcher.

Even the constrained assessments made by the Committees are not necessarily available for public consideration or comment. The AWA makes no provision for publication of Committee reports but does set out harsh penalties for Committee members who make public disclosures regarding the “trade secrets, processes, operations, style of work, or apparatus” of a research facility.<sup>34</sup> Research institutions have resisted disclosure on the basis that Committee proceedings are confidential and include proprietary information,

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29. 9 C.F.R. § 2.31(d)(1).

30. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 205.

31. Brody, *supra* note 27, at 427.

32. *Id.* at 430.

33. *Id.* at 436.

34. 7 U.S.C. § 2157 (2012).

that disclosure would compromise academic freedom, or that disclosure would provoke terror threats and other security concerns.<sup>35</sup> Advocates have occasionally succeeded in accessing Committee reports, particularly with respect to public agencies, using state “sunshine laws.”<sup>36</sup> This access has, however, been uneven, uncertain, and dependent upon the language and construction of particular state statutes.<sup>37</sup> The Committee system is thus not structured either to assess the justification for any given experiment or to provide a forum for public review and response to proposed research projects.

### B. *Limited USDA Enforcement and Transparency*

USDA enforcement of the AWA has been a notoriously unreliable source of protection for laboratory animals and has attracted substantial criticism. Unsurprisingly, animal advocates have been vocal about perceived shortcomings in USDA enforcement.<sup>38</sup> Further criticisms have come from more “neutral” parties such as the USDA Office of the Inspector General, which has reported failures to aggressively pursue violations of the AWA, fines that are so low they fail to deter violators, and inadequate site inspection procedures.<sup>39</sup> Research facilities are not required to make a showing of

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35. On arguments resisting disclosure on the basis of confidentiality and proprietary information, see Gary L. Francione, *Access to Animal Care Committees*, 43 RUTGERS L. REV. 1, 2 (1990). On arguments resisting disclosure on the basis of perceived safety concerns and terror threats, see, for example, Mark Pazniokas, *Court: UConn Can Withhold Names of Animal Researchers, For Now*, CT. MIRROR (June 22, 2016), <http://ctmirror.org/2016/06/22/court-uconn-can-withhold-names-of-animal-researchers-for-now/>; Todd Wallack, *Mass. Agencies Increasingly Cite Terrorism Risk to Withhold Records* (Feb. 6, 2017), <https://www.bostonglobe.com/metro/2017/02/05/massachusetts-agencies-increasingly-cite-terrorism-risk-withhold-records/xZbRd5rO5bmyG29XeP4tJ/story.html>.

36. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 243–48.

37. *Id.*

38. See, e.g., Ass’n of the Bar of the City of N.Y., *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 346–349 (2003) (describing the USDA’s “long and notorious reputation for ineffective enforcement” of the AWA, attributed both to “underfunding” and to a “fundamental lack of interest on the part of the USDA”); Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 938 (2001) (discussing under-enforcement of the AWA, including “the Department of Agriculture’s failure to promulgate and enforce adequate regulations pursuant to the [AWA]”); see also Joshua E. Gardner, Note, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act*, 68 GEO. WASH. L. REV. 330, 358–59 (2000) (arguing that AWA enforcement should be shifted to the historically more effective Environmental Protection Agency).

39. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T AGRIC., AUDIT REPORT NO. 33601-00001-41, ANIMAL AND PLANT HEALTH INSPECTION SERVICE OVERSIGHT OF RESEARCH FACILITIES 3 (2014), <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf>; OFFICE OF THE INSPECTOR

regulatory compliance before commencing research, and the USDA lacks statutory authority to suspend, revoke, or even refuse to renew registrations for non-compliant research facilities.<sup>40</sup> The USDA has complete discretion as to whether or not to penalize noncompliant research facilities and has in practice failed to enforce the AWA aggressively. Even serious cases of non-compliance often result in a simple “warning letter,” and generally only cases of repeated, serious violations are referred to the Investigative and Enforcement Services division, which may, after investigating the matter, seek civil penalties of up to \$10,000 per violation per animal per day.<sup>41</sup>

The fines levied against the New England Primate Research Center in 2013 give credence to charges that the USDA chooses not to aggressively enforce the AWA. After a series of highly publicized incidents at that facility, resulting in intense public scrutiny and changes in the facility’s management, a fine of \$24,000 was laid.<sup>42</sup> The legal issue here was not the underlying justification for the research, but rather a failure to meet basic standards of humane care.<sup>43</sup> The incidents giving rise to the fine spanned a number of years, and included the deaths of two primates as a result of severe dehydration when staff did not notice or react to defective mechanical watering systems. The \$24,000 fine was a fraction of the amount which the USDA was empowered to levy. Given that eleven separate violations were found, the USDA could have fined up to \$110,000.<sup>44</sup> Putting the \$24,000 fine in further perspective, animal advocates have noted that the facility in question receives approximately

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GEN., U.S. DEP’T AGRIC., AUDIT REPORT NO. 33002-3-SF, APHIS ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES 4–18 (2005), <https://www.usda.gov/oig/webdocs/33002-03-SF.pdf>.

40. Cf. Delcianna J. Winders, *Administrative License Renewal and Due Process—A Case Study*, 47 FLA. L. REV. (forthcoming 2018).

41. Pippin, *supra* note 8, at 472; see also Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 78 OHIO ST. L.J. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2920870](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920870).

42. Kay Lazar, *Harvard Fined \$24,000 for Monkey Deaths*, *Animal Care Issues*, BOS. GLOBE (Dec. 18, 2013), <http://www.bostonglobe.com/metro/2013/12/18/harvard-fined-for-violating-animal-welfare-law-care-monkeys/5Nzt6eld8fR1V6tyuRxOWP/story.html>.

43. As we have seen, the AWA does not require “ethical merit review.” See *infra* Part II.B. Nonetheless it bears mention that the center has been credited with significant research advances relating to AIDS, neuropsychiatric disorders, drug addiction and Parkinson’s disease. See Carolyn Y. Johnson, *Harvard Primate Lab’s End Puzzles Researchers*, BOS. GLOBE (May 29, 2015), <https://www.bostonglobe.com/metro/2015/05/28/closing-harvard-primate-center-leaves-legacy-discovery-controversy/Ax8wW1NfiIeqaFMbPDBYcI/story.html>; *Landmark Accomplishments*, NEW ENG. PRIMATE RES. CTR., <http://www.hms.harvard.edu/NEPRC/accomplish.html> [<https://web.archive.org/web/20180201040947/http://www.hms.harvard.edu/NEPRC/accomplish.html>] (last visited Feb. 1, 2018).

44. Lazar, *supra* note 42.

\$185,000 annually in federal funding.<sup>45</sup> As former animal researcher Dr. John Pippin explains, “[t]he bar for receiving a fine or other penalty is high . . . and settlements are encouraged that substantially discount fines, avoid federal charges, and allow the cited facilities to neither admit nor deny the alleged violations.”<sup>46</sup>

Notably, while the fines might not have stung, public outrage and continuing press coverage of the lab’s practices—including revelations about further primate deaths due to inadequate care—may have had an impact.<sup>47</sup> These scandals included the discovery that a dozen monkeys had been either found dead or euthanized due to severe dehydration at the center between 1999 and 2011, and publicity around the deaths of a half-dozen cotton-topped tamarins within two days of their being rehomed from the center to an Oregon zoo.<sup>48</sup> The effects of negative publicity relating to treatment of animals at the facility reverberated well beyond the formal fines levied by the under the AWA. The New England Primate Research Center was closed in 2015, purportedly for strategic reasons unconnected to negative publicity surrounding the primate deaths. Press coverage of the closure, however, uniformly remarked on the close temporal connection between the public outcry and the lab’s closure.<sup>49</sup>

Significantly, the public advocacy campaign surrounding the deaths of primates at the lab was made possible by one crucial feature of the AWA scheme that is now at risk: the ready public availability of USDA animal inspection reports, warning letters, records of settlement agreements, administrative complaints, and annual reports.<sup>50</sup> In early February of 2017, the USDA clawed back

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45. *Id.* (citing a spokesman for the People for the Ethical Treatment of Animals).

46. Pippin, *supra* note 8, at 472; see also Winders, *Administrative Law Enforcement, Warnings, and Transparency*, *supra* note 41 at 62 (documenting an average penalty discount of 96.4% for repeat-violators of the AWA who entered into settlement agreements).

47. Johnson, *Harvard Primate Lab’s End Puzzles Researchers*, *supra* note 43; Carolyn Y. Johnson, *More Suspicious Monkey Deaths Uncovered at Primate Center*, BOS. GLOBE (Apr. 8, 2015), <https://www.bostonglobe.com/metro/2015/04/07/primate/Rn1QvIFUqFH9m4LfU71IrJ/story.html>.

48. Carolyn Y. Johnson, *US Probes Harvard Primate Facility*, BOS. GLOBE (April 10, 2015), <https://www.bostonglobe.com/metro/2015/04/10/harvard-primate-center-under-investigation-for-deaths-shipped-monkeys/gSbwj1vmedS14PwUij4gJ/story.html>.

49. See, e.g., Johnson, *Harvard Primate Lab’s End Puzzles Researchers*, *supra* note 43. In addition to the AWA fine and the lab’s closure, further, less publicly visible effects might be traceable to advocacy efforts around the deaths of monkeys at the center. These might include costs relating to insurance, staffing changes, eligibility for grants, and the career advancement of individual professionals affiliated with the laboratory. My thanks to Martha Minow for pointing out the breadth of these possible repercussions.

50. See Meredith Wadman, *USDA Blacks Out Animal Welfare Information*, SCI. (Feb. 3, 2017, 6:00 PM), <http://www.sciencemag.org/news/2017/02/trump-administration-blacks-out-animal-welfare-information>.

tens of thousands of records that were previously available on the USDA website.<sup>51</sup> According to a USDA statement posted on the website that once housed these records, the intent behind the removal was to maintain privacy rights, and those seeking access to the deleted records must do so through formal requests under the Freedom of Information Act.<sup>52</sup> Press reports have questioned the USDA's expressed concern over individual privacy interests, remarking that the removed reports were already highly redacted and generally contained little, if any, personal information.<sup>53</sup> Notably, the proposed substitute process for obtaining the removed information, through Freedom of Information Act inquiries, may require years of wait time per request.<sup>54</sup> Some records have been restored following public outcry over their removal, but many remain unavailable or difficult to access.<sup>55</sup>

Whatever the source or motivation for this dramatic rollback of readily available information on laboratory animal welfare, the effects on public debate over animal experimentation will likely be significant. Ready access to these USDA documents has enabled the press to cover questions relating to the treatment of laboratory animals, and has been crucial to efforts of animal advocates to educate the public, lobby, and litigate.<sup>56</sup> The use of public advocacy to supplement lax USDA oversight is threatened by this rollback of public

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51. *Id.*; see also Karin Brulliard, *USDA Abruptly Removes Animal Welfare Information from its Website*, CHI. TRIB. (Feb. 3, 2017, 8:05 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-usda-animal-welfare-information-website-20170203-story.html>.

52. *Updates to APHIS' Website Involving Compliance Information*, U.S. DEP'T AGRIC., [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2017/sa-02/awa-hpa-compliance](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2017/sa-02/awa-hpa-compliance) (last modified Feb. 15, 2017).

53. See, e.g., Wadman, *supra* note 50; see also Brulliard, *supra* note 51.

54. Brulliard, *supra* note 51.

55. See Jill Ettinger, *USDA's Animal Welfare Records Still Obscured Despite New Public Search Tool, Says Animal Rights Groups*, ORGANIC AUTHORITY (Aug. 22, 2017), <http://www.organicauthority.com/usdas-animal-welfare-records-still-obscured-despite-new-public-search-tool-says-animal-rights-groups/>; Jon Hochschartner, *Harvard's Animal Law Fellow Explains USDA Blackout*, SPLICE TODAY (Mar. 17, 2017, 10:31 AM), <http://www.splicetoday.com/politics-and-media/harvard-s-animal-law-fellow-explains-usda-blackout/>; People for the Ethical Treatment of Animals, *UPDATE: USDA's New 'Public Search Tool' Falls Short*, PEOPLE ETHICAL TREATMENT ANIMALS (Aug. 18, 2017), <https://www.peta.org/blog/leading-animal-protection-groups-others-sue-usda-website-blackout/> (quoting Delcianna J. Winders stating that the new search tool is "virtually unusable in many cases, as the USDA has made it impossible to search for records from some of the worst abusers by concealing their identities. Alarming, the agency has also just announced that it will not put its enforcement actions back online"); Animal Legal Defense Fund, *UPDATE: USDA Records Blackout Litigation: Animal Legal Defense Fund Files Opening Brief Appealing the Dismissal of Lawsuit Against USDA*, ANIMAL LEGAL DEFENSE FUND (Feb. 2, 2018), <http://aldf.org/press-room/press-releases/update-usda-records-blackout-litigation-animal-legal-defense-fund-files-opening-brief-appealing-dismissal-lawsuit-usda/>.

56. See Ettinger, *supra* note 55; Hochschartner, *supra* note 55; People for the Ethical Treatment of Animals, *supra* note 55.

documents, as is the depth and scope of primary source materials available to ground informed public debate on particular instances of animal use.

### C. *Obstacles to Private Standing*

Animal advocates have sought to supplement the USDA's oversight by bringing private suits to enforce the AWA, but aspects of the governing legal regime have placed serious limits on litigation as an alternative means of supporting concrete public debate around animal experimentation. As in many contexts where litigation is pursued as a strategy for social and legal change, the costs and burdens of litigation pose challenges to finding willing plaintiffs and tend to favor more well-resourced parties.<sup>57</sup> In the AWA context, limits on legal standing to bring suit have been an additional persistent hurdle.<sup>58</sup> The AWA includes no "citizen suit" provision, and courts have concluded that the AWA scheme evinces "a comprehensive plan" of USDA supervision, not "a succession of private lawsuits."<sup>59</sup> A further obstacle arises from the constitutional requirement that plaintiffs must establish an actual or imminent injury even where they can find an oblique cause of action, for example under the Administrative Procedure Act.<sup>60</sup> Unlike human beings, ships, or corporations, animals have not been recognized as legal plaintiffs in their own right.<sup>61</sup> As a result, injuries to animals cannot satisfy the constitutional injury requirement.<sup>62</sup> A number of scholars have proposed that a guardianship model—along the lines of those used to represent the legal interests of children, corporations, or legally incompetent adults—might be productively extended to allow for the legal representation of animals' interests before the courts.<sup>63</sup> So far, however, neither Congress nor the

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57. Cf. Marc Gallanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95, 149 (1974) (describing "the way in which the architecture of the legal system tends to confer interlocking advantages on overlapping groups whom we have called the 'haves'").

58. For a conversation between animal law experts on the problem of standing, see David Cassuto et al., *Legal Standing for Animals and Advocates*, 13 ANIMAL L. REV. 61 (2006).

59. *Int'l Primate Protection League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 940 (4th Cir. 1986). For discussion and arguments in favor of the establishment of a citizen suit provision, see Ass'n of the Bar of the City of N.Y., *supra* note 38.

60. Ass'n of the Bar of the City of N.Y., *supra* note 38 at 349–51.

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

62. See *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1204–16 (2009).

63. See, e.g., Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morton*, 95 CAL. L. REV. 513 (2007); Kelsey Kobil,

courts have acted on these proposals to extend to animals a right to sue in their own capacity.<sup>64</sup>

Because animals cannot be plaintiffs, the only injuries that qualify as grounding constitutional standing are injuries to human or corporate plaintiffs who are entitled to bring suit.<sup>65</sup> The courts, for example, have found standing in cases where a human person pleads that they have suffered an “aesthetic injury” from witnessing animals in pain or distress.<sup>66</sup> But the “aesthetic injury” cases provide only the narrowest of grounds for standing in the animal research context. Only persons who are involved in ongoing research, or who have immediate plans to conduct further research, and who experience “aesthetic injury” due to illegal USDA acts or omissions, are able to bring suits to challenge agency implementation of the AWA.<sup>67</sup>

With respect to protections for laboratory animals, this test poses serious practical constraints on “aesthetic injury” as a basis for litigation under the AWA. Given the narrow category of persons who are likely to have ongoing contact with laboratory animals, the existing law of standing effectively shields the regulatory enforcement of laboratory animal protections from review by the courts. The one case where aesthetic injury was successfully plead with respect to research animals involved a university student.<sup>68</sup> Such plaintiffs will not likely be forthcoming in corporate laboratories where only current employees will have the requisite ongoing contact with AWA-protected animals.<sup>69</sup> Moreover, whatever litigation is able to survive the standing test is nonetheless distorted by it.<sup>70</sup> The judicial requirement that litigation be focused on the aesthetic or other

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*When it Comes to Standing, Two Legs are Better than Four*, 120 PENN. ST. L. REV. 621 (2016); cf. Stone, *supra* note 61 (proposing a guardianship model for natural objects, and suggesting at note 26 that his analysis may have application to animals as well).

64. *Developments in the Law*, *supra* note 62, at 1206–07.

65. Cf. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 834 (9th Cir. 2006), *vacated en banc at the request of the parties*, 490 F.3d 725 (9th Cir. 2007) (“The injury at issue is not the animals’ but the human observer’s.”).

66. See *Developments in the Law*, *supra* note 62, at 1204–16.

67. *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 499–500 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000).

68. *Glickman*, *supra* note 67.

69. Cf. Ass’n of the Bar of the City of N.Y., *supra* note 38 at 351 (remarking in the context of animal breeders, also covered by the AWA, that the aesthetic injury standard is such that appropriate “plaintiffs are obviously few and far between, particularly for actions against institutional facilities such as puppy mills, where the animals are hidden from public view and seen regularly only by those who profit from their confinement”).

70. See Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1329–32 (1974); cf. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15

injuries suffered by people or corporations works to obscure a direct focus on the experiences of animal research subjects, a concern which ought to be at the heart of the AWA regime.<sup>71</sup>

Laurence Tribe has commented that these restrictions as to who may bring suit, in combination with lax regulatory prosecution, has produced persistently weak enforcement rising to the level of a massive structural “loophole” in the AWA scheme.<sup>72</sup> Observing the same set of challenges, Cass Sunstein laments that U.S. law now provides for “a wide array of protections for animals,” that are often “worth little more than the paper on which they are written.”<sup>73</sup> In addition to this functional challenge, the current enforcement structure has the effect of ensuring that there is very little litigation construing or applying the substantive provisions of the AWA, thus foreclosing another possible forum for public deliberation.<sup>74</sup> In theory, such litigation might arise as a result of research facilities challenging an enforcement action for alleged regulatory infractions. In practice, however, there is little incentive for research facilities to expend resources judicially reviewing penalties that are so low and so rarely applied.<sup>75</sup> The public attention that may be associated with such litigation creates a further disincentive for the only parties who have regular, meaningful opportunities to initiate legal proceedings construing the AWA.<sup>76</sup> The administrative law judges who hear these cases, moreover, have ceased their past practice of posting pleadings online.<sup>77</sup>

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L. & Soc’y REV. 631, 632 (1980) (arguing that “the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding”).

71. 7 U.S.C. § 2131 (2012) (setting out the AWA’s “Congressional statement of policy,” including, “to insure that animals intended for use in research facilities . . . are provided humane care and treatment”).

72. Laurence H. Tribe, *Ten Lessons our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 3 (2001).

73. Cass Sunstein, *Can Animals Sue?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 251, 252 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

74. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 234–36; *see also* Gardner, *supra* note 38, at 346 (“Because of the rigid standing requirements, courts seldom review the merits of animal welfare cases and instead dismiss would-be plaintiffs on the basis of either insufficient injury or lack of redressable injury.”).

75. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 235–36; *see also supra* notes 41 and 46 and accompanying text.

76. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 235–36.

77. *Cf.* Winders, *Administrative Law Enforcement, Warnings, and Transparency*, *supra* note 41, at 66 (observing that the enforcement of the AWA through relatively low-profile administrative proceedings decreases the regime’s deterrent effect).

