

## TWO MAJOR FLAWS OF THE ANIMAL RIGHTS MOVEMENT

By  
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*In its current guise, animal rights advocacy imposes few intellectual demands on its proponents, usually requiring little more than a colorful Web site and a college dictionary—the former to construct an audience and the latter to provide the emotion-laden phrases needed to inflame that audience into supporting stringent penalties for animal related crimes. Hard thought is not really essential for animal rights advocates to be able to proclaim an end to animal abuse or an allegiance to easing animal suffering, and the standard advocate toolkit simply need not include “rational legal analysis” among the apparatus utilized to rail against mistreatment, to weigh in with personal anecdote on topical news stories, or to call for increasing fines