#### D. Summary: Public Debate under the AWA

The introduction to this Article suggested that public debates over animal experimentation almost always take place at a high level of abstraction, with each side marshalling examples that support their position, but with very few conversations taking the form of competing arguments arising from the same actual or proposed experiment. Legal fora have the potential to invite the forms of case-specific adjudication that are missing from the present debate, but, as this section has shown, the current AWA scheme does not serve this function. Concrete deliberations grounded in the particular facts of animal use are both limited and concealed under the current regime. Committee deliberations foreclose attention to the “ethical merit” of particular experiments and are in any event not systematically available for public reflection and response. USDA reporting, monitoring and enforcement, long criticized for being overly lax, have generated publicly available documentation of some aspects of experimental animal use, but access to that documentation is now being clawed back. Private litigation seeking to construe and enforce the AWA is frustrated by the applicable standing regime. The AWA’s primary modes of regulatory enforcement thus operate in concert to keep concrete questions about animal experimentation far from public view.

## II. BEYOND RIGHTS AND WELFARE

AWA law reform proposals have had only a marginal (if any) focus on the facilitation of public debate.<sup>78</sup> Arguments in favor of greater protection for animal interests—in the animal research context and more broadly—are often cast as falling into two general camps: “animal welfare” and “animal rights.” This section will offer a brief overview of the terms in which justice for animals are most commonly conceptualized, drawing primarily on the “animal ethics” scholarship that has come to define the conceptual turf for

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78. One exception is Mimi Brody, who advocates ethical merit review in part on the basis that it might stimulate public debate. Brody, *supra* note 27, at 440; cf. Peter Sankoff, *The Animal Rights Debate and the Expansion of Public Discourse: Is It Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?* 18 ANIMAL L. 281, 293 (2012) (describing the Canadian and New Zealand animal protection experience outside the experimentation context and concluding that, “animal welfare laws that encourage discourse surrounding animal use and contain opportunities for public consultation are more likely to provide long-term benefits than laws that create fragmented discourse or obscure it altogether”).

the more recent field of “animal law.”<sup>79</sup> I will argue here that neither the “animal rights” nor the “animal welfare” approach takes the relationship between law and social change as a central concern, despite the fact that advocates in both the rights and welfare tradition have called for dramatic changes in current practices of animal use.

### A. *Welfarism and Humane Treatment*

Animal welfarism is associated with the utilitarian tradition, and focuses on balancing the costs and benefits of animal use. A strong version of this position is elaborated by Peter Singer. Following the classical utilitarian Jeremy Bentham, Singer proposes that the ability to experience suffering and enjoyment (“sentience”) should form the primary object of moral concern, and rejects standards based on intelligence or rationality as “arbitrary.”<sup>80</sup> Singer argues that when balancing interests, equivalent interests of humans and animals (for example, the interest in avoiding physical pain) should be given equal weight, and that “[w]e must not disregard or discount the interests of another being, merely because that being is not human.”<sup>81</sup> This does not necessarily require identical treatment. In Singer’s view, it is worse to kill a person than to kill a mouse because a human has an interest in planning for the future, while, Singer posits, a mouse does not.<sup>82</sup>

The irrational attribution of greater weight to equivalent human interests amounts, in Singer’s view, to unjustifiable “speciesism.”<sup>83</sup> Because animal experimentation is institutionalized, and often supported with government funding, Singer views the practice as lying “at [the] heart” of contemporary speciesism.<sup>84</sup> Singer criticizes the AWA system for failing to incorporate any consideration of whether research objectives are of sufficient importance to outweigh the suffering caused by an experiment.<sup>85</sup> Singer does not call for the outright abolition of experimentation, but rather for the conduct

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79. See PAUL WALDAU, *ANIMAL STUDIES: AN INTRODUCTION* 134 (2013) (surveying the fields of “animal law” and “animal ethics” (i.e. “philosophy”)).

80. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 8–9.

81. Peter Singer, *Introduction* to *IN DEFENSE OF ANIMALS: THE SECOND WAVE* 1, 7 (Peter Singer ed., 2006).

82. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 19.

83. *Id.* at 6. The term “speciesism” is attributed to Richard Ryder. *Id.* at 269 n.4.

84. *Id.* at 22. The second practice Singer notes here is animal agriculture. Together, Singer argues, animal experimentation and animal agriculture “cause more suffering to a greater number of animals than anything else that humans do.” *Id.* at 22–23.

85. *Id.* at 76.

of a meaningful balancing process founded on the equal consideration of equivalent human and animal interests. In a controversial illustration of the implications of this approach, Singer proposes that “[s]ince a speciesist bias . . . is unjustifiable, an experiment cannot be justifiable unless the experiment is so important that the use of a brain-damaged human would also be justifiable”—a circumstance which he suggests may, in some cases, arise.<sup>86</sup> As an intermediate step, Singer advocates the establishment of a strengthened Committee review system authorized to refuse experiments on the basis that the harm caused outweighs projected benefits.<sup>87</sup> Although Singer expects that such committees would likely operate under pervasive speciesist bias, he also expects that they would nonetheless eliminate some experiments and make others less painful.<sup>88</sup>

Other welfarist approaches have had less radical implications. Many legal scholars, for example, have called for the introduction of interest balancing in determining when animal experimentation should be permitted without requiring Singer’s equal consideration of equivalent animal interests.<sup>89</sup> Advocates for animal research have often viewed welfarism as a less radical alternative to animal rights (an approach detailed below).<sup>90</sup> Animal rights advocate Gary Francione, moreover, has derided the current AWA regime as an example of “legal welfarism” that provides rights only to human persons, and leaves animals subject to a welfare calculation that fails to take animal interests seriously among the consequences to be balanced.<sup>91</sup>

Contrary to Francione’s suggestion, I would propose that a regime like the AWA that includes some protections for animal interests without incorporating those interests in any form of case-by-case “balancing” is not well described by the utilitarian framework underpinning legal welfarism as I (and Francione) have

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86. *Id.* at 85. Singer’s exploitation of disabled persons as a foil in his discussions of the ethical status of animals has attracted harsh criticism from disability advocates—including respecting the factual accuracy of Singer’s claims about the interests and capacities of cognitively disabled persons. *See, e.g.*, Stephen Drake, *Not Dead Yet!*, in PETER SINGER UNDER FIRE: THE MORAL ICONOCLAST FACES HIS CRITICS 213 (Jeffrey A. Schaler, ed., 2009). For a scholarly critique of Singer’s logic and consistency in discussions of disability, see William P. Alford, *Dissonance in Peter Singer’s Treatment of Development and Disability* (Aug. 6, 2017) (unpublished manuscript, on file with the author).

87. SINGER, ANIMAL LIBERATION, *supra* note 5, at 86.

88. *Id.*

89. *See* Brody, *supra* note 27; Dresser, *supra* note 27.

90. *See, e.g.*, Ronald McLaughlin, *Animal Rights vs. Animal Welfare: Can Animal Use Meet the Needs of Science and Society*, in ANIMAL RESEARCH, ANIMAL RIGHTS, ANIMAL LEGISLATION 11, 11–13 (Patrick W. Concannon, ed., 1990).

91. *See* FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 11–13.

described it.<sup>92</sup> As the AWA lacks ethical merit review, it does not actually call for the sort of “balancing” Francione describes, except to the extent that all laws might be thought to rest on an *a priori* balance of interests. The AWA regime is built upon the antecedent determination that any and all research aims justify animal experimentation.<sup>93</sup> For this reason, the AWA scheme might be better understood as falling under a distinct category of “humane treatment” approaches, which seek to improve treatment of animals without either according rights or engaging in balancing to determine whether the underlying use of animals is justified. While I have argued that analytic clarity commends distinguishing humane treatment approaches from welfarist balancing, the broader rights-welfare debate is more centrally concerned with the underlying shared assumption of welfarism and humane treatment that animals may or should be used for human ends—an assumption that is flatly rejected by those in the animal rights camp.

### B. *Animal Rights*

While welfarist and humane treatment approaches are generally concerned with the consequential outcomes of balancing or humane standards, animal rights approaches are rule-based or deontological. Tom Regan, the philosopher most often associated with animal rights theory, argues that animals, like humans, are “subjects-of-a-life” in the sense that they are “individuals who have lives that fare experientially better or worse for themselves, logically independently of whether they are valued by others.”<sup>94</sup> In Kantian terms, they are ends in themselves, rather than merely means to the ends of others.<sup>95</sup> Similarly to Singer, Regan holds that arguments that humans alone are subjects-of-a-life constitute unjustifiable speciesism.<sup>96</sup> Because subjects-of-a-life have intrinsic value, they are

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92. Francione’s description of welfarism shares the focus on balancing which I suggest departs from the AWA scheme. *Id.* at 7 (“I think it uncontroversial to say that *all* versions of welfarism involve some type of balancing.”).

93. See *supra* notes 27–33 and accompanying text.

94. TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS: AN INTRODUCTION TO MORAL PHILOSOPHY 93 (2003).

95. Kant himself did not include animals in the “kingdom of ends.” See Christine M. Korsgaard, *A Kantian Case for Animal Rights*, in THE ETHICS OF KILLING ANIMALS 154, 160 (Tatjana Višak & Robert Garner eds., 2016). Sunstein aptly describes the project of rights theorists (speaking of legal theorist Gary Francione in particular) as an effort to “make Kantianism safe for animals.” Cass R. Sunstein, *Slaughterhouse Five*, NEW REPUBLIC (Jan. 29, 2001), <http://www.newrepublic.com/article/books-and-arts/slaughterhouse-five>.

96. REGAN, ANIMAL RIGHTS, HUMAN WRONGS, *supra* note 94, at 94.

owed an equal right to respectful treatment.<sup>97</sup> Animals, like people, are therefore “protected by invisible No Trespassing signs”—individual rights that “trump[ ] any private or public interest.”<sup>98</sup> On Regan’s account, a right may be overridden, but not on the simple basis that this would produce a better outcome: “[W]e must never harm individuals who have inherent value on the grounds that all those affected by the outcome will thereby secure ‘the best’ aggregate balance of intrinsic values (e.g., pleasures) over intrinsic disvalues (e.g., pains).”<sup>99</sup> Animal experimentation, in Regan’s view, never meets the threshold required to override animal rights:

Because animals used in research are routinely, systematically treated as if their value is reducible to their usefulness to others, they are routinely, systematically treated with a lack of respect; thus are their rights routinely, systematically violated.

It is not refinement in research protocols that is called for; not mere reduction in the number of animals used; not more generous use of anesthetic or the elimination of multiple surgery; not reforms in an institution that is possible only at the price of systemic violations of animal rights. Not larger cages, empty cages. Total abolition.<sup>100</sup>

Legal scholars in the animal rights tradition commonly focus on questions of “legal status.” Gary Francione’s influential work, *Animals, Property, and the Law*, proposes that the root of human mistreatment of animals is the definition of animals as property under the law.<sup>101</sup> On this view, when legal rules are premised on welfarist interest-balancing, humans (who have rights) will invariably prevail over animals (who are chattel), even when trivial human interests are weighed against significant animal interests.<sup>102</sup> Legal scholar and animal rights advocate Steven Wise has concentrated on the particular characteristics of chimpanzees and bonobos, arguing that these species, at least, exhibit sufficient autonomy to deserve the status of legal persons, protected by fundamental, enforceable legal rights to bodily integrity and bodily liberty.<sup>103</sup>

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97. *Id.* at 94–96.

98. *Id.* at 97–98.

99. REGAN, THE CASE FOR ANIMAL RIGHTS, *supra* note 10, at 286.

100. REGAN, ANIMAL RIGHTS, HUMAN WRONGS, *supra* note 94, at 97.

101. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 4.

102. *Id.*

103. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 247–257 (2000). Wise sets out a more ambitious program, embracing more species, in STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS (2002).

Rights advocates and welfarists have exchanged criticisms as to their respective approaches. Singer has charged that those seeking abolition of experimentation have shown an “‘all or nothing’ mentality that [has] effectively meant ‘nothing’ as far as the animals were concerned.”<sup>104</sup> Conversely, rights advocates have argued that “[a]ny balancing of human and animal interests . . . is likely to be problematic as long as no rights considerations serve to limit the results of the balancing process.”<sup>105</sup> Moreover, rights advocates have charged that welfarist and humane treatment measures create a veneer of respectability around animal use which may slow or obstruct more fundamental change by giving the public the false impression that animals already enjoy adequate legal protection.<sup>106</sup>

Despite this apparent opposition, however, it is not always easy to draw clean lines between those advocating rights, welfare, or humane treatment. The rights and welfare positions outlined here provide only a representative and schematic overview of a rich discursive field in which many scholars have combined and revised elements from each of these classical positions.<sup>107</sup> In practice, there is little daylight between the prescriptive dimensions of Singer and Regan’s arguments. At a conceptual level, Cass Sunstein has shown that welfarist arguments can support a rights-style change in the legal status of animals, proposing that, “[i]f getting rid of the idea that animals are property is helpful in reducing suffering, then we should get rid of that idea.”<sup>108</sup> Nonetheless, the opposition (or “continuum”) between rights and welfare continues to serve as the dominant framework under which legal approaches to animal justice are conceptualized, including in the area of animal experimentation.<sup>109</sup>

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104. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 87.

105. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW*, *supra* note 17, at 259.

106. See *infra* note 231 and accompanying text.

107. For example, Cass Sunstein has argued that Gary Francione combines rights and utilitarian theoretical elements and questions the coherence of the resulting model. Sunstein, *Slaughterhouse Five*, *supra* note 95. Rebecca Dresser argues that positions blending rights and welfarism are evident in the works of Joel Feinberg and Barnard Rollin. Dresser, *supra* note 27, at 741–42 (citing Joel Feinberg, *Human Duties and Animal Rights*, in *ON THE FIFTH DAY: ANIMAL RIGHTS AND HUMAN ETHICS* 45, 56–60 (Richard Knowles Morris & Michael W. Fox eds., 1978) and BERNARD ROLLIN, *ANIMAL RIGHTS AND HUMAN MORALITY* 94–95 (1981)).

108. Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 400 (2003). In a similar vein, Singer has suggested that rights language offers a “convenient political shorthand” for achieving welfarist objectives. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 8. *But see* FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW*, *supra* note 17, at 112–14.

109. WALDAU, *supra* note 79, at 117 (describing contemporary animal law as being characterized by “a continuum running from one pole called ‘welfare’ to another pole called ‘rights’”); Sankoff, *supra* note 78 at 283 (“The framework of this debate is well known to just about anyone with even basic familiarity of animal law.”); *see also id.* at 284 (noting that the debate is so well-worn that “many advocates seem tired of this discussion”).

C. *A Missing Link: Law and Social Change*

Notably, both rights and welfarism, in their most essential forms, purport to offer theoretical frameworks that can be productively employed here and now, and in any place or time, to produce just outcomes. While this may be appropriate to the philosophical projects in which Singer and Regan are most directly engaged, such an approach is inadequate to considering animal justice as a legal and political project. Reasoned philosophical argument of the kind that Singer and Regan engage can play a crucial role in moving the needle on these problems. But a workable *legal* theory of animal justice must incorporate the necessity of that moving needle. This is especially so where advocates call for drastic changes to current practices, as both Regan and Singer do.<sup>110</sup>

A theory of animal legal protection that aspires to broad social change requires a framework that acknowledges the need for a range of argumentation, from the traditional to the critical. Rather than seeking determinate moral frameworks, animal legal theory must embrace the role that shifting public opinions and mainstream “common sense” play in defining human-animal relationships, including through democratic legislative change. Moreover, animal legal theory must accept that this essential democratic terrain demands discursive openness, attention to social power dynamics, responsiveness, and elements of unpredictability.<sup>111</sup>

We have seen that the current AWA regime fosters an extremely limited form of discourse. By accepting at the outset that all human wants trump all animal needs, the regime truncates debate. The only legally cognizable interests are those of human beings, and the only legally cognizable debates presume that every experiment is justified. Regan and Singer speak directly to these limitations, calling respectively for approaches that recognize the worth of animal subjects-of-a-life, and engage in meaningful balancing of human

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110. Singer acknowledges the distance between his position and current practice on animal experimentation and calls for intermediate measures in deference to this reality. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 85–87. Nonetheless, the thrust of his work is to offer a utilitarian balancing approach—a theoretical account which is not aimed at the dynamics of social change, and which promises to yield “correct” answers to moral problems independently of social consensus.

111. The focus of this Article is the AWA regime and the democratic generation and transformation of legislation. I suggest, but do not fully develop the implications of the evolving ethic for judicial interpretive change. See Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1 *THEORETICAL INQUIRIES* L. 245 (2000) (commenting on the role of “common sense” in the human rights context); *cf. infra* notes 237–238 and accompanying text (critiquing Wise’s treatment of social and relational aspects of judicial interpretation).

and animal interests. But while Regan and Singer each embody valuable modes of argument beyond those rendered legally intelligible by the AWA, neither makes a direct case for broadening the terms of public debate. Neither embraces the gap between their own prescriptions and the *status quo* as a crucial dynamic with which their theories must contend. Neither takes as central to the problems of animal justice the ways in which personal stories of animal lives are shielded from public view. This is perhaps understandable since Singer and Regan are better described as animal ethicists than legal theorists. But legal scholars have often picked up the framework of the Singer-Regan debate<sup>112</sup> without incorporating the institutional and democratic dimensions necessary to a *legal* approach to animal justice.

### III. FROM RIGHTS AND WELFARE TO AN “EVOLVING ETHIC”

I propose an alternative focus for advocates of legal reform in the context of animal research: to pursue reforms that aim to support the public deliberation that will necessarily precede any substantial change in our legal relationships with other animals. Instead of debating the relative merits of rights and welfare as competing frames for conceptualizing our obligations to animals, this approach seeks to understand and leverage the mechanics of law and social change in democratic systems. In the following sections, I will elaborate this more democratically-focused approach to animal law, beginning with a discussion of the “evolving ethic” developed by Laurence Tribe in the environmental law context—and adapted here as a model for an approach to animal law focused on the practical dynamics of law and social change.

In the sections that follow, I will elaborate the ways in which the proposed evolving ethic illuminates crucial aspects of animal legal protection that are not adequately or directly addressed by the rights and welfare paradigms. First, drawing on feminist animal care ethicists, I will argue that appeals to affect and emotion, and to particularized imaginative storytelling, are crucial to any account of legal justice for animals. Second, drawing on relational theory, I will propose that an effective normative and descriptive account of animal law must account for the deeply social nature of law-making and human-animal relationships and so must not depend on an excessively individualistic or abstract image of law and its human and animal subjects. In both sections, I will draw on examples from the

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112. See *supra* note 109 and accompanying text.

history and contemporary context of the AWA animal experimentation regime to demonstrate how the evolving ethic presents a more descriptively productive and more normatively-nuanced approach than the rights and welfare models of animal law are able to provide.

A. *Embracing Democracy: Public Values, Legal Change*

Laurence Tribe's foundational article, *Ways Not to Think About Plastic Trees*, elaborates an approach to environmental law that confronts and embraces the unpredictability of legal change over time, acknowledging that fundamental legal transformations unfurl through successive public and legal shifts wherein each shift changes the horizons of possibility for what may come next.<sup>113</sup> Although Tribe's focus is not directly on fostering democratic deliberation, his image of legal and social change as governed by an "evolving ethic" recognizes the interpenetration of public values and legal change—an insight at the center of the approach to animal law set out here.

Tribe's article called for a departure from the anthropocentric, want-focused assumptions that he perceived as animating environmental protection law and discourse. His approach to achieving this ambition embraced an inevitable interconnection between process and outcome.<sup>114</sup> Tribe explains that the "ends" pursued by individuals and institutions "are shaped by the questions they ask, the intentions they form, the processes of choice they adopt, and the choices they in fact make."<sup>115</sup> To illustrate, Tribe offers the image of a "multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes."<sup>116</sup> While this description of "the society" risks evoking a sense of communities as monoliths capable of unified movement, in practice such movement arises from social contest and debate among diverse persons and constituencies. Thus, while we may aim our efforts in the direction of "likely consequences," analytic and deliberative processes themselves takes on particular significance in light of the fact that "no such destination

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113. See Tribe, *Ways Not to Think About Plastic Trees*, *supra* note 70, at 1346.

114. See *id.* at 1324–25.

115. *Id.* at 1325.

116. *Id.* at 1338.

is describable in advance.”<sup>117</sup> Central to Tribe’s analysis is the contention that “the human capacity for empathy and identification is not static,” and is susceptible to successive moments of expansion (and, I would add, contraction or redirection) as we arrive at new understandings of “reciprocity and identity.”<sup>118</sup>

I propose an approach to animal experimentation that embraces this necessary interconnection between aspiration and practice. I have conceded at the outset that my interest in expanding the scope of debate is motivated in substantial part by a desire to move our practices and intuitions respecting animals in a particular direction. Following Tribe, I do not purport to have the ultimate destination charted in advance. Instead, I propose that we work to craft institutions that encourage us to debate our relationships with other animals in a range of registers, from cool rationalism to warm empathy, and from debates amongst those we might each see as peers to exercises of imagination and listening across great differences.

A new approach is necessary to overcome the limits of prevailing approaches that conceive of rights and welfare as the primary lenses through which to understand animal law. Rather than taking boundaries (rights) or balancing (welfare) as the central images of animal protection, the image of a multidimensional spiral (the evolving ethic) invites us to inquire into the history and prospects for social and legal transformation over time. The evolving ethic commends law reform projects that embrace the flexible and responsive nature of human empathy and the importance of interpersonal and institutional relationships as central concerns of animal law. Instead of pursuing a predefined outcome, the evolving ethic reminds us that new possibilities emerge from changing practices and changing material circumstances, such that questions about how law can best promote just human-animal relationships cannot be adequately answered in the abstract.

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117. *Id.* at 1339.

118. *Id.* at 1345. Tribe’s argument extends beyond the relationships between humans and animals, considering the possibility of human obligations toward natural objects. Tribe concedes that our capacities for empathy will be most easily developed with respect to animals most like us and will be successively more distant with respect to dissimilar animals, plants and other natural objects. *Id.* at 1343–45. The question of human obligation to natural objects other than animals is beyond the scope of this Article. Cf. Jessica Eisen, *Milk and Meaning: Puzzles in Posthumanist Method*, in *MAKING MILK: THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD* (Yoriko Otomo & Mathilde Cohen eds., 2017).

### B. *Making Room: New Voices, New Challenges*

I have suggested that Singer and Regan invite a broader conversation than that envisioned by the AWA scheme, calling as they do for consideration of values that are not cognizable under the current regime.<sup>119</sup> I have also suggested that there are other modes of argument that are not well described by the rights and welfare paradigms.<sup>120</sup> Drawing on feminist theory, this section will elaborate some of the modes of argument that are beyond the scope of rights and welfare frames but that are nonetheless crucial elements of the transformation of animals' legal status and protections over time.

Scholars working within the fields of feminist and ecofeminist theory have argued that an exclusive focus on rights and welfare marginalizes important voices.<sup>121</sup> In particular, these scholars have argued that the classical rights and welfare approaches deal at too high a level of generality and tend to adopt a myopic or essentialist focus on a single interest or value.<sup>122</sup> Both Singer and Regan begin and conclude their theories with generalized, abstract questions about the composition of the relevant moral community (sentient beings or subjects-of-a-life), and about what the members of that community are owed (equal consideration or rights). Tzachi Zamir has attributed this "two-stage" focus on status and entitlement to a perceived need to respond to the prevalent view that animal interests are of no moral import because animals lack moral status.<sup>123</sup> The resulting reasoning is highly abstract and distant from the particular contexts in which humans and animals interact. While both Singer and Regan draw on real examples and apply their frameworks to general factual contexts, neither gives significant attention to the multiplicity of considerations that might be relevant

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119. See *infra* Part III.A, III.B.

120. See *infra* Part III.C.

121. The criticisms set out here rely on a number of interrelated fields, including ecofeminism, feminist care ethics, and relational theory. For works that more carefully describe and distinguish the diverse theoretical strands on which I draw here, see Maneesha Deckha, *Non-Human Animals and Human Health: A Relational Approach to the Use of Animals in Medical Research*, in *BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW* (Jennifer J. Llewellyn & Jocelyn Grant Downie eds., 2012) (describing the relationship between relational theory and ecofeminism) and Josephine Donovan & Carol J. Adams, *Introduction to THE FEMINIST CARE TRADITION IN ANIMAL ETHICS: A READER 1* (Josephine Donovan & Carol J. Adams eds., 2007) (describing a range of approaches to animal ethics, including ecofeminism and capabilities theory, with a focus on care ethics).

122. These criticisms are often offered with great respect for the role that Singer and Regan have played in provoking public and scholarly interest in problems of animal justice. See, e.g., Cathryn Bailey, *On the Backs of Animals: The Valorization of Reason in Contemporary Animal Ethics*, 10 *ETHICS & ENV'T* 1, 12 (2005).

123. TZACHI ZAMIR, *ETHICS AND THE BEAST: A SPECIESIST ARGUMENT FOR ANIMAL LIBERATIONISM* 16–17 (2007).

to assessing or transforming practices in particular cases. With respect to animal experimentation, Regan's sweeping call for "empty cages" sets a hard, acontextual rule. Singer's call for balancing admits more flexibility on a case-by-case basis, but suggests that just outcomes can and should be achieved through highly rational calculations and weightings of competing interests. Neither focuses on the mechanisms through which prevailing practices and assumptions are grounded in particular social contexts, or on how those practices and assumptions might be transformed over time.

As many feminists have argued, neither theory attributes any role to emotional appeals or artistic and imaginative works. Nor do these theories attend to the impact that social power plays in shaping practices of animal use. The following subsections will flesh out this body of criticism and draw on the history of the AWA regime to illustrate the central role that social processes of communication and imagination have in fact played in key material advances in animal protection.<sup>124</sup> The evolving ethic provides a way of conceptualizing law and legal change for animals that incorporates these crucial dynamics in a way that rights and welfare do not. The proposed evolving ethic does not seek to discard rights and welfare argumentation but does reject their portrayal as competing "answers" to the problems of animal law and justice. Instead, the evolving ethic recasts rights and welfare as discursive forms that exist alongside other compelling modes of democratic engagement.

### 1. From Abstraction and Sameness to Particularity and Power

The starting point for much feminist writing in animal ethics is a rejection of the abstract moral discourse through which rights and welfare theorists often articulate their positions. Deborah Slicer, for example, argues that, "Singer and Regan give us . . . delimited descriptions, and these descriptions allow them to reformulate general, prescriptive principles that are applicable to similarly and

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124. While my focus here is on the feminist critique of rights and welfare, bolstered by a case study of the AWA's animal experimentation regime, it should be noted that sociologists, political scientists, and legal scholars have also documented and theorized the role of emotion in a number of other social movement contexts. See, e.g., James M. Jasper, *Emotions and Social Movements: Twenty Years of Theory and Research*, 37 ANN. REV. SOC. 285 (2011); PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS (Jeff Goodwin, James M. Jasper & Francesca Polletta eds., 2001); G.E. Marcus, *Emotions in Politics*, 3 ANNUAL REVIEW OF POLITICAL SCIENCE 221 (2000); the essays in LAW, REASON AND EMOTION (M.N.S. Sellers, ed., 2017); cf. Angela P. Harris, *Compassion and Critique*, 1 COLUM. J. RACE & L. 326 (2011).

superficially described situations.”<sup>125</sup> Slicer thus describes both Regan and Singer as offering “atemporal, abstract, and acontextual characterizations of issues, of the values at stake, and of appropriate resolutions,” and that both thus “grossly oversimplify” the difficult problems raised by animal research.<sup>126</sup> Carol Adams and Josephine Donovan echo this criticism, observing that,

[T]he rights approach (as well as utilitarian interest theory) tends to be abstract and formalistic, favoring rules that are universalizable or judgments that are quantifiable. Many ethical situations, however, including those involving animals, require a particularized, situational response . . . that may not be universalizable or quantifiable.<sup>127</sup>

This critique of abstraction often focuses on the fact that rights and welfare theories are each built on a single “criterion of moral considerableness” which constitutes the “essential” attribute necessary to determine moral status.<sup>128</sup> The resulting attention to human-animal continuities is often characterized by a myopic focus on a handful of discrete traits that humans and animals are seen to have in common.<sup>129</sup> This drive to take particular traits as a guidepost to who is “in” and who is “out” of our moral community has been criticized for replicating the same type of “dualist” and “hierarchical” logic that has so often worked to justify the mistreatment of animals.<sup>130</sup> An analytical focus on isolated and acontextual “traits,” moreover, forecloses attention to particular animals in their lived contexts.<sup>131</sup>

The limitation of appeals to “sameness” as a basis for legal power and protection is well-trod territory in feminist theory. Catharine MacKinnon identifies the difficulty with seeking rights for women

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125. Deborah Slicer, *Your Daughter or Your Dog? A Feminist Assessment of the Animal Research Issue*, 6 *HYPATIA* 108, 113 (1991).

126. *Id.* at 114.

127. Donovan & Adams, *supra* note 121, at 6.

128. *See* Slicer, *supra* note 125, at 110.

129. Donovan & Adams, *supra* note 121, at 5.

130. Slicer, *supra* note 125, at 112; *see also* Syl Ko, *Revaluing the Human as a Way to Revalue the Animal*, in *APHRO-ISM: ESSAYS ON POP CULTURE, FEMINISM, AND BLACK VEGANISM FROM TWO SISTERS*, 106, 114 (Aph Ko & Syl Ko eds., 2017) (arguing that efforts to align humans and animals on the same side of a binaristic approach to obligation are misguided since “the binary is the reason why animals are in this position in the first place”); *cf.* Marti Kheel, *The Liberation of Nature: A Circular Affair*, in *THE FEMINIST CARE TRADITION IN ANIMAL ETHICS: A READER* 39, 43 (Josephine Donovan & Carol J. Adams eds., 2007).

131. Slicer, *supra* note 125 at 110–11 (arguing that an “essentialist” focus on a single important axis of sameness or difference “renders inessential” important relationships and particular circumstances).

or for animals on the basis of proving that they share “qualities that men value in themselves”:

So the question becomes: Are they like us? Animal experimentation, using mice as men (so men don't have to be), is based on degrees of an affirmative answer. The issue is not the answer; the issue is, is this the right question? . . . It is not that women and animals do not have these qualities. It is why animals should have to be like people to be let alone by them, to be free of the predations and exploitations and atrocities people inflict on them, or to be protected from them. . . . Why should animals have to measure up to humans' standards for humanity before their existence counts?<sup>132</sup>

Thus, MacKinnon explains, the “sameness” focus of prevailing approaches to animal law “misses animals on their own terms, just as the same tradition has missed women on theirs.”<sup>133</sup> Two lines of criticism elaborate what is missed when “sameness” and “difference” define conversations about animal ethics. First, as Slicer explains, making “sameness” a priority leaves these approaches unable to “acknowledge, much less celebrate, differences.”<sup>134</sup> Instead, some feminists have called for an approach that recognizes the possibility that differences too might generate “relationships characterized by such ethically significant attitudes as respect, gratitude, compassion, fellow or sisterly feeling, and wonder.”<sup>135</sup> A second, distinct line of critique has urged that a focus on “sameness” and “difference” tends to drift toward analysis in “literal, ‘biological,’ matter-of-fact” terms that obscure the role that social choice and hierarchy play in determining which similarities matter, and the moral and political implications of particular differences.<sup>136</sup> As Syl Ko explains, “[s]imilarities, differences, and ideas that revolve around group membership are not ahistorical or non-contextual,” and the project of defining which precise qualities ought to attract value and obligation is “a story that is *not* and never

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132. Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 263, 267 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (citations omitted).

133. *Id.* at 264.

134. Slicer, *supra* note 125, at 112.

135. *Id.*; see also Kheel, *supra* note 130, at 39 (urging a more holistic approach to animal ethics).

136. Ko, *supra* note 130, at 118.

has been based on biology or biological facts.”<sup>137</sup> On this account, the greatest danger of abstract and ahistoric analyses, including those focused on sameness and difference, is the foreclosure of analysis of animal use as a socially-organized expression of power and hierarchy.

## 2. From Hard Logic to Affective Reasoning

The critique of Singer and Regan’s preferences for abstraction has been accompanied by a charge that both thinkers have repudiated the important role that emotion plays in defining and resolving problems of animal justice. Regan urges animal advocates “not to indulge our emotions or parade our sentiments,” and instead to commit to “rational inquiry.”<sup>138</sup> Singer too describes his own approach as “appealing to reason rather than to emotion or sentiment.”<sup>139</sup> Just as Zamir observed two-stage analyses of status and entitlement as arising from a particular rhetorical need,<sup>140</sup> Singer and Regan’s appeals to unsentimental rationalism might be understood as arising from a specific argumentative context. Both scholars expressly attribute their emphasis on rational argument to the need to refute widespread perceptions of animal advocates as overly sentimental and emotional.<sup>141</sup> It is also important to emphasize that both Singer and Regan have quite clearly experienced their subject matter as emotionally charged and have successfully drawn on emotionally evocative examples in their writing.<sup>142</sup> Instead, the criticism, as Cathryn Bailey explains, is that Singer and Regan’s analytic postures treat “the emotional as separate from and less important than the rational,”<sup>143</sup> despite the fact that, in practice, “reason and emotion are intertwined.”<sup>144</sup> This critique is connected to broader feminist calls for a “unified sensibility” that

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137. *Id.* at 109, 118. *See also MacKinnon, supra* note 132, at 264 (“In place of recognizing the realities of dominance of humans over animals and men over women is a sentimentalization of that dominance, combined with endless loops of analysis of sameness and difference. We see denial that each hierarchy involves socially organized power, combined with justifications of why one group, because of its natural superiority, should have what is, in substance, power, dominion, and sovereignty over the other”).

138. REGAN, *THE CASE FOR ANIMAL RIGHTS*, *supra* note 94, at xii.

139. SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 243.

140. *See supra* note 123 and accompanying text.

141. *See* REGAN, *THE CASE FOR ANIMAL RIGHTS*, *supra* note 94, at xii; SINGER, *ANIMAL LIBERATION*, *supra* note 5, at xxi (Preface to the 1975 Edition).

142. For a thoughtful discussion on this point, see Bailey, *supra* note 122, at 12. *See also infra* note 165 and accompanying text.

143. Bailey, *supra* note 122, at 6.

144. *Id.* at 13.

acknowledges the synthetic nature of reason and affect.<sup>145</sup> At the heart of this effort is a concern that attempts to excise emotion from reason risk obscuring and marginalizing much of what actually motivates moral action.<sup>146</sup>

To this end, Donovan charges that “both rights and utilitarianism dispense with sympathy, empathy, and compassion as relevant ethical and epistemological sources for human treatment of nonhuman animals.”<sup>147</sup> This denial of the role of affect in moral, political, and legal reasoning seems particularly misguided in the context of animal ethics. Just as the focus on particular traits was seen to reproduce a form of dualistic and hierarchical thinking that has supported animal abuse, the suggestion that logic and reason are separable and superior to affect and feeling reverberates with worldviews that have placed man above woman, and human above animal.<sup>148</sup> In other words, prizing rationality (which we often understand to be the exclusive domain of the human mind) diminishes not only the importance of affect but also those beings that we associate with emotion, impulse, and instinct (animals).<sup>149</sup> There is, perhaps, something ironic about the choice to theorize animal justice in terms that are so foreign to how we might expect animals to understand or communicate their own concerns. As Bailey explains, “[i]f reason sets the parameters of the discourse . . . only reason can be heard. Only reason will decide when something of relevance has been said, who has won or lost.”<sup>150</sup> This leaves precious little space for the kinds of emotive, visceral, and immediate communications which we might receive (were we open to them) from animals themselves.<sup>151</sup>

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145. Slicer, *supra* note 125, at 115 (noting the contributions of Marti Kheel, Mary Midgley, Sara Ruddick and Robin Morgan).

146. Slicer, *supra* note 125, at 115.

147. Josephine Donovan, *Feminism and the Treatment of Animals: From Care to Dialogue*, 31 *SIGNS* 305, 306 (2006).

148. Bailey, *supra* note 122, at 14 (“A discourse that assumes that it is the nature of rationality and emotionality to be sharply distinct reflects and reaffirms the view that it is the nature of human and animal to be sharply distinct.”).

149. Of course, questions of who exactly belongs on which side of the divide between the human/rational and the animal/instinctual have been deeply gendered, raced, and otherwise political. See, e.g., Maneesha Deckha, *The Subhuman as a Cultural Agent of Violence*, 8 *J. CRITICAL ANIMAL STUD.* 28 (2010); Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 *J. ANIMAL L.* 15, 21–24 (2009).

150. Bailey, *supra* note 122, at 8.

151. On the imperative to develop human receptivity to animal communications, see Sue Donaldson & Will Kymlicka, *Rethinking Membership and Participation in an Inclusive Democracy: Cognitive Disability, Children, Animals*, in *DISABILITY AND POLITICAL THEORY* 168, 192–196 (Barbara Arneil & Nancy Hirschmann eds., 2016).

### 3. Challenges and Possibilities for Particularity and Affective Discourse

Calls to consider animals and questions of animal justice in social context and to embrace the legitimacy of affective reasoning pose serious challenges. This is especially so to the extent that these shifts require us to understand and communicate about animal emotion and experience.<sup>152</sup> Maneesha Deckha has confronted this challenge, drawing on strands of the feminist literature discussed above, calling for efforts to “foreground the laboratory rat’s first personal perspective” despite limits on “how humans can know what animals are thinking and feeling.”<sup>153</sup> We are not without some basis for such explorations. Catharine MacKinnon addresses what she refers to as the “speaking for the other” problem:

What is called ‘animal law’ has been human law: the laws of humans on or for or about animals. These are laws about humans’ relations to animals. Who asked the animals? References to what animals might have to say are few and far between. Do animals dissent from human hegemony? I think they often do. They vote with their feet by running away. They bite back, scream in alarm, withhold affection, approach warily, fly and swim off.<sup>154</sup>

This is all true, of course. But the observation that animals “dissent” is not the end of the matter. It is instead an invitation to seek out the thoughts and feelings of animals living under human rule and to take up the challenge of communicating the shape and weight of these affective, particular experiences in ways that have the potential to influence human law and politics.<sup>155</sup>

The practical and epistemological challenges associated with these calls to consider animal perspectives should not be underestimated. Humility is in order.<sup>156</sup> Understanding the perspectives of

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152. See Eisen, *supra* note 118.

153. Deckha, *Non-Human Animals and Human Health*, *supra* note 121, at 306.

154. MacKinnon, *supra* note 132, at 269.

155. Cf. Jessica Eisen, *Animals in the Constitutional State*, 15 *ICON: Int’l J. Const. L* 1 (2018) (exploring the challenges of incorporating animal interests into constitutional law and politics given limits on human-animal communications respecting higher-order lawmaking).

156. WALDAU, *supra* note 79, at 77 (offering the “humility-focused observation” that “we have only begun to explore [ethical abilities] . . . found in those societies composed of non-human individuals who have large brains, social skills of great complexity, and distinctive personalities”); Eisen, *supra* note 118, at 243 (arguing that there are “real, embodied, experiential factors that make it particularly challenging for participants in human language communities—including those with posthumanist political orientations—to make knowledge claims about animal experiences”).

others has long posed significant challenges, even between different human beings.<sup>157</sup> These difficulties are magnified where other species are concerned. The most obvious obstacle is the general unavailability of human language as a means by which animals might communicate their experiences and preferences. But even at a more basic level, the sensory apparatuses and embodiment of some other species differ dramatically from those of humans, making their experiences all the more distant from ours. Thomas Nagel famously observed the difficulties that a human being faces in trying to understand what it might like to be a bat:

Our own experience provides the basic material for our imagination, whose range is therefore limited. It will not help to try to imagine that one has webbing on one's arms, which enables one to fly around at dusk and dawn catching insects in one's mouth; that one has very poor vision, and perceives the surrounding world by a system of reflected high-frequency sound signals; and that one spends the day hanging upside down by one's feet in the attic. In so far as I can imagine this (which is not very far) it tells me only what it would be like for *me* to behave as a bat behaves. But that is not the question. I want to know what it is like for a *bat* to be a bat. Yet if I try to imagine this, I am restricted to the resources of my own mind, and those resources are inadequate to the task.<sup>158</sup>

But Nagel does not cast this problem as insurmountable. First, Nagel suggests that we may in fact be capable of achieving a certain "schematic" understanding of a bat's experience.<sup>159</sup> Even though bat experiences have a subjective character that is beyond our comprehension, we can nonetheless accept that "bats feel some versions of pain, fear, hunger, and lust, and that they have other, more familiar types of perception besides sonar."<sup>160</sup> Second, Nagel

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157. A parallel to Thomas Nagel's point elaborated below (that we may only imagine ourselves in the position of a bat, not as a bat in the position of the bat) is expressed by Iris Marion Young in the context of human social difference and oppression: "when people obey the injunction to put themselves in the position of others, they too often put *themselves*, with their own particular experiences and privileges, in the positions they see the others." Iris Marion Young, *Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought*, in *JUDGMENT, IMAGINATION, AND POLITICS: THEMES FROM KANT AND ARENDT* 205, 214 (Ronald Beiner and Jennifer Nedelsky eds., 2001).

158. Thomas Nagel, *What is it Like to Be a Bat?*, 83 *PHIL. REV.* 435, 439 (1974). Nagel's purpose in raising this problem was to explore the philosophical problem of whether and how one might objectively describe subjective experience—a project which is beyond the scope of the present inquiry.

159. *Id.*

160. *Id.*

proposes that the “imagination” of bat experience is not so different from the admittedly partial understandings we are able to achieve with respect to other persons: “when one moves to species very different from oneself, a lesser degree of partial understanding may still be available.”<sup>161</sup>

The potential that Nagel attributes to this sort of exercise of “imagination” is echoed by others whose projects have centered more directly on the problem of justice for animals. Martha Nussbaum argues that “[g]ood imaginative writing” has been a powerful force in advancing the interests of animals. To this end, she notes J. M. Coetzee’s fictional advocate Elizabeth Costello’s assertion that “[T]he heart is the seat of a faculty, *sympathy*, that allows us to share at times the being of another.”<sup>162</sup> For her part, Costello focuses on the ways that fictional writing might advance this project respecting animals.<sup>163</sup> Alice Walker’s *Am I Blue* is just one particularly compelling example, describing a horse’s expressions of pain and loneliness, and lamenting that people “have forgotten, and daily forget, all that animals try to tell us” of their experiences.<sup>164</sup> Nussbaum casts the category of imaginative writing more broadly, including evocative non-fiction. She notes, for example, that Peter Singer himself has produced “some of the most powerful invitations to imagine animal suffering ever written,” despite the fact that his theoretical project seems to “militate against reliance on imagination.”<sup>165</sup> One might expand the field of imaginative writing even further, embracing a recent wave of popular and scientific scholarship that has inquired into the emotional and mental lives of animals.<sup>166</sup>

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161. *Id.* at 442 n.8.

162. NUSSBAUM, *supra* note 10, at 355, 448 n.34 (quoting J.M. COETZEE, *THE LIVES OF ANIMALS* 45 (1999)).

163. COETZEE, *supra* note 162, at 49–58.

164. Alice Walker, *Am I Blue*, in *LIVING BY THE WORD* 3, 7 (1988) (describing the obvious distress of a horse separated from his only horse companion: “He galloped furiously, as if he were being ridden, around and around his five beautiful acres. He whinnied until he couldn’t. . . . I almost laughed (I felt too sad to cry) to think there are people who do not know that animals suffer.”).

165. NUSSBAUM, *supra* note 10, at 354.

166. See, e.g., JONATHAN P. BALCOMBE, *PLEASURABLE KINGDOM: ANIMALS AND THE NATURE OF FEELING GOOD* (2006); MARC BEKOFF, *MINDING ANIMALS: AWARENESS, EMOTIONS, AND HEART* (2002); FRANS DE WAAL, *ARE WE SMART ENOUGH TO KNOW HOW SMART ANIMALS ARE?* (2016); DONALD R. GRIFFIN, *THE QUESTION OF ANIMAL AWARENESS: EVOLUTIONARY CONTINUITY OF MENTAL EXPERIENCE* (rev. ed. 1981). On the role of expert knowledge in human understanding of animal lives, see Donaldson & Kymlicka, *supra* note 151 at 193.

Even between humans, such exercises of imagination are necessarily haunted by risks of error and bias.<sup>167</sup> In the case of animals, there is a troubling track record of advocacy efforts wherein dominant cultural groups assert the interests of animals in ways that target or persecute racialized or vulnerable human groups.<sup>168</sup> Efforts to imagine the lives of others can collapse under the weight of self-interest, projection, and other distortions. The risks are especially high when there are significant power differentials involved, or when there are limits on our ability to hear direct testimony from those whose experiences we seek to understand.<sup>169</sup> Nussbaum acknowledges this “real risk of getting things wrong” when imagining animal lives, but accepts this as just one iteration of a risk that pervades “[a]ll of our ethical life.”<sup>170</sup> This is not to diminish the magnitude of these risks, but rather to suggest that they are an inevitable part of the imaginative work necessary to ethical encounters with others.<sup>171</sup> We need a theory of animal law that is alive to the force and dangers of efforts to imagine experiences across profound differences, and to communicate those experiences through art and affective appeals.

#### 4. The AWA History of Affect and Particularity in Legal Change

The history of the birth and development of the AWA testifies to the need for a theory of animal law that embraces the centrality of affective reasoning, imaginative works, and attention to particular

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167. See, e.g., Martha Minow, *Guardianship of Phillip Becker*, 74 TEX. L. REV. 1257, 1258, 1260 (1996) (commending the frankness, sensitivity and creativity of one judge’s efforts to imagine the experiences of a “mentally disabled teenager” through an imagined “platonic dialogue”, but acknowledging these efforts to be a “disturbing reminder that law is a thin veneer on a justice system run by human beings”).

168. Cf. CLAIRE JEAN KIM, *DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE* (2015) (discussing responses to racialized animal use in the contexts of live animal markets, dogfighting, and whaling); Eisen, *supra* note 155, at 8-10 (describing the relationship between minority persecution and efforts to protect animals through constitutional law).

169. See, e.g., Young, *supra* note 157.

170. NUSSBAUM, *supra* note 10, at 354. A more fulsome treatment of Nussbaum’s capabilities approach to animal justice is beyond the scope of this Article. I will remark, though, that the list of animal “capabilities” which Nussbaum offers as relevant to defining justice for animal (life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; relations with other species; play; and control over one’s environment) serves as another example of an approach that embraces a range of values and interests that are not adequately expressed through traditional rights and welfarist approaches. *Id.* at 392–401.

171. For a foundational philosophical treatment of the ethical necessity of encounters with the “other,” see EMMANUEL LEVINAS, *TOTALITY AND INFINITY* (Alphonso Lingis trans., Duquesne University Press 2011) (1961).

stories—even if the regime itself does not seem to prioritize these values. The initial enactment of federal protections of animal research subjects, and the most significant subsequent legislative reforms, were each propelled forward by dramatic imaginative renderings of the lived experiences of particular animals. These experiences testify to the significance of public access to the stories of animal lives under law’s evolving ethic in a way that rights and welfare analyses cannot fully capture.

Amid growing concern that the burgeoning animal research community was relying on disreputable dog dealers to feed their growing need for research subjects, the AWA’s predecessor legislation (the Laboratory Animal Welfare Act, LAWA) was enacted in 1966.<sup>172</sup> The LAWA’s enactment is widely attributed to broad public outcry over the theft of a pet Dalmatian named Pepper, who was sold into medical research and ultimately died in an experimental surgery before his distraught human family could track him down. Following decades of “stalemate” between animal advocates and biomedical researchers, a legislative proposal known as “Pepper’s Law” captured public attention and political capital.<sup>173</sup> Animal advocates seized on Pepper’s case, in part because they “knew Pepper’s story would strike a chord,” in light of a recent increase in family pet ownership and the influence of two contemporary popular works of imaginative fiction: Disney’s *101 Dalmatians*, released in 1961, and *Lady and the Tramp*, reissued in 1962.<sup>174</sup>

A pair of emotionally evocative press reports are frequently credited with tipping the scales in favor of LAWA’s enactment. In quick succession, *Life Magazine* and *Sports Illustrated*, two of the most widely read publications in the country, released images and accounts of laboratory animal captivity that shocked the American public and their representatives into action. The *Sports Illustrated* article led off with Pepper’s story. It did not lean on facts or evidence of dog intelligence or sentience but instead painted a vivid and plausible imaginative account of Pepper’s subjective experience: “Like most family dogs, she had too much faith in people. She wagged her tail at strangers, and she liked to ride in automobiles.

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172. The Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966).

173. Daniel Engber, *Pepper Goes to Washington*, SLATE (June 3, 2009, 7:22 AM), [http://www.slate.com/articles/health\\_and\\_science/pepper/2009/06/pepper\\_goes\\_to\\_washington.html](http://www.slate.com/articles/health_and_science/pepper/2009/06/pepper_goes_to_washington.html); see also Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, U.S. DEP’T AGRIC., <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> [<https://web.archive.org/web/20180201041120/https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction>] (last visited Feb. 1, 2018).

174. Engber, *supra* note 173; see also Lindsay Schafer Hurt, *Fuzzy Toys and Fuzzy Feelings: How the “Disney” Culture Provides the Necessary Psychological Link to Improving Animal Welfare*, 10 J. ANIMAL & NAT. RESOURCE L. 253 (2014).

Probably in the early hours . . . a dog thief simply stopped his car on the road . . . opened the door, invited Pepper to hop in, and then drove away with her.”<sup>175</sup> The “chain of dog dealers” into whose hands Pepper was likely traded was described as “not the kind a dog likes to be connected with,” citing convictions for “cruelty” and “unsanitary conditions.”<sup>176</sup> Although the piece included some statistics and factual information about the trade in research animals, its clear focus was on the emotional experiences of Pepper and her family, along with other families who lost their pets in similar circumstances. The author was unapologetic about this appeal to emotion: “the domestic dog is part of the human heart and the human home and has been since lost time, for reasons no one can or need explain.”<sup>177</sup>

Within a few months, *Life Magazine* published a story entitled “Concentration Camps for Dogs.”<sup>178</sup> The article began with nearly five pages of photographs, with spare text captions, depicting conditions in which “unscrupulous dog ‘dealers’” house dogs before they “dispose of their packs at auction where the going rate is 30¢ a pound. Puppies, often drenched in their own vomit, sell for 10¢ apiece.”<sup>179</sup> The two-paragraph introduction preceding the photo essay related the story of one individual dog named Lucky who was stolen and later found, “a pathetic, emaciated horror, cowering, hopeless and up for auction.”<sup>180</sup> Following a series of photographs of starving and dead dogs in squalid conditions, the article went on to detail a law enforcement raid of the facility depicted. Again, an appeal to emotion was at the fore:

Most of the state policemen who took part in the raid were hardened to almost anything from years of experience, but they spoke among themselves in terms of personal outrage, especially those who had pets of their own at home. The

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175. Coles Phinizy, *The Lost Pets that Stray to the Labs*, SPORTS ILLUSTRATED (Nov. 29, 1965), <http://www.si.com/vault/1965/11/29/612645/the-lost-pets-that-stray-to-the-labs>.

176. *Id.*

177. *Id.*

178. Stan Wayman, *Concentration Camps for Dogs*, LIFE, Feb. 4, 1966, at 22. Comparisons between Nazi holocaust and the contemporary treatment of farmed and laboratory animals have been controversial. See, e.g., ROBERTA KALECHOFKY, ANIMAL SUFFERING AND THE HOLOCAUST: THE PROBLEM WITH COMPARISON 34 (2003) (agreeing that there are “terrible cogent connections, dark connecting threads, between animal suffering and the Holocaust,” but arguing that “comparison between the two depletes both of meaning,” with the effect that “each victim, human or animal, Jew or non-Jew, becomes a generalized metaphor for any other victim”).

179. Wayman, *supra* note 178, at 22–23.

180. Wayman, *supra* note 178.

veterinarian who came along to identify sick dogs was infuriated by what he saw: a scrawny beagle clawing and chewing at one of the piles of frozen entrails that lay everywhere in [the] yard. Another dog licking desperately at a dish of water that was frozen solid. . . . [A] large hound frozen to death.<sup>181</sup>

The article concluded with a one-page photo spread of “Three that Made It Safely Back Home to their Owners,” depicting dogs who had been stolen for research but who were ultimately recovered by their families. The piece concluded with an image of an Irish Setter named Reds, standing upright with his front paws resting on the shoulders of a smiling little girl. The caption explained that when Reds was recovered from a research hospital by her family, “the dog went into a spasm of joy. So did six-year old Kelly Ann.”<sup>182</sup>

The reasons why these stories so moved those with the power to make law are not simple. I have emphasized the fact that the animals in these stories are named and treated as having meaningful subjective experiences and relationships. But there is another story to be told here about the ways these media accounts successfully positioned these animal lives as part of a hegemonic vision of the American family, whose value and social status is defined by race, class, ability, and heteronormativity. The reader is not only invited to experience life through the eyes of stolen dogs, but also to look at those dogs through the eyes of Pepper’s human family, Red’s companion “six-year old Kelly Ann” and the “hardened” state “policemen” tasked with protecting their way of life.<sup>183</sup> Every person and family appearing in the *Life Magazine* photo essay is white and apparently able-bodied, as are Pepper’s family and the heterosexual couples and families who populate the advertisements that ran alongside the *Sports Illustrated* article.<sup>184</sup> The fact that these influential articles were steeped in dominant images of white family life resonates with longstanding critiques that the political strength of emotional appeals is profoundly connected to the race, sex, and other social status of those whose emotions are invoked.<sup>185</sup>

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181. *Id.* at 27.

182. *Id.* at 28–29.

183. *Id.* at 27–29.

184. Phinizy, *supra* note 175; Wayman, *supra* note 178. The *Sports Illustrated* article may be viewed in its original layout, with advertisements, at <https://www.si.com/vault/issue/43103/40/2>, and Pepper’s owners are pictured in Engber, *supra* note 173.

185. See e.g. Tyrone S. Palmer, “What Feels More Than Feeling?” *Theorizing the Unthinkability of Black Affect*, 3 CRITICAL ETHNIC STUDIES 31, 33 (2017) (arguing that despite increasing public awareness of violence against Black people, “Black reactions to that gratuitous violence are consistently characterized as inappropriate, exorbitant, and themselves gratuitous,” to the

The LAWA, spurred by reactions to these media accounts, moreover, reflected the magazine articles' focus on the theft of family pets and the sordid conditions of confinement in dog dealing operations. The only animals covered by the legislation were primates and animals that are commonly kept as family pets (i.e. dogs, cats, guinea pigs, rabbits, and hamsters).<sup>186</sup> The regulations covered dealers and research facilities only up until the commencement of experimentation, a limitation commonly described as ending the regime's reach at "the laboratory door."<sup>187</sup> In keeping with Tribe's "evolving ethic," advocates viewed this as a modest but significant step in the right direction. As one key activist explained: "This was the breakthrough and end of stalemate . . . . We decided, well, we'll just have to go ahead and year after year, whenever we can, amend it and strengthen it, amend it and strengthen it."<sup>188</sup>

Although the AWA has been amended several times since, the most dramatic package of amendments came in 1985, again following an intense popular reaction to images and reports respecting the lived experiences of particular animals. In the early 1980s, People for the Ethical Treatment of Animals (PETA) co-founder Alex Pacheco went undercover as a volunteer laboratory assistant to document the conditions and treatment of laboratory animals. In one of the earliest "major infiltrations" of an animal research laboratory, Pacheco collected photographs and video documenting conditions that would come to form the centerpiece of a public awareness campaign that included pressure on public officials to launch a criminal prosecution of the lead researcher, Dr. Edward Taub.<sup>189</sup> Pacheco's disclosures prompted congressional hearings on possible reform of the AWA, featuring Pacheco's own testimony about the lives of laboratory animals.<sup>190</sup>

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extent that "Black affect" is "unthinkable" in public life). The emotional and affective responses of women have also been marginalized and ignored, including in the context of women's overrepresentation in animal justice movements, pursuant to stereotypes of women as being "hysterical," "irrational" or soft-hearted. EMILY GAARDER, *WOMEN AND THE ANIMAL RIGHTS MOVEMENT* 8 (2011).

186. Adams & Larson, *supra* note 173.

187. See, e.g., *id.* (citing Dale Schwindaman, *1970 Amendments to the Animal Welfare Act*, in *ANIMAL WELFARE ACT: HISTORICAL PERSPECTIVES AND FUTURE DIRECTIONS SYMPOSIUM PROCEEDINGS* 31, 31–32 (Michael D. Kreger et al. eds., 1996)).

188. Engber, *supra* note 173 (quoting Ann Cottrell Free).

189. SIOBHAN O'SULLIVAN, *ANIMALS, EQUALITY AND DEMOCRACY* 84 (2011); Alex Pacheco with Anna Francione, *The Silver Spring Monkeys*, in *IN DEFENSE OF ANIMALS* 135 (Peter Singer, ed., 1985). For a critical analysis of the role of criminal prosecutions in the animal protection movement, see JUSTIN F. MARCEAU, *ANIMAL LAW AND CRIMINAL PUNISHMENT* (Forthcoming 2018).

190. LARRY CARBONE, *WHAT ANIMALS WANT* 90 (2004).

Soon thereafter, in 1984, the Animal Liberation Front infiltrated a University of Pennsylvania laboratory and stole footage of head trauma experiments, which were then edited by PETA into a twenty-minute film titled “Unnecessary Fuss.”<sup>191</sup> The film began with a silent, scrolling quotation from Dr. Tomas Gennarelli of the raided University of Pennsylvania clinic, refusing to comment on the laboratory studies “because it has potential to stir up all sorts of *unnecessary fuss* among those who are sensitive to those sorts of things.”<sup>192</sup> The video did not present arguments or evidence relating to the sentience or intelligence of the baboons who were the research subjects in the videotaped study, though the physical similarities between baboon and human bodies and facial expressions surely contributed to the impact of the footage. The focus was instead on the evident suffering of the baboons, juxtaposed against the researchers’ cavalier and mocking attitudes. The film depicted

“researchers strapping baboons into [a device designed to stimulate the head trauma of sudden impacts] and then operating it, laughing, smoking, acting disrespectful all the while, at one point commenting to each other that one of the baboons was awake prior to the head injury (despite protocol provisions for anesthesia for the procedure).”<sup>193</sup>

Another description of the tape explains:

Posing before the camera, young scientists held dazed baboons in silly ‘say cheese’ poses; dangled them by crippled limbs, laughed when they struggled. Propping up one brain-damaged animal, whose paws quivered uncontrollably, researchers turned the camera on him and began a voice over: ‘Friends! Romans! Countrymen! (laughter) Look, he wants to shake hands. Come on . . . He says, ‘You’re gonna rescue me from this aren’t you? Aren’t you?’<sup>194</sup>

The video was distributed to congressional offices and, within months, the AWA amendments of 1985 were signed into law.<sup>195</sup>

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191. UNNECESSARY FUSS (People for the Ethical Treatment of Animals, 1984), [www.youtube.com/watch?v=MbqYLOJBdI](http://www.youtube.com/watch?v=MbqYLOJBdI).

192. *Id.*

193. CARBONE, *supra* note 190, at 90 (citation omitted).

194. DEBORAH BLUM, THE MONKEY WARS 118 (1994).

195. CARBONE, *supra* note 190, at 90–91. The video also sparked protests of the lab. Ultimately the baboon study was defunded, and the university was fined \$4,000 following proceedings that relied upon the stolen footage. BLUM, *supra* note 194, at 118.

The 1985 amendments to the AWA transformed the regulatory regime. Among the most significant changes, the Committee review system was established, providing for some minimal system of ongoing institutional review of proposed animal experiments and oversight of the conditions in which animals are held.<sup>196</sup> Despite the challenges of limited transparency and lack of ethical merit review, as discussed above, the spare procedural requirements of AWA Committee review have had a material impact on research practices. The shocking conditions and experimental procedures which the *New York Times* recently exposed at a Nebraska agricultural animal research center have often been attributed to the exemption of agricultural animals from the AWA scheme and the consequent lack of mandatory Committee review consistent with the 1985 AWA amendments.<sup>197</sup> Other changes brought in through the 1985 amendments included requirements respecting the psychological needs of primates and the exercise needs of dogs.<sup>198</sup>

The 1985 AWA amendment history, like the 1966 enactment of the predecessor LAWA, is a testament to the central role that imaginative works and affective appeals play in animal law reform. The rights and welfare paradigms have played crucial roles within the sphere of moral theory, and even among animal advocates themselves, but neither approach engages as a matter of legal theory with the ways in which diverse forms of argumentation operate to effect legal and social change. To adequately address the role that affective and imaginative works played in spurring forward the AWA legal regime, we must embrace a very different set of questions, and a very different mode of answer, from those suggested by the classical frames of rights and welfarism.

Acknowledging the practical centrality of efforts to depict and describe the experience of particular animals in this legal history requires us to interrogate what it means to take animals themselves as “a kind of interlocutor” in legal debate and reform.<sup>199</sup> The history of the AWA regime was shaped in important ways by the communications and relationships of stolen dogs including Pepper, Lucky, and Reds; the Silver Spring Monkeys (Paul, Billy, Sarah,

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196. Adams & Larson, *supra* note 173.

197. See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP’T AGRIC., AUDIT REPORT NO. 02007-0001-31, U.S. MEAT ANIMAL RESEARCH CENTER REVIEW (2016), <https://www.usda.gov/oig/webdocs/02007-0001-31.pdf>.

198. Adams & Larson, *supra* note 173. On the regulatory decision to implement these requirements through less demanding “performance standards,” rather than more exacting “engineering standards,” and subsequent litigation, see FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 240.

199. Bailey, *supra* note 122, at 14.

Chester, and thirteen others);<sup>200</sup> and the baboons depicted in *Unnecessary Fuss* (B-10 and others, also known only by their numbered tags);<sup>201</sup> along with the efforts by human actors to listen, document, imagine, and amplify their experiences. As Bailey suggests, taking seriously the role that an animal can play as an “interlocutor” in public deliberation demands “not so much a deduction of the ‘correct’ moral principles, but an opening of oneself to what is there . . . that we be present to that being on its own terms instead of through the distancing lens of a very narrowly conceived reason.”<sup>202</sup>

This sort of wide-ranging, social-contextual, imaginative, even indeterminate, approach is not well accommodated by either the rights or welfare model. Nor do the rights or welfare model direct us to consider the very real questions and challenges that arise from such an approach—the dangers of projection, the challenges of listening across distance, the ways the powerful are at such risk of “getting things wrong” when imagining the lives of the powerless, and the relationship between animal advocacy and other justice struggles.<sup>203</sup> Rights and welfare models can explore the ways in which it is “irrational” to prize the experiences of humans, or pet dogs or primates, over other species that are similarly “sentient” or “subject-of-a-life,” but they do not seek to develop a nuanced account of how or why people actually come to care across vast differences in embodiment and social position.

While the rights and welfare models may tell us important things about the shortcoming in the current AWA regime, they don’t offer us a language for explaining why the regime’s failure to provide a forum for public discussion of particular cases stands as an obstacle to advancing animal interests. In both touchstone moments of the AWA’s development (the 1966 LAWA enactment, and the 1985 AWA amendments), the emotionally evocative and particular stories that advocates told were only possible because of subterfuge, investigative reporting, and outright theft. It is critical to develop an

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200. BLUM, *supra* note 194, at 106.

201. In the footage, the researchers are heard referring to one of the baboons as “B-10”. As Ingrid Newkirk explains:

While one baboon was being injured on the operating table by the hydraulic device, the camera panned to a brain-damaged, drooling monkey strapped into a high chair in a corner of the room, with the words “Cheerleading in the corner, we have B-10. B-10 wishes his counterpart well. As you can see, B-10 is still alive. B-10 is hoping for a good result,” followed by laughter.

INGRID NEWKIRK, *FREE THE ANIMALS* 196 (2000).

202. Bailey, *supra* note 122, at 14.

203. NUSSBAUM, *supra* note 10, at 354; *see supra* note 168–71 and accompanying text.

approach to animal law that holds at its core the need to facilitate and legitimize documentation, publication, imagination, and debate arising from particular cases and particular animal lives. This imperative takes on a new urgency as the current administration works to claw back the public's already-limited access to crucial source materials for such projects.<sup>204</sup>

As I hope to have shown here, Regan and Singer's important contributions should not be understood as the only, or even the determinative, frameworks for understanding the ways in which law embodies and advances our relationships with other animals. As Slicer explains in her challenge to the centrality of rights and welfare in animal justice discourse, "if these are our only options, then we must sometimes disregard what our imaginations or hearts or the simple facts are telling us, in order to articulate situations, some of them very uncooperative, in a way that fits these principles and their corresponding conceptual frameworks."<sup>205</sup> Appeals to such values as emotion, diversity, imagination, and wonder, and debate grounded in the broader political context of competing justice priorities, have the potential to move us along the evolving ethic's multidimensional spiral as we pursue a more expansive and expanding social dialogue regarding our relationships with other animals.

### C. *Changing Focus: New Questions, New Conversations*

The preceding discussion focused on the ways in which an exclusive focus on rights and welfare leaves us unable to account for the role that affective, particularized, and imaginative storytelling play in animal law reform. But this limitation might be understood as just one piece of a broader difficulty of the rights and welfare paradigms: that neither takes up the dialogic and relational nature of social values as central to their theories of just human-animal relationships. The ecofeminist and care ethicists' critiques of "abstraction" in rights and welfare theories<sup>206</sup> hint at the difficulties of ignoring the social and contextual nature of justice problems. Critical theorists operating in human justice traditions have further developed this insight. In particular, scholars identified with "relational theory" have questioned approaches to law that cast rights as ahistoric, instead seeking to reveal the extent to which even our

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204. See *supra* notes 49–56 and accompanying text.

205. Slicer, *supra* note 125, at 113; see also Donovan & Adams, *supra* note 121, at 6.

206. See *supra* notes 125–131 and accompanying text.

most prized collective values are subject to ongoing social contestation and refinement in the crucibles of dialogue and lived experience.

The evolving ethic proposed here is deeply relational in this sense. The image of a “multidimensional spiral” embraces the evolution and contestation of social consensus as a central dynamic of law and ethics, emphasizing the ways in which shifts in values and legal rules build upon each other, often in ways that are not entirely controllable or predictable in advance.<sup>207</sup> Relational theory helps us to build on Tribe’s insights into the social nature of human law and policy by illuminating the broader importance of social relationships in defining the terms of political debate, the substance of legal change, and the consequences of legal rules. This section will argue that animal rights and welfare frameworks each tend to adopt traditional (or what I will call “pre-critical”) postures toward law and rights, neglecting the relational nature of human-animal justice problems. In the preceding section, we saw that the history of the AWA testifies to the need for attention to affect and particularized storytelling in accounts of animal law. Here I will elaborate a broader argument that the animal research context demands an account of law that embraces the social complexities of human-animal legal relationships. Again, we will see that the evolving ethic offers a more fulsome account of the human beings, animals, and relationships at stake in animal law than either the rights or welfarist accounts.

### 1. From Boundary to Relationship

Regan’s analogy between a right and a “No Trespassing” sign resonates with a tendency in animal rights literature to invoke the language of boundary and prohibition in explaining the preferred vision of animal legal protection.<sup>208</sup> The persistence of this image of rights as impermeable, ahistoric boundaries is surprising given how much compelling work has been done in human justice contexts to expose law and rights as contingent, evolving, and historicized. American legal realism, critical legal studies, critical race theory, feminist jurisprudence and relational theory have each attacked pre-critical visions of rights as determinate and deducible through

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207. See *supra* note 116 and accompanying text.

208. See, e.g., GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 194 (1996) (emphasizing prohibition); REGAN, ANIMAL RIGHTS, HUMAN WRONGS, *supra* note 94 at 97–98 (using trespassing metaphor).

logic. These traditions have launched forceful challenges against pre-critical visions of “law as ‘impersonal’ rules and ‘neutral’ principles, presumed to be inanimate, unemotional, unbiased, unmanipulated and higher than ourselves,” and disrupted images of “[l]aws like masks, frozen against the vicissitudes of life; rights as solid as rocks; principles like baseballs waiting on dry land for us to crawl up out of the mud and claim them.”<sup>209</sup>

Relational theorist Jennifer Nedelsky has focused specifically on challenging the pre-critical (in her terms “liberal”) image of rights as boundaries that separate self-sufficient individuals. Nedelsky explains that the “perverse quality” of boundary metaphors that cast political projects in terms of protecting separate selves from intrusions by the collective “is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated.”<sup>210</sup> On the relational account, this grossly misdescribes what real human persons need in order to survive and thrive: social relationships that nourish their potential and give shape to the values and desires that they pursue through relations with others.<sup>211</sup> Nedelsky and other critical theorists point out that that human persons are in fact necessarily essentially constituted by social relationships, from the private and interpersonal to the public and systemic.<sup>212</sup> Rights

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209. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 11–12 (1991).

210. JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 97 (2011). The use of the gendered “man” in this phrasing is not accidental; see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 153 (1990).

211. ROBERT LECKEY, *CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY* 106 (2008) (“[R]elational theorists understand that subjects are socially constituted, embedded in their contexts, their selfhood and agency formed by thick relationships with others.”); Anne Donchin, *Autonomy and Interdependence: Quandaries in Genetic Decision-Making in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY AND THE SOCIAL SELF*, 236, 239–40 (Mackenzie & Stoljar, eds, 2000) [Hereinafter *RELATIONAL AUTONOMY*] (“Interconnections continue to shape and define us throughout our lifetime, so that patterns through which we construct (and reconstruct) our self-identity and infuse it with meanings are bound up with meanings given in the social world external to us.”); Catriona Mackenzie & Natalie Stoljar, *Autonomy Refigured in RELATIONAL AUTONOMY*, *supra* note 211 at 4 (describing relational approaches as being based on the “shared conviction . . . that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity”). Of course, relational theory is not the only theoretical approach that emphasizes relationships. See, e.g., Gordon Christie, *Law, Theory and Aboriginal Peoples*, 2 *INDIGENOUS L.J.* 67, 110–111 (2003) (describing relationality in indigenous legal theory).

212. NEDELSKY, *LAW’S RELATIONS*, *supra* note 210, at 19; see also LECKEY, *supra* note 211, at 7.

work not to separate us from each other, but always to structure our relationships in ways that foster or frustrate a range of values.<sup>213</sup>

Nedelsky is particularly concerned that the pre-critical image of rights as hard, determinate boundaries derived from the needs of abstract, isolated individuals, works to disguise the ongoing social choices that in fact underlie the creation and enforcement of legal rights. As Patricia Williams explains, “much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and unexamined claims.”<sup>214</sup> Thus Nedelsky has questioned the pervasive “notion that there are certain basic rights that no government, no matter how democratic, should be able to violate.”<sup>215</sup> Nedelsky’s concern with this conception of legal rights is its potential to obscure the realities that “[d]ebates over the meaning and implementation of rights are inherent in rights themselves,”<sup>216</sup> and that “[r]ights must be defined before they can be protected.”<sup>217</sup> Importantly, this definitional project is not (only) a question of moral philosophy, but is an ongoing and iterative process through which actual, relational selves arrive at “collective decisions about the implementation of core values.”<sup>218</sup>

Critical analyses of law are united by their acknowledgment that every social justice struggle inscribed in rights and law has demonstrated this quality of shifting and disputed substantive justice goals arrived at through deliberation and social contest. The right to equal protection under the law has evolved with changing social and legal norms,<sup>219</sup> as have such apparently boundary-like rights as freedom from cruel and unusual punishment,<sup>220</sup> right to liberty,<sup>221</sup>

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213. NEDELSKY, LAW’S RELATIONS, *supra* note 210 at 5 (“Both law and rights will then be understood in terms of the relations they structure—and how those relations can foster core values, such as autonomy.”).

214. WILLIAMS, *supra* note 209, at 11.

215. *Id.* at 238.

216. *Id.* at 239.

217. *Id.* at 233.

218. *Id.* at 233, 234 (arguing that “protection of rights is best understood as a dialogue of democratic accountability”); *see also* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 210, at 309 (describing “rights as tools in continuing, communal discourse”); CHRISTINE M. KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL THEORY 202–03 (1998) (emphasizing that “rights emerge in relationships in social contexts and create a forum for dialogue among community members”). Because rules express and shape relations of power and access, inclusion in democratic rulemaking is a central concern. *See generally* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 210; NEDELSKY, LAW’S RELATIONS, *supra* note 210.

219. *See, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

220. *See, e.g.*, COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL PUNISHMENT (2007).

221. *See, e.g.*, Lawrence O. Gostin, *Deciding Life and Death in the Courtroom*, 278 JAMA 1523 (1997).

and even property rights.<sup>222</sup> Legal definitions of prohibited assault, rape and murder have not been hard apolitical boundaries protecting people from naturally-defined wrongs; they have been fault lines around which legal and political advocates have fought for material changes in the relationships between groups and individuals.<sup>223</sup>

This critical understanding of the sources and functions of legal rights has not permeated the legal scholarship on animal rights. Metaphors of determinate boundaries and separation remain pervasive in this field, and rights are treated as hard and impervious to social balancing. Gary Francione, for example, prefers rules which take the form of a prohibition, rejecting out of hand any other form of rule, regardless of the extent to which it might advance the interests of animals. He explains, for example, that the AWA fails to create “true rights” of the kind he advocates for animals, since the regime expresses a “balancing” of human interests against animal interests, in which animals (as property) are bound to lose.<sup>224</sup> He goes on to explain that a complete ban of some “particular types” of experiment “might conceivably be thought to . . . embody a rights-type concept” of the sort he might endorse.<sup>225</sup> The most important feature of a legal rule, on this view, is its form as a prohibition. This account of what is valuable about rights elevates a focus on boundary at the expense of attention to the types of relationships and practices supported by a legal rule. The distinction Francione draws between rights and balancing may be sensible as a matter of formal typology of legal rules. A more fulsome account of law’s role in human-animal relationships, however, requires attention to the practical interaction of rules, practices, and lived experiences—and to the roles that shifting and contested social values play in defining every aspect of these dynamics.

In particular, Francione’s focus on formal prohibitions risks obscuring the extent to which all formal rights express some form of balance. Contrary to Francione’s suggestion,<sup>226</sup> even human rights

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222. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed., 2008).

223. See, e.g., CAROLINE LIGHT, *STAND YOUR GROUND: THE HISTORY OF AMERICA’S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* (2017); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. J.L. & GENDER 103 (1983).

224. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW*, *supra* note 17, at 92.

225. *Id.*

226. *Id.* at 92–93 (suggesting that it is possible that certain “prohibitions” may be “similar to what is provided by human rights” in a way that welfarist balancing is not).

are subject to balancing in one way or another—including in systems that do not formally embrace ‘proportionality’ as a principle of constitutional adjudication.<sup>227</sup> Moreover, the choice to create a hard prohibition on certain types of experiments could only emerge from a social balancing process of sorts—even if that balance were not written into the form of the law itself. The technical “form” of the rule as a prohibition does not tell us what we need to know about what kinds of rules foster or frustrate particular values and practices in a given context.

Consider, for example, the U.S. Fish and Wildlife Service (FWS) decision to list wild and captive chimpanzees as endangered species, with the effect that any invasive research on a chimpanzee now requires a special permit, to be granted only in cases where the FWS determines the research will benefit the wild chimpanzee population.<sup>228</sup> This rule is not a hard “right” in the form Francione would prefer but instead creates a constrained form of welfarist balancing that shifts the burden to researchers to justify their experiments on narrowly prescribed grounds.<sup>229</sup> Nonetheless, the rule is credited with effectively ending the practice of invasive research on chimpanzees in the United States.<sup>230</sup> Would a hard, acontextual prohibition of some smaller category of experiments be preferable, even if it permitted more actual experiments? A rights theorist in the model Francione develops would have to prefer the rule that looks like a “right” over the rule with the most potential to transform the lived experiences of animals and the shape of human-animal relationships more broadly.

A version of this (in my view perverse) outcome is evident in Francione’s public opposition to proposed legislation to improve

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227. Cf. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094 (2015).

228. Nicholas St. Fleur, *U.S. Will Call All Chimps ‘Endangered,’* *N.Y. TIMES* (June 12, 2015), <https://www.nytimes.com/2015/06/13/science/chimpanzees-endangered-fish-and-wildlife-service.html>.

229. In a remarkable exception, the regime as presently interpreted allows researchers to donate to a conservation organization in lieu of substantively justifying their research as beneficial to wild populations. Animal advocacy groups have argued that this violates governing legislation and regulations. *When the Endangered Species Act Doesn’t Actually Protect Endangered Species*, *PEOPLE ETHICAL TREATMENT ANIMALS* (May 8, 2015), <http://www.peta.org/blog/when-the-endangered-species-act-doesnt-actually-protect-endangered-species/>.

230. David Grimm, *New Rules May End U.S. Chimpanzee Research*, 349 *SCI.* 777 (2015). On some accounts, the decisive blow to chimpanzee research in the United States was in fact the National Institute of Health’s decision to cease all funding of chimpanzee research. See Jocelyn Kaiser, *NIH to End All Support for Chimpanzee Research*, *SCI.* (Nov. 18, 2015), <http://www.sciencemag.org/news/2015/11/nih-end-all-support-chimpanzee-research>. In either case (or if both changes operated in concert to produce this outcome), it was a change in background rules and relationships—not a rights-style prohibition—that produced this significant shift in practice.

conditions for farmed animals on the basis that such laws regulate and thus tacitly approve animal exploitation.<sup>231</sup> Francione does not reject incrementalism altogether, but his view of what constitutes acceptable incremental change is grounded in the form of legal rules, not their direct impact or consequences for animal lives: “The rights advocate . . . does not seek the incremental reduction of pain and suffering, but rather seeks the incremental eradication of the property status of animals.”<sup>232</sup> Francione rejects, for example, advocacy for laws requiring that thirsty animals receive water on their way to slaughter because “[i]f there is someday to be an end to this, that end cannot come simply by trying to reduce suffering, but can only come by eradicating the institutionalized exploitation of animals.”<sup>233</sup> A critical view of law and rights illuminates the extent

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231. See Gary L. Francione, *What to Do on Proposition 2?*, ANIMAL RTS. (Sept. 2, 2008), <http://www.abolitionistapproach.com/what-to-do-on-proposition-2/#.WJdlxbYrLBI> (arguing that the ballot initiative “will only reinforce speciesism and the notion that it is morally acceptable to consume nonhumans as long as we do so ‘humanely’”); see also FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 256–58. Francione does not directly make the argument for formal prohibition in this statement on farmed animal protection. Instead, he advocates non-violent vegan education as the cornerstone of the social change he sees as necessary to achieve rights. Francione, *What to Do on Proposition 2*, *supra*. I cast Francione’s position on Proposition 2 as an arguable “version” of his legal rights argument because I think it is fair to understand his focus on non-violent vegan education as springing from the assumption expressed in other works that regulation of use cannot produce true “rights”; and that unless and until such “rights” are possible, law has no useful role to play. For exploration and criticism of this strand of rights-based abolitionism, see Luis E. Chiesa, *Animal Rights Unraveled: Why Abolitionism Collapses into Welfarism and What It Means for Animal Ethics*, 28 GEO. ENVTL. L. REV. 557 (2016).

Not all rights advocates take this kind of relatively extreme position. The Executive Director of Steven Wise’s Nonhuman Rights Project (discussed immediately below), for example, celebrated the FSW listing of captive chimpanzees as “a step-by step improvement for these highly intelligent, self-aware animals.” Nat Michael Mountain, *Will U.S. List Captive Chimpanzees as Endangered?*, NONHUMAN RTS. PROJECT (June 12, 2013), <https://web.archive.org/web/20131001180852/http://www.nonhumanrightsproject.org/2013/06/12/will-u-s-list-captive-chimpanzees-as-endangered/> (quoting Natalie Prosin, Executive Director of the Nonhuman Rights Project). As discussed below, however, when rights advocates adopt this form of incremental stance, their approach is better described by the evolving ethic than by traditional animal rights frames. See *infra* note 251 and accompanying text.

232. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 208, at 221–22.

233. Francione also likens animal exploitation to human slavery in this passage, saying the following about advocacy for such laws:

But that is like saying that if I am obligated to give a dying human slave a drink of water, then I should seek rules that require slaves to be given water so as to treat them humanely. If I am absolutely opposed to slavery as an institution, however, it is difficult to understand how my seeking rules about water furthers my aim to eradicate the institution.

*Id.* at 222. Many animal advocates have exhibited a troubling insistence on analogizing African American slavery with contemporary animal exploitation, even in the face of consistent efforts by animal advocates of color to problematize this practice, and often without nuanced attention to the social and legal histories they are invoking. See, e.g., Harris, *Should People of*

to which the facts of exploitation are intertwined with legal status—that an animal with enforced access to water is in a different socio-legal position from a thirsty animal who is denied access, whatever the legal terminology used to describe the actors involved. When we accept the critical view of law as best understood with reference to the practices, values and relationships that legal rules permit and foster, the formal shape of a rule comes to seem less important than the practical impact of that rule.

Images of rights as absolute boundaries, moreover, do not accurately capture the complexity of decisions surrounding just human-animal relationships, even if we agree with rights theorists that animal experimentation is unjust in all cases. Consider, for example, the scholarship and advocacy efforts of animal rights theorist Steven Wise. In his scholarship, Wise has argued that animals who exhibit capacities for “realistic” or “practical” autonomy ought to be granted legal “liberty rights.”<sup>234</sup> He describes these rights in terms of “bodily integrity” and “bodily liberty.”<sup>235</sup> In Hohfeldian terms, Wise explains that the most essential forms of animal rights must take the legal form of “an ‘immunity’ [which] disables another person from interfering with you. . . . Such immunities as freedom from slavery and torture are the most basic kinds of legal rights, and so it’s these to which nonhuman animals, like human beings, are most strongly entitled.”<sup>236</sup>

Wise concedes that there are “subjective” dimensions to law that may affect judicial decision-making, but insists that these dimensions, which are “impervious to reason” are separate and separable from a distinct “objective component” of law.<sup>237</sup> (Recall the care ethicists’ interrogation of distinctions of this kind.<sup>238</sup>) Wise contends that “the objective component thoroughly permeates

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*Color Support Animal Rights?*, *supra* note 149. A full treatment of this complex issue is beyond the scope of this Article.

234. Steven M. Wise, *Animal Rights, One Step at a Time*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 19, 32 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Wise also occasionally uses the term “dignity rights” when referring to these “liberty rights.” Wise, *DRAWING THE LINE*, *supra* note 103, at 33.

235. Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity Rights in a Liberal Democracy*, 22 *VT. L. REV.* 793, 797 (1998).

236. Wise, *DRAWING THE LINE*, *supra* note 103, at 26.

237. Wise, *Hardly a Revolution*, *supra* note 235, at 797–98.

238. See *supra* notes 143–150 and accompanying text. Arguably, Wise’s belief that an “objective” component of law stands separately and above its “subjective” component has contributed to his litigation losses, since his briefs and arguments rarely attend to the political and prudential (in Wise’s terms, “subjective”) factors that are inseparable from judicial decision-making. My thanks to Delcianna Winders for raising this point. See also Richard A. Posner, *Animal Rights* (reviewing Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000)), 110 *YALE L.J.* 527, 534 (2000) (“What Wise’s book really does, rather than supplying

Western law at every level and creates the near absolute barriers to the domination of one person by another that is the outstanding characteristic of western liberal democratic justice.”<sup>239</sup> As with Francione’s account of rights as impervious to balancing, Wise’s account seems to misstate the achievements of rights within human communities.<sup>240</sup> In order to accept Wise’s account that legal rights have created “absolute barriers to the domination of one person by another” we must look away from the facts and conditions of mass incarceration, immigration detention, police violence, and private violence indirectly supported by the state.<sup>241</sup> Each of these represents instances where the scope and content of liberty rights remain fiercely contested, and where “domination” is inarguably present despite, or ostensibly in service of, “liberty rights.”

Moreover, Wise’s focus on the preeminent importance of legal immunities echoes the liberal vision of atomistic selves—in this case animal selves—whose interests are served best by being let alone. In December of 2013, before the above-mentioned FSW listing of captive chimpanzees as endangered, Wise’s Nonhuman Rights Project pursued a claim in *habeas corpus* to enforce the bodily liberty rights of four chimpanzees, including two research subjects named Hercules and Leo. But the very order sought in that case betrayed the fiction that “immunity” or being “let alone” accurately describe what Hercules and Leo needed:

While there are grave concerns about the health and well-being of Hercules and Leo, this Petition does not seek their immediate production to the Court or their placement in a temporary home as there are no adequate facilities in close

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reasons for change, is supply the rationalizations that courts persuaded on other grounds to change the law might use to conceal the novelty of their action. . . . But judges must have reasons for wanting to make the change, and this is where a lawyer’s brief, of which Wise’s book is an extension, tends to fall down”).

239. Wise, *Hardly a Revolution*, *supra* note 235, at 798.

240. Cf. Harris, *Should People of Color Support Animal Rights?*, *supra* note 149, at 25 (noting the tendency of animal rights activists to draw analogies with slavery and criticizing the “implicit assumption that the African American struggle for rights is over, and that it was successful”).

241. Wise, *Hardly a Revolution*, *supra* note 235, at 798. For elaborations of mass incarceration and violence against women as failures of the promise of ‘rights’ against state and private violence, see respectively MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11–12, 15 (2010) (arguing that despite civil rights victories and the now-prevailing “colorblind public consensus”, mass incarceration has emerged as “a new caste system” that has been “largely immunized from legal challenge”) and NEDELSKY, *LAW’S RELATIONS*, *supra* note 210, at 200–30 (describing pervasive violence against women and children as an instance of “the liberal state’s failure on its own terms”).

proximity to the Court. However, this Petition seeks a determination forthwith that [their] detention is unlawful and demands their immediate release to a primate sanctuary . . . for the purpose of providing them with the specialized care necessary to satisfy their complex social and physical needs for the duration of their life.<sup>242</sup>

This concession that the order sought is in fact confinement and specialized care in a sanctuary rather than a laboratory complicates the images of “immunity” and “liberty” that otherwise pervade the filings.<sup>243</sup> Because Wise is careful not to cast his argument in terms of an “animal welfare” paradigm,<sup>244</sup> his briefs contain almost no reference to the actual conditions in which Hercules and Leo live in the laboratory or how they would be better off in a sanctuary. Instead, the “Statement of Facts” set out in his Memorandum of Law focuses exclusively on evidence of the social, emotional, and intellectual capacities of chimpanzees.<sup>245</sup> Rights, on this account, flow from the nature of the animal itself. Questions about material practices of animal use, and whether and how they might be transformed, form no part of the argument.

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242. Petition for Writ of Habeas Corpus at 2, Nonhuman Rights Project, Inc., *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (Sup. Ct. 2015) (No. 152736/15), [http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Suffolk-Verified-Petition-of-E.Stein-and-S.Wise\\_.pdf](http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Suffolk-Verified-Petition-of-E.Stein-and-S.Wise_.pdf).

243. Of course, there are *habeas corpus* cases involving prisoners and others, where the relief sought is transfer from one form of confinement to another. These are a “stretch” made to accommodate human cases where traditional “release” from confinement is not feasible. It is difficult to imagine an animal experimentation case where a traditional habeas remedies of “release” would be considered appropriate.

244. This distinction is particularly evident in the oral arguments, as depicted in the documentary film *UNLOCKING THE CAGE* (Pennebaker Hegedus Films and HBO Documentary Films 2016) (showing the oral arguments made in Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (App. Div. 2015)). See also one of Wise’s more recent filings, claiming,

The NhRP . . . does not challenge the conditions of Kiko’s confinement nor does it seek his transfer from one facility to another. Rather, the NhRP demands his immediate release to an appropriate primate sanctuary . . . where he will be able to exercise his autonomy and right to bodily integrity to the fullest extent possible in North America.

Petition for Writ of Habeas Corpus at 9, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392 (Sup. Ct. 2017) (No. 150149/16), <http://www.nonhumanrightsproject.org/wp-content/uploads/2016/01/00.1-Verified-Petition-Oral-Argument-Requested.pdf>.

245. Memorandum of Law in Support of Order to Show Cause at 4–38, Nonhuman Rights Project, Inc., *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (Sup. Ct. 2015) (No. 152736/15), <https://www.nonhumanrights.org/content/uploads/Suffolk-Petitioners-MOL-in-Support-of-OTSC.pdf>.

Who is the person imagined by animal rights theory? And who is the animal? What, if anything, binds or separates them? The human person of animal rights theory is a thing to be restrained—to be stopped, held back, to refrain from acting. And the animal of animal rights theory has much in common with the atomistic individual of pre-critical liberal theory. What the animal needs is to be let alone—to be protected by the hard lines that keep humans away from them and from each other. Wise is clear that his project makes philosophical compromises to strengthen its legal force,<sup>246</sup> but even as a matter of legal practice, it is not clear that this vision of leaving animals alone adequately describes his own advocacy projects—or what is possible and desirable for animals currently used in experimentation.

Both the facts relied upon to establish the requisite personhood for a *habeas corpus* claim and the relief sought underline the reality that rethinking our relationships with animals that are currently held in laboratories requires something quite different from an isolated “immunity” right—even if we oppose animal experimentation in all cases. This is true for animals like Hercules and Leo who would be individually unable to survive in their species’ natural habitats and takes on still deeper dimensions with respect to other common laboratory animals like beagles, who have coevolved with human beings over thousands of years in complex dynamics of care and exploitation. On some level, we know that “hands off” does not actually describe what our human legal and political communities owe to these animals. Instead of a simple story of repairing breached immunities, any meaningful transformation of our relationships with animals that are currently held in laboratories will require attention to challenging questions about the harms of our current relationships, the alternative relationships that might be fostered by different legal rules, and an embrace of “the steady burden of learning to live together and apart.”<sup>247</sup>

Moreover, just as the need to be “let alone” does not adequately capture what animals now held in laboratories need from people, restraint and inaction does not fully describe what transformation in human-animal relations will require of human communities. A vision of animal rights grounded in human inaction neglects the crucial and inevitable role that human political dialogue plays in defining the lives of captive animals, including those now held in laboratories. Rights are not ahistoric, obvious boundaries that demand only our obedience. Legal theory must attend to human-

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246. WISE, DRAWING THE LINE, *supra* note 103, at 34.

247. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 210, at 311.

animal relations as a site of democratic dialogue and ongoing deliberation. There is work to be done to make the lives and experiences of animals legible to the human societies and legal systems that affect them so profoundly. This work will involve human beings doing the difficult and necessary work of uncovering and interpreting animal realities, and translating them into law and politics—work which demands exercises of listening, imagination and storytelling on our part. This is not a project of pure restraint but a project of creativity, dialogue and democratic deliberation over time.

## 2. From Balancing to Dialogue

Who is the person imagined by animal welfare theory? And who is the animal? What, if anything binds or separates them? In its purest utilitarian form, there are “correct” and “incorrect” answers to questions about the justifiability of experiments, with the only limits being imperfect information and bias. Both the human beings and the animals of this most stripped-down version of utilitarian welfarism are carriers of objectively discernible and quantifiable interests. Humans and animals are utility-bearing units—capable of positive or negative physical and emotional states—whose interests may be quantified and weighed against each other. Relationships are significant only to the extent that they impact utility metrics. It is left to human persons to discern the weights and draw the balance. And those human decision-makers choose best when acting as well-informed but dispassionate calculators.

Most of the legal scholarship in the animal welfare tradition does not hew strictly to this spare articulation of utilitarian ethics. Animal welfare scholars advocating ethical merit review are highly conscious of the social realities that are likely to shape legal balancing processes and frequently emphasize the importance of Committee personnel and structure.<sup>248</sup> As noted above, some scholarship commonly associated with welfarist balancing in fact adopts a stance that might be better described as a “humane treatment” approach.<sup>249</sup> In David Favre’s view, for example, the justifiability of animal experimentation has “four basic elements,” only one of which relates to the balance between harm and research objectives;

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248. Brody, *supra* note 27, at 445–58; Dresser, *supra* note 27 at 771–73. As noted above, even Singer concedes that, in practice, bias or “speciesism” will interfere with the human capacity to arrive at correct answers in their balancing processes. *See supra* note 88 and accompanying text.

249. *See, e.g.,* FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 92, at 7.

the other three pertain to such “humane treatment” concerns as the ways in which experimental animals are sourced, the conditions in which animal subjects are kept prior to experimentation, and how animals are dealt with following experimentation.<sup>250</sup>

Welfarists are more likely than rights advocates to refer to social dialogue and incremental change as valid and necessary—though these concerns are referenced by rights theorists as well.<sup>251</sup> But when welfarists (and rights advocates) discuss incrementalism, bias, and social dialogue, they are engaging in forms of analysis that do not fit easily within either category of the rights/welfare dualism that is so often used to describe the available options for theorizing animal law. Instead, these kinds of arguments drift towards a crucial dynamic of animal law that is better described by the evolving ethic. In particular, these arguments turn our attention to the ways in which both rights and balances are contestable social choices. In doing so, they open the door to considering the roles that other kinds of arguments— affective, imaginative, and relational—always already play in defining how we relate to other animals, including through law.

### 3. From “Rights vs. Welfare” to a Dialogic Toolbox

The evolving ethic has the potential to help us to move past the increasingly stale debate over whether animal justice is best achieved through “rights” or “welfare.”<sup>252</sup> In addition to the particular limits of rights and welfarism observed above, the larger universe of argumentation within animal law theory—which often casts rights and welfare as competing poles on a single continuum of possible answers—has generated an abstract and unproductive conversation regarding the relative merits of “rights” and “welfare” as guiding principles for animal law.<sup>253</sup> The relational dimensions

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250. David S. Favre, *Some Thoughts on Animal Experimentation*, 2 ANIMAL L. 161, 163–64 (1996).

251. For a welfarist approach emphasizing social change and incrementalism, see Brody, *supra* note 27. For an animal rights theorist’s treatment of social change and incrementalism, see Wise on “subjective” components of law, discussed *supra* note 237 and accompanying text. But see Francione’s rights-style argument that incremental welfare reforms cannot advance the cause of animal rights, discussed *supra* note 231. In Francione’s view, incremental reforms consistent with the rights approach include education supporting the abolition of “institutionalized exploitation on a social and personal level,” and outright prohibitions (rather than regulations) respecting specific forms of animal use. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 208, at 192, 190–219.

252. See WALDAU, *supra* note 79, at 34; Sankoff, *supra* note 78 at 283–84.

253. See FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 259; SINGER, ANIMAL LIBERATION *supra* note 5, at 87.

of the evolving ethic help us understand the “rights vs. welfare” debate—and related debates over whether animals and people are “means” or “ends”—as unproductive.

Consider first the question of whether animals and humans ought to be thought of as “means” or as “ends.”<sup>254</sup> The theoretical proposition that only persons are “ends in themselves” is sometimes identified as the basis for the AWA regime’s implicit assumption that any human interest trumps any animal need.<sup>255</sup> As discussed above, Regan has taken particular issue with this assumption, proposing that all subjects-of-a-life should be treated as ends in themselves and never as mere means to the ends of others.<sup>256</sup> Francione has similarly pointed to this opposition between “means” and “ends” as explaining the AWA regime.<sup>257</sup>

Relational theory helps us to see that debates over whether animals are “means” or “ends” serves as a distraction from the concrete questions of policy that must be addressed in debates over animal experimentation. The idea that any individual, human or animal, is an “end” (in the sense of the terminal point of inquiry) is incompatible with the relational understanding of selves as mutually constituting and interconnected. Legal rules are best understood with reference to the relationships they produce, with an eye to the many consequences that ripple out from a given state of legal relations. This is not an inquiry that “ends” with any given individual. Conversely, the relational approach acknowledges that we are all always “means,” operating in community to produce particular patterns of relationships that shape and impact ourselves and others. Being a “means” is not lesser or degrading on this account. It is simply descriptive of the reality that all of our lives and choices are interconnected.<sup>258</sup>

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254. The Kantian roots of this debate are beyond the scope of this Article. *See supra* note 95 and accompanying text. My engagement here is with this conversation as it has arisen in the animal law context.

255. For Nedelsky’s treatment of the related issue of the “equal moral worth of human beings,” see NEDELSKY, *LAW’S RELATIONS*, *supra* note 210 at 194–99.

256. *See* REGAN, *ANIMAL RIGHTS, HUMAN WRONGS*, *supra* note 94, at 93, 96–98; REGAN, *THE CASE FOR ANIMAL RIGHTS*, *supra* note 10 at 286.

257. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW*, *supra* note 17, at 114 (“[T]o classify something as property is to defend its treatment solely as a means to the ends chosen by the property owner.”); *id.* at 250 (“The Animal Welfare Act purports to create public regulation of animal use in science but, in reality, allows researchers to regulate themselves and their colleagues. This invites the ‘balancing’ of human and animal interests in the context of a belief system—modern science—that accepts the institutional premise that animals may be used as means to human ends . . .”).

258. Nedelsky offers this related criticism of the perceived split between deontological and consequentialist approaches to human justice problems:

There is another sense in which the term “end” simply means that what happens to individuals matters. This meaning does not require that a moral, legal, or political inquiry literally “end” once it has been assessed with reference to the individual; it means instead that we are foreclosed from arguing that the consequences to the individual are irrelevant. Understood in these terms, the notion of persons as “ends” is unobjectionable on its own, but it fails to illuminate problems of human-animal relationships. Even the AWA scheme is premised on the assumption that animal experiences matter at least *somewhat*, even if not much.<sup>259</sup> Almost everyone would concede that both humans and animals are reasonable reference points for assessing the propriety of human-animal relationships, including those who would almost always choose human interests over animal interests. The debate as to whether animals are “means” or “ends” simply masks the uncontentious reality that our choices impact the interconnected lives of both humans and animals. We are, all of us, both means and ends. The dichotomy between “means” and “ends” is a distraction that cannot assist us in the difficult, necessary tasks of assessing contextual choices and understanding socio-legal transformation.

Similarly, the debate as to whether “rights” or “welfare” is the optimal means of conceptualizing justice for animals pulls focus away from particular questions of animal use and the contested social values that inform our always-provisional answers. Rights and welfarism are best understood as dialogic tools for achieving concrete relational goals, not as principles to be defended or challenged in the abstract. An important virtue of rights lies in the demand to attend to specific cases, particularly of marginalized individuals and groups. As Martha Minow observes, rights rhetoric is “remarkably well suited” to the task of constraining power.<sup>260</sup> In

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The division between consequentialist and deontological theories is premised on the possibility of a useful conception of human beings whose nature can be understood in abstraction from any of the relations of which they are a part. Once one rejects this premise, the sharp distinction between rights defined on the basis of human nature versus rights defined in terms of the desirability of the relationships they foster simply dissolves. Since there is no freestanding human nature comprehensible in abstraction from all relationship, from which one could derive a theory of rights, the focus on relationship does not constitute a failure to respect the essential claims of humanness. The focus on relationship is a focus on the nature of humanness and what makes it possible for humans to thrive; a relational approach is not a willingness to sacrifice the requirements of humanness to a calculation of the benefits of outcomes.

NEDELSKY, LAW'S RELATIONS, *supra* note 210, at 457 n.70.

259. Tribe describes the AWA regime as “one of the few pieces of existing federal law aimed unambiguously at protecting nonhuman interests.” Tribe, *Ways Not to Think About Plastic Trees*, *supra* note 70, at 1343.

260. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 210, at 307.

some cases, this legal form of demand might effect crucial transformations in human animal relationships—transformations whose substance will depend on the nature of the “right” guaranteed, the mechanisms for enforcement, and the force of competing social values and rights with which it must contend. Welfarist measures, with their focus on balancing of interests and attention to outcomes, offer a different set of tools. Some kinds of welfarist balancing—along the lines of the proposed ethical merit review or the standards now applied to chimpanzees as listed endangered species—also have the potential to transform practices around animal experimentation, again depending on their scope, enforceability, and surrounding context of competing values.<sup>261</sup>

While the dialogic value of rights lies in the power of demand, the dialogic value of welfare lies in the process of balancing. Both can intersect in complex ways with affective appeals and other tools of social contest and democratic debate. But these powers—of demand and of balancing—are only as substantive as the social consensuses that define and support them. For measures that take the shape of a rights-like “demand,” or a welfare-like “balance,” or some other form, success in realizing social values must always be measured with reference to the relationships they produce and the practices they support—including the discursive relationships and practices that have the potential to effectuate ongoing shifts in material conditions. The question as to which approach (rights or welfare) is *better* should not be answered in the abstract. Debating between these positions at a high level of generality prevents us from inquiring into the most meaningful dimensions of particular iterations of the problems of animal use. In terms of legal form, both rights and welfarist balancing have the potential to operate in concrete contexts to structure relationships in beneficial (or harmful) ways. Asking which is better is like asking whether a hammer or a wrench is better. It depends on the context: the task, the possibilities, and what we hope to achieve. It is very likely that you will often need both, along with other tools, to make meaningful progress.

#### 4. From Teleology to Dynamism

We must look beyond rights and welfare theories to understand the significance of some of the most important features and shortcomings of the AWA regime. The development of Committee review, for example, has effected significant changes in the lives of

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261. See *supra* notes 228–230 and accompanying text.

laboratory animals, even though these committees neither establish rights nor mandate balancing in the form of ethical merit review. The introduction of even this very limited form of transparency and legally mandated dialogue over particular experiments has had an impact on the intra-human and human-animal relationships that shape the lives of laboratory animals.<sup>262</sup> Similarly, the posting, recent retraction, and selective reposting of AWA reporting and inspection documents have had a significant impact on the relationships that give animal protection laws their substance. This is true even though the posting of these reports does not in itself create any animal rights or mandate any balancing. The evolving ethic helps us to understand that transparency is crucial to animal protection, not only because it enhances enforcement of existing standards but also because it moves democratic conversations about animal protection into the realm of concrete cases—pushing us not toward a predetermined telos or outcome, but in a direction that makes the uneven patchwork of developments that inevitably constitute socio-legal change possible.

Committee review and access to reporting and inspection documents provide the raw materials necessary for some limited conversation about the lives of particular animals in particular contexts. Instead of leaving conversations about animal protection in the realm of general debates about the “essential” nature of humans, animals, and obligations, or the abstract virtue of baselines versus balancing, these institutions create some minimal legitimate pathways for considering animal lives in their relational contexts—for telling stories about real animal experiences and describing the complex relationships that shape those experiences. They provide the materials and data necessary for the kinds of affective appeals about the lived experiences of animals that have been at the heart of every major advance in the AWA regime, and they effect shifts in relational dynamics within and between communities of researchers, animals, legislators, advocates, consumers, and others. The evolving ethic helps us to understand why these institutions are valuable, as well as why the remaining constraints on public access to concrete cases—which are severe—are so threatening to meaningful change in our current relationships with animals now used in laboratory experiments.<sup>263</sup>

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262. See *supra* note 197 and accompanying text (observing the attribution of disturbing conditions on an experimental farm to the lack of AWA Committee review in that context, implying that the Committee system has had an impact on practices in those circumstances where it does apply).

263. See *supra* Part II; *infra* Part V.

Moreover, the evolving ethic helps us to make sense of the AWA's complex history in ways that rights and welfare do not. Rights and welfare conceptions can offer us tools for evaluating particular aspects of the AWA, for example in critiquing a lack of a "floor" below which animal treatment may not fall, or the lack of ethical merit review. But the evolving ethic helps us to understand transformations of the AWA regime over time as a product of complex competing interests, and shifting public consensus, rather than simply as advances or retreats against a single vision or metric. The above-canvassed history of the role of affective appeals in formal democratic transformation of the AWA regime helps to illuminate some interests and values that have intensified over time. For example, the 1985 inclusion of standards for the psychological well-being of primates represented a significant shift in social concern, animated in part by affective appeals. As one primate researcher remarked following the dramatic reaction to the *Unnecessary Fuss* video, "I used to look at my friends who studied dogs and cats, and thank God I worked with monkeys. No one cared about them. That turned around so fast it was unbelievable."<sup>264</sup> As illustrated by the evolving ethic's "multidimensional spiral," initial steps like the enactment of the LAW are taken through complex appeals to public reason and sentiment, without the pretense that ultimate destinations are "describable in advance."<sup>265</sup> Subsequent reforms share this tentative quality of a "next step" that may not have been possible or even foreseeable when the prior step was taken.

The evolving ethic also helps us to understand that legal changes do not represent instances of teleological "progress" towards rights or welfarism. Instead, the relational evolving ethic reveals social and legal change to be the product of more complex democratic interplays between competing interests and values. The drafting of the regulations following the 1985 amendments, for example, was highly contentious, with an initial draft being scrapped and rewritten to better reflect the demands of the research community.<sup>266</sup> The evolving ethic, infused with an awareness of law as a product and process of relational engagement, urges scholars of animal law to develop an understanding of all competing values, and how they interact with each other to settle an unsettle public consensus. While rights and welfare direct our attention to what animals are

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264. BLUM, *supra* note 194, at 44, 119 (quoting Roy Henrickson who worked for the University of California-Berkeley and was the chief veterinarian at the California Regional Primate Research Center in the 1960s).

265. Tribe, *Ways Not to Think About Plastic Trees*, *supra* note 70, at 1339.

266. Favre, *supra* note 250, at 162.

like (subjects of a life; sentient), and how we wrong them (violation; disproportionate harm), we must move beyond the parameters of rights and welfare to understand the significance of other social values relevant to animal protection law.

Some of the relevant values relate directly to animals, such as the “speciesism” that rights and welfarists often reference, and others relate to the sorts of affective appeals to empathy detailed in the previous section. But the evolving ethic helps us to see how other broader values and power dynamics are relevant to our social choices around animal experimentation. What kinds of images of science and progress animate the regime? How do values and surrounding species endangerment shape the permissibility of research, and vice versa?<sup>267</sup> What kinds of values around the size of government and the harms of bureaucratic “red tape” are at play?<sup>268</sup> How do we explain the racial, political, and socio-economic composition of (and divisions and coalitions within) the animal protection movement, and how do these factors affect the movement’s power and legitimacy? And what about the composition of the population of research scientists, or those who most benefit from cutting edge treatments? These are important questions that “critical animal law” and “critical animal studies” scholars are already beginning to ask in their scholarship.<sup>269</sup> The evolving ethic renders these questions of power and political dynamics intelligible to animal law in a way that the rights and welfare paradigms do not.

In this sense, the evolving ethic also differs from some approaches to animal experimentation that have been advanced under the rubrics of feminist and relational theory—despite the influence that these bodies of scholarship have had on the present proposal. Deckha, for example, characterizes relational theory as inherently opposed to “oppressive relationships of all kinds,” and concludes that a relational consideration of animal experimentation would therefore yield a specific result:

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267. See *supra* notes 228–230 and accompanying text (discussing the application of regulations related to the protection of endangered species to effectively eliminate research on captive chimpanzees, and the inclusion of an exception for research that might work to conserve wild chimpanzee populations).

268. Cf. REFORMING ANIMAL RESEARCH REGULATIONS: WORKSHOP RECOMMENDATIONS TO REDUCE REGULATORY BURDEN, REPORT OF AN APRIL 17, 2017 WORKSHOP ORGANIZED BY FASEB, AAMC, AND COGR WITH ASSISTANCE OF NABR (2017), <http://www.faseb.org/Portals/2/PDFs/opa/2017/FASEB-Animal-Regulatory-Report-October2017.pdf>.

269. See, e.g., LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE (Yoriko Otomo & Edward Mussawir eds., 2013); Maneesha Deckha, *Critical Animal Studies and Animal Law*, 18 ANIMAL L. 207 (2012); Harris, *Should People of Color Support Animal Rights?*, *supra* note 149.

[T]he practical recommendation under . . . relational theory would be to stop all medical research on animals (and humans) except in exceptional circumstances. Exceptions could include situations where the research is not intrusive, does not cause pain or suffering, and would be useful to the individual animal's well-being or the well-being of her or his species (but it would not permit a researcher to introduce a pathogen or other harmful agent into an animal's body and then study its effects even if the findings would later benefit animals themselves). The central point here is that a relational approach would not reinforce the human/animal boundary that now orders medical research, in terms of whose body is viewed as a research subject in the absence of consent and whose interests receive priority.<sup>270</sup>

Since the “institutional change required to embark on a post-humanist social order” is not currently on the “legislative radar,” Deckha proposes measures that might improve laboratory animal lives in the meantime, advocating an “incomplete relational approach” that would require “augmentation to be able to reach the same result that a relational account would facilitate.”<sup>271</sup> Her analysis thus proceeds on the basis that there is a discernible relational outcome, although it may not be politically feasible at present.

A more dialogical relational approach, such as the evolving ethic proposed here, resists this separation of ideal answers from political possibility.<sup>272</sup> Instead of asking first what is ideal, and second what

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270. DECKHA, *Non-Human Animals and Human Health*, *supra* note 121 at 301 (internal citations omitted).

271. *Id.* at 303, 307–08. In particular, Deckha advocates a version of the Swiss model, discussed *infra* notes 287–290 and accompanying text.

272. Because Deckha's relational approach has a stronger prescriptive and normative component than the relational approach I develop here, Deckha's might be described as “strong” relational theory, and my own approach as “weak” relational theory, according to a typology developed by Robert Leckey. See *infra* notes 299–304.

The relational evolving ethic offered here also differs from Slicer's ecofeminist approach, which calls for particularized contextual analysis. Slicer, *supra* note 125. For Slicer, the correct answer to the justice problems posed by a particular experiment can only be found through attention to the specific context of a given experiment. *Id.* at 117, 121 (explaining that “for many thoughtful people the question of *whether* animals should be used in research is more pertinently one of *when* they should be used and *how* they will be treated” and conceding that, though she makes “very few recommendations about when, if ever, we may use animals in research” she has a “general antipathy” moderated by “some ambivalence” and a desire for less “simplistic” treatments of the issue). Deckha is critical of Slicer for failing to set out a clear program as to what would be permitted or restricted under such a contextual approach and suggests that there may be a “latent speciesism” underlying Slicer's call for contextual analysis of animal use without also proposing that such an approach might justify non-consensual research on human subjects. Deckha, *Non-Human Animals and Human Health*,

subset of the ideal is possible, the evolving ethic fuses these questions into a single multi-faceted project. This project presses for broad social and democratic reconsideration of animal justice problems as an essential component of both the ideal and the possible—both of which exist, not as givens, but as dynamic and interdependent discursive fields. From this vantage point, questions of animal justice cannot be adequately answered with reference to outcome alone. Instead, the answer must take the form of new questions, and new ways of answering. Such an analysis does not point us to answers but only to the possibility of new questions that we can try, together, to answer. Particularly with respect to problems that engage broad socio-legal norms and democratic legislative change, the evolving ethic emphasizes that answers we arrive at alone are not answers at all.<sup>273</sup>

Of course, this framing might appear to introduce a troubling level of indeterminacy—leaving the future of animal protection in the hands of an unknown, and in some ways unknowable future. A more complex conversation, involving a more diverse set of voices, and a broader conception of the relevant context, is not likely to yield concrete prescriptions that align with those envisioned by rights advocates or welfarists or ecofeminists. But this indeterminacy as to the outcomes—perhaps better cast as constantly shifting, responsive, and dynamic objectives and achievements—of social change movements is not *created* by the evolving ethic; it is merely *acknowledged* by it.

#### IV. THE EVOLVING ETHIC AND THE AWA

Many commentators have criticized the AWA scheme for its failure to provide adequate protections to laboratory animals. The current regime permits painful and deadly experiments to be conducted on animals, with no necessary inquiry into the importance of the research objectives pursued. Moreover, the AWA does not provide any reliable or effective mechanism to enforce the basic protections it formally provides. The evolving ethic illuminates a

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*supra* note 121, at 302. Neither Slicer nor Deckha have placed at the center of their analysis the fact that, at present, animal viewpoints and ecofeminist commitments lie very far from the mainstream of law and politics. The evolving ethic, on the other hand, is explicitly grounded in a persistent tension between the need for substantial change and the reality of ongoing disagreement.

273. This does not constitute a rejection of Deckha's conclusions or analysis, but rather a re-situation of them as claims and ambitions that take their place in a broader transformative conversation—a reality that Deckha herself acknowledges in her own confrontation of the distance between her proposals and immediate legislative possibility.

further concern with the AWA regime: it limits and conceals public debate over concrete cases, leaving us with an arid public discourse that is unmoored from particular consequences and vulnerable to distracting and unhelpful abstractions. The undeniable role that affective storytelling has played in the history of the AWA has been *in spite* of the AWA regime, with public disclosures often obtained illegally or through trickery, rather than through the legal channels provided for by the AWA. The USDA's recent decision to further restrict access to AWA records threatens to exacerbate this challenge. The evolving ethic here proposed seeks to achieve and legitimize a more democratized public discourse that is concrete, inclusive, and thoughtful—open to the importance of affective and imaginative discourse and attention to hierarchy flagged by feminist theory, and sufficiently concrete to avoid the unhelpful abstractions challenged by relational theory. But what might this look like in the context of laboratory animal protection?

There is no single answer to this question, but rather a series of possible avenues which we might pursue. I have suggested that aspects of the current discussion about animal justice have focused on abstract questions that risk narrowing the field of intelligible questions and answers in assessing particular cases. The challenge is to develop law and policy solutions that push concrete cases to the fore in ways that create space for a public discourse that is both grounded in a wide range of standpoints and argumentative approaches and guarded against abstractions that risk distracting attention from the relational consequences of competing choices.

Two of the most common law reform proposals advanced in the AWA context have great potential in this regard: reforms to the law of standing and the introduction of ethical merit review. Often these proposals are advanced on the basis that they will provide stronger protection for laboratory animals in the immediate term. For example, in urging the creation of citizen suits under the AWA, Cass Sunstein has argued that the USDA monopoly on AWA enforcement “is a recipe for continued illegality.”<sup>274</sup> Others have advocated a welfarist balancing regime in large part on the basis that such an approach would greatly reduce current levels of experimentation.<sup>275</sup> Both proposals, however, could also work to generate space for increased public consideration of concrete cases. In respect of revised standing rules, the evolving ethic would be served by a twin focus on increasing opportunities for substantive litigation

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274. Sunstein, *The Rights of Animals*, *supra* note 108, at 401.

275. *See, e.g.*, SINGER, *ANIMAL LIBERATION*, *supra* note 5, at 86.

and reshaping the scope of cognizable legal injuries to include injuries to animals.<sup>276</sup> This would create a public forum inviting discussion of animal experiences that are currently excluded from legal consideration under the AWA. Moreover, litigation has the potential to attract commentary and interventions from a range of perspectives and stakeholders. Regarding the introduction of ethical merit review, reforms focused on public accessibility and an expansive definition of relevant ethical factors may serve similar functions. Although the current administration's decision to frustrate easy public access to AWA records is too recent to have garnered significant attention in law reviews, advocacy groups' calls to reverse this move undoubtedly arise from a similar awareness of the necessity of legal institutions that foster informed dialogue over animal research.<sup>277</sup>

The current regime governing experimentation on human subjects illuminates how these changes might work to generate and enrich public debate. The Human Subjects Research Regulation (the "Regulation") sets out a highly relational approach to assessing proposed research projects,<sup>278</sup> and the resulting regime has effectively generated broad-based and thoughtful deliberation. The Regulation requires that Independent Review Boards assess research protocols to determine whether the "[r]isks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result"—a standard referred to as the "risk-benefit ratio."<sup>279</sup> The concepts of "risk" and "benefit" have not only worked to demarcate standards of acceptable research practice, but they

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276. This could be done either through a guardianship model, or less directly (and therefore less desirably, on some accounts) by so expanding the scope of legally cognizable human injuries to effectively embrace all injuries to animals arising from violations of the Act. Either change could be achieved through congressional action. See generally Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).

277. See Karin Brulliard, *Resistance is Growing to the USDA's Blackout of Animal Welfare Records*, WASH. POST (Feb. 16, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/16/resistance-is-growing-to-the-usdas-blackout-of-animal-welfare-records/?utm\\_term=.3ede82edf7f0](https://www.washingtonpost.com/news/animalia/wp/2017/02/16/resistance-is-growing-to-the-usdas-blackout-of-animal-welfare-records/?utm_term=.3ede82edf7f0); see also *supra* note 55 and accompanying text.

278. Basic HHS Policy for Protection of Human Research Subjects, 45 C.F.R. § 46.101–.505 (2017). Because the Regulation is legally binding only on human subject research funded or conducted by participating government agencies, it is not a direct analogue to the AWA. For a discussion of how the AWA fits into the broader scheme of regulations governing animal research, including government-funded and government-conducted research, see Brody, *supra* note 27.

279. 45 C.F.R. § 46.111(a)(2) (2017); Nancy Neveloff Dubler, *Remaining Faithful to the Promises Given: Maintaining Standards in Changing Time*, 32 SETON HALL L. REV. 563, 564 (2002).

have also worked to define the contours of the debate made possible under the legal regime governing human subject research. For example, scholars have turned their attentions to identifying and typologizing the various forms of risk to human research subjects that might be considered in this ratio, embracing such broad considerations as physical risk, psychological risk, social risk, economic risk, and legal risk.<sup>280</sup> The benefit side of the ratio has similarly produced scholarly consideration of a range of factors, including direct benefits (from the treatment tested), collateral benefits (ranging from free medical examinations to “the personal gratification of altruism”), and aspirational benefits (experienced by future society rather than the individual test subject).<sup>281</sup> Thus, in the human research context, scientists, lawyers, and ethicists have taken up the regulatory invitation to participate in a continual and collective definition of governing norms.

The availability of litigation as a means to protect human research subjects has also been instrumental in creating relational debate over particular cases. In setting out the conditions for informed consent, the Regulation prohibits research subjects from waiving their legal rights to sue researchers for negligence.<sup>282</sup> As a result, litigation has prompted ongoing judicial and scholarly consideration, in the public eye and in the context of concrete cases, as to the duties owed to human research subjects.<sup>283</sup> These cases have adjudged the conduct of hospitals, researchers, pharmaceutical companies, university officials, and even Institutional Review Board members.<sup>284</sup> Through consideration of particular cases, courts and commentators have debated the unique demands of human subject research, defining and refining the governing legal standards accordingly.<sup>285</sup>

In reviewing the human research subjects regime, I do not propose that those standards could simply be grafted on to the animal research context. (In particular, the central role that informed consent plays in the human research context limits the ways this regime

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280. Ernest D. Prentice & Bruce G. Gordon, *Institutional Review Board Assessment of Risks and Benefits Associated with Research*, in 2 ETHICAL AND POLICY ISSUES IN RESEARCH INVOLVING HUMAN PARTICIPANTS L-1, L-4 to L-5 (2001).

281. See Nancy M.P. King, *Defining and Describing Benefit Appropriately in Clinical Trials*, 28 J.L. MED. & ETHICS 332 (2000) (setting out the typology).

282. 45 C.F.R. § 46.116 (2017).

283. See, e.g., Michelle M. Mello et al., *The Rise of Litigation in Human Subjects Research*, 139 ANNALS INTERNAL MED. 40 (2003).

284. *Id.* at 42.

285. See generally E. Haavi Morreim, *Medical Research Litigation and Malpractice Tort Doctrines: Courts on a Learning Curve*, 4 HOUS. J. HEALTH L. & POL'Y 1 (2003).

might be applied without substantial modification to the animal research context.<sup>286</sup>) Instead, I hope to have illustrated that a legal regime which invites open-textured public debate on concrete cases is likely to generate exactly that.

Experiences with animal research in other jurisdictions support this suggestion as well.<sup>287</sup> The evolving ethic proposed here commends comparative analysis. Rather than presupposing that there is a “correct” approach to welfarist balancing or absolutist rights protection, the evolving ethic opens up the possibility that there may be a multiplicity of approaches to law and transformation—and that each of these is moored in specific (though interrelated and constantly changing) social contexts. Comparative analysis can illuminate the particularity of our own legal and social approaches and expand our perceptions of the available options.<sup>288</sup>

In Switzerland, for example, a legislated system of ethical merit review of animal experiments has produced a rich, context-driven discourse—including nuanced high court jurisprudence on the justifiability of particular experiments—considering the ways in which animal suffering ought to be measured, the relative merits of basic and applied research, and the extent to which primates’ genetic similarity to human beings should give rise to special consideration in close cases.<sup>289</sup> This dialogue has produced material changes in animals’ lives, including limiting the permissibility of some particular experiments which are found not to meet the burden of justification.<sup>290</sup> Proposals to introduce ethical merit review, to make litigation possible under the AWA, and to reinstate public access to inspection reports and related data, would be important steps in that direction.

The evolving ethic also urges us to consider alternative avenues for generating public dialogue on animal research. Our discussion so far has focused on how to enhance public engagement with

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286. *But see* Jane Johnson & Neal D. Barnard, *Chimpanzees as Vulnerable Subjects in Research*, 35 THEORETICAL MED. & BIOETHICS 133 (2014) (arguing that, as with vulnerable human research subjects, surrogate decision-makers may be appointed to consent to, or refuse, research participation on behalf of chimpanzees).

287. *See, e.g.*, Sankoff, *supra* note 78 (adopting comparative analysis of animal protection regimes and exploring the dynamics of legal change and public dialogue outside the research context).

288. *Cf.* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 439 (1985).

289. *See, e.g.*, Bundesgericht [BGer] [Federal Supreme Court] Oct. 7, 2009, 135 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 405 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Oct. 7, 2009, 135 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 384 (Switz.).

290. BGer Oct. 7, 2009, 135 BGE II 405 (Switz.); BGer Oct. 7, 2009, 135 BGE II 384 (Switz.).

questions surrounding particular *experiments*. Another dimension that might be pursued under the evolving ethic includes efforts to support public choice and debate relating to animal testing for particular *products*. Despite the demand for consumer products (particularly cosmetics) which are not tested on animals, there is still no legal regulation of terms like “cruelty free” or “against animal testing” that are frequently used in product marketing.<sup>291</sup> While some careful consumers may take the time to familiarize themselves with independent, credible labeling agencies, many “hurried and uninformed” customers do not.<sup>292</sup> Clear and consistent labeling, supported by law, would make the version of public deliberation that occurs in the marketplace better informed.<sup>293</sup> Yet another dimension of experimental animal use that demands greater publicity and more informed debate is the persistence of economic and regulatory environments that encourage the perpetual development of new plastics and other materials, supported by successive rounds of animal testing to determine toxicity.<sup>294</sup>

The core contribution of the evolving ethic, however, is the understanding that the questions we ask through law, and the answers we give, exist in an ongoing and iterative relationship. When we invite debate on particular cases and turn our minds in a serious and sustained way to questions of animal justice, we might expect some changes along the lines we have observed in other jurisdictions. In the European Union, for example, sustained public attention to questions of animal research has resulted in regulations requiring a phase-out of all animal testing on cosmetics, amounting to a blanket policy judgment that cosmetics testing is never “worth” the trade-off in animal suffering.<sup>295</sup> The European Union, Belgium, Austria, Sweden and the Netherlands have engaged in public dialogue regarding the particular capacities and

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291. See Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. Rev. 454, 459 (2006); cf. Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 29 (2004). See generally Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391 (2013).

292. Sullivan, *supra* note 291, at 412. Sullivan suggests that the lack of clear and consistent labeling in the context of agricultural products has depressed demand for humanely produced agricultural products. *Id.* at 412–15.

293. Thomas Rodham Wells has argued, in the agricultural context, that rather than labeling less-cruel items, the law ought to impose “warning” labels alerting customers to animal cruelty in the manufacture of products. Thomas Rodham Wells, *The Case for Ethical Warning Labels on Animal Products*, PHILOSOPHER’S BEARD (Dec. 31, 2013), <http://www.philosophersbeard.org/2013/12/the-case-for-ethical-warning-labels-on.html>.

294. See Jessica Eisen et al., *supra* note 11, at 14, n.43–44 and accompanying text.

295. See Commission Regulation 1223/2009 of 30 Nov. 2009, *Cosmetic Products*, 2009 O.J. (L 342) 59.

experiences of great apes and have concluded that laboratory research on those species should be disallowed in all cases.<sup>296</sup> But aside from these kinds of judgments, which might be expected in a matter of years if a particular kind of discourse emerged in the United States, the evolving ethic acknowledges that such a debate would also have the potential to produce new modes of discourse that we cannot now predict.

Welfare-inflected questions relating to the kinds of benefits that might arise from particular experiments, and the kinds of harms that might be suffered by particular species and individual animals, are important. So too are rights-inflected questions relating to whether there ought to be absolute outer limits on permissible experimentation in certain contexts or respecting some species. But the evolving ethic helps us to see that the forms of these questions are limited by the current moment. First, the menu of available options for social choice in areas of scientific research are likely to be drastically and constantly altered by emerging technologies—with those technological changes in turn being driven by social choices themselves.<sup>297</sup> Moreover, we might expect that sustained consideration of particular cases in their full material and relational contexts would move us along the evolving ethic's "multidimensional spiral," illuminating questions and contributions that we don't currently experience as relevant to the animal testing debate. The animal experimentation debate—that we may soon be ready to accept as warranting a broader "ethical merit review," direct consideration of animal interests as a basis for litigation, or even "rights" for some species—has the potential to spiral towards broader questions about the ways we choose to allocate social resources: as between medications versus prevention or as between developing innovative cures versus making current medical technologies more widely

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296. *International Bans: Countries Banning or Limiting Chimpanzee Research*, PROJECT R&R, <http://www.releasechimps.org/laws/international-bans> [https://web.archive.org/web/20180201162742/http://www.releasechimps.org/laws/international-bans] (last visited Feb. 1, 2018). On the U.S. situation, see *id.*; *supra* notes 228–230 and accompanying text.

297. Pippin, *supra* note 8, at 507; Hannu Raunio, *In Silico Toxicology—Non-Testing Methods* 2 FRONTIERS PHARMACOLOGY 33 (2011); Dalson Chen, *No More Lab Rats: Alternatives to Animal Testing Sought at New Windsor Research Centre*, WINDSOR STAR (June 19, 2017, 7:18 PM), <http://windsorstar.com/news/local-news/no-more-lab-rats-alternatives-to-animal-testing-sought-at-new-windsor-research-centre>. The relationship between feminism and the proliferation of oral contraceptives is another case study in the dynamic interactions between social priorities, scientific change, and evolving values and material conditions. See, e.g., Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002).

available across income brackets and national borders.<sup>298</sup> There may well be strong arguments that these are false dichotomies or that even a thorough debate on these questions would not change much about the particular balances we, as a democratic polity, have struck. But they are questions worth asking if and when we are ready. And there will be others that we cannot now predict.

## V. ANSWERING OBJECTIONS

My emphasis on generating discourse gives rise to three interrelated potential objections. The first is that my focus on dialogue is a cipher: that there is something intellectually dishonest about a call for debate when what I really hope for is less experimentation, better lives for animal research subjects, or other broader changes in the ways we relate to other animals. The second objection is that, from the perspective of those who share my interest in improved animal protection, a focus on dialogue works to sanction half-measures that fail to adequately respond to ongoing and widespread violence against research animals. The third objection is that I might be wrong in my suggestion that a more concrete and nuanced public debate over experimentation would yield any material changes. If this is true, what does the evolving ethic offer?

The first objection is one that has been levelled at certain other relational theorists who have embraced approaches that seek to demystify public debate and encourage analyses that focus on real relationships. In criticizing these approaches, Robert Leckey has distinguished between two forms of relational theory, one which he calls “weak” and the other “strong.” Leckey proposes that the dialogic approach set out by Nedelsky and others, and which I have embraced here, is the weak form.<sup>299</sup> Leckey charges that advocates of this “methodological and largely content-neutral” approach wrongly assume that “simply thinking about relationships or focusing on them generates results.”<sup>300</sup> The strong relational approach, by contrast, “is committed to promoting optimal relationships, and

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298. See, e.g., SINGER, ANIMAL LIBERATION, *supra* note 5, at 86 (suggesting that human health would be improved more effectively if more resources were spent on nutrition, sanitation, and health care to communities in need rather than laboratory experiments).

299. LECKEY, *supra* note 211, at 13 (citing Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. & JURIS. 343 (1993); Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law* 1 HYPATIA 11 (1996)).

300. LECKEY, *supra* note 211, at 13–14.

it has a substantive criterion for identifying them.”<sup>301</sup> By this measure, Deckha’s relational approach to animal experimentation is stronger than my own.<sup>302</sup> The main difficulty Leckey identifies with weak relational theory is a tendency to slip normative commitments in through the “side door” without declaring them.<sup>303</sup> Leckey asks, “[i]f one has such a vision, why not advocate for it explicitly instead of suggesting that it results, neutrally, from the mere exercise of thinking about relationships?” More pointedly, Leckey posits that the weak relational approach “implies, erroneously, that points of disagreement would dissolve if only everyone adopted the same accurate description and everyone took the time to think about relationships.”<sup>304</sup>

While my approach may be “weak” under Leckey’s typology, I do not believe that I have either made a secret of my normative commitments, or assumed that my values would become consensus values if more people “took the time” to seriously consider and debate issues of animal justice, including animal experimentation. I am not naïve about what such a discussion might produce, particularly in the immediate term. Many people believe reflexively, and some even after sustained reflection, that animal lives do not matter; that their pain is irrelevant; and that the most trivial of human interests outweighs even the gravest animal need.

This is a hard reality for people who care about animal well-being. But it is a reality that cannot be ignored by those advocating for animal interests in democratic states. I embrace “weak” relational theory as a component of my casting of the evolving ethic, not because I think of it as a “side door” through which to slip in my substantive commitments but because I think that it can help us to generate a more productive conversation about an issue that is under-contextualized in public discourse. I have argued that, in part because of the governing legal regime, public dialogue about animal experimentation has suffered from a dearth of debate where all sides are invited to describe and assess the same factual context. As a result, the public conversation about animal experimentation has drifted upwards to levels of abstraction that are consistently unmoored from actual, particular cases.

As to the second objection, the present call for dialogue has entailed the endorsement of legal measures that will undoubtedly disappoint some animal advocates—particularly those identified

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301. *Id.* at 14.

302. *See supra* note 121 and accompanying text.

303. LECKEY, *supra* note 211, at 16–17.

304. *Id.* at 16.

with the “rights” camp. Strengthened Committee review, revised standing rules, easy public access to AWA records, ethical labeling, or even a narrowly drawn ban on cosmetics testing or experimentation on specific species, are a far cry from Regan’s “empty cages.” This tension recalls a familiar debate among animal justice advocates as to the validity of intermediate steps. Francione has observed that some welfarists advocate for “balancing” as a transitional measure towards the eventual achievement of animal rights.<sup>305</sup> In the experimentation context, Francione describes these advocates as calling for changes to the regulation of animal research “only as an interim step on the way to recognizing that animals have a right not to be so used.”<sup>306</sup> Such an approach blends rights theory with a separate and separable desire to achieve more immediate results. This differs from the evolving ethic which embraces changing social values and democratic dialogue as a crucial and central component of animal justice. The evolving ethic advocated here does not seek incremental improvements towards a predefined outcome. Instead, the evolving ethic recognizes that human relationships with animals are defined by social and political forces such that our conception of just relationships in this field must have social and democratic dimensions.

My answer to critics who reject half-measures is that the very notion of a half-measure is belied by the impossibility of a “whole” answer that does not include sustained public renegotiation of the legal and ethical status of animals. Vigorous public argumentation and good faith consideration of complex problems from many angles are our best tools for building empathy and for translating those advances into more robust forms of animal protection. Looking ahead, we can attempt to discern the direction, but not the destination, of a legal regime and social world that adequately respects animal lives. This does not mean that we must abandon Regan or Singer but instead that we must reconceptualize their contributions as pieces of a broader public conversation, rather than as final and ahistoric answers that must compete with each other for the title of “correct answer” to problems of animal justice.

This brings me to the third and final objection: what if debate would not produce any actual change in the experimental use of animals? Perhaps, on this view, there is no meaningful public debate because we have reached a well-informed and deliberate consensus—the consensus embodied by the AWA regime—that all experimentation is justifiable in pursuit of any human ambition,

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305. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 17, at 256–57.

306. *Id.* at 256.

with narrow specified exceptions. What if this consensus would not be disturbed by broader, better-contextualized deliberation? Would I still then endorse dialogue on these questions as having independent value?

This is the hardest objection to meet. I would be very disappointed if this turned out to be true, and I might wonder at the resources expended on litigation and public dialogue that, in the end, would change nothing about the ways we use animals. It is true that animal experimentation presents us with hard cases, at least as far as public opinion is concerned. In conceding that animal experimentation may be justifiable in some situations, Martha Nussbaum urges that “[w]e should admit, then, that there will be an ineliminable residue of tragedy in the relationship between humans and animals.”<sup>307</sup> For Nussbaum, such acknowledgments, as part of a process of “constant public and philosophical discussion,” have independent value because they affirm the dignity of animals, encourage us to contemplate alternatives, and foster “dispositions to behave well toward [animals] when no such urgent exigencies intervene.”<sup>308</sup> It is this last point that I think is most persuasive, and gives most support to a call for dialogue in the context of animal research. As noted above, the present project considers the question of animal experimentation in the context of a broader set of relationships in which human beings have relatively unfettered access to animal bodies and lives in satisfaction of virtually any human interest. Particularized consideration of the question of animal research may open up important discursive space for consideration of the many other uses and abuses to which we subject other species. These areas, too, will see change only in fits and starts, unpredictable though not entirely uncontrollable, in the mode of an evolving ethic.

Of course, if debate will not change anything, it is no answer to say that my proposals may spur peripheral debates which may be equally ineffective. Ultimately, my only answer to this question is that I reject the premise. The assumption that well-informed, good-faith dialogue has the power to transform public approaches to animal use is perhaps inseparable from the value of this prescriptive project. As described above, I believe that the experiences of other jurisdictions support my intuition on this point.<sup>309</sup> More pressingly though, for those who think that dialogue offers only dim hope, I would answer that no dialogue offers no hope. We cannot “skip

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307. NUSSBAUM, *supra* note 10, at 404.

308. *Id.* at 404–05.

309. *See supra* notes 295–296 and accompanying text.

over” the democracy piece of the puzzle in seeking to understand and transform law’s role in animal exploitation. For readers who share my belief that the *status quo* treatment of animals poses urgent justice problems, there is no viable alternative to the necessary foundational work of generating earnest public conversation on this point. The AWA regime is one place in which we might nourish such conversation.

### CONCLUSION

Who is the human of the evolving ethic, and who is the animal? What, if anything, binds or separates them? The human of the evolving ethic is a political actor—moved by reason and emotion, and able to appeal to others on these terms. The human person is not only the laboratory scientist to be restrained or the dispassionate calculator of utility, but also the interested corporate CEO, the activist with a picket sign, the journalist, the photographer, and the storyteller, shaping law through engagement with others. The person is not singular but multiple, not static but evolving, always crucially defined by relationships that are in constant flux.

The animal of democratic animal law is a part of this network of relations—an “interlocutor” in the democratic exchange through which human persons develop and implement formal laws.<sup>310</sup> The animal does not vote, or draft legislation, or run for office, but does express the needs, desires, affections, and resistances that are the bedrock of community life. A challenge for human law and society is to find ways to make these animals visible in law-making—to find ways to bring our legal and political institutions around to the difficult task of listening and caring across profound differences.<sup>311</sup>

The evolving ethic here proposed blends three lines of critical insight. The first, deriving from ecofeminist theory, highlights the voices, perspectives, and modes of argument that are marginalized by traditional approaches to animal rights and welfare. The second, arising from relational and critical theory, seeks to shed those frames of analysis, embedded in traditional approaches, that have served to distract attention from the concrete sources and consequences of particular legal and policy choices. The third dimension

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310. See Bailey, *supra* note 122, at 14.

311. Cf. Eisen, *supra* note 155 (exploring the challenges of incorporating animal interests into constitutional law and politics given limits on animals’ ability to express preferences respecting higher-order lawmaking).

of the evolving ethic, distinguishing it from some iterations of relational and ecofeminist theory, is a focus on social and political contestation as integral to animal justice projects.

The marginalized approaches called forth by ecofeminists and the fresh analytic terrain ploughed by relational and critical theory do not, under the evolving ethic, yield sure answers. Instead, they direct us to the field of constant social contestation that is elemental to legal and material change. The evolving ethic calls on us to craft not only answers, but further questions, that invite fresh consideration of old problems—all the while guarding against new exclusions and new truisms that may come to limit future incarnations of these ongoing debates.

Throughout, I have argued that the evolving ethic is fostered by attention to concrete cases—that consideration of the actual facts of animal use, in their full relational context, illuminate how animal law actually operates more effectively than conversations defined by rights and welfare. There are many aspects of animal law that might be explored as illustrative of this connection between law, transparency, social dialogue, and relational transformation—from roiling debates over Ag-Gag laws,<sup>312</sup> to the growing significance of documentary filmmaking to animal law reform efforts.<sup>313</sup> This Article has focused on the specific context of animal experimentation under the AWA regime, emphasizing the ways in which the current regime's failure to create adequate space for public deliberation over concrete cases has contributed to abstract and limited public debate. The evolving ethic helps us to see that law now has a role to play in bringing this discussion back to earth—back to the stacked cages in our research facilities; the crowded aisles of our pharmacies; the floors of our legislatures; and all the many public and private places where we shape and share our values through law.

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312. See, e.g., Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317 (2015).

313. See Angela Fernandez, *Already Artificial: Legal Personality and Animal Rights*, in THE HOSTILE TAKEOVER: HUMAN RIGHTS AFTER CORPORATE PERSONHOOD (Jody Greene & Sharif Youssef eds., Forthcoming) (June 20, 2016) (unpublished manuscript) (on file with author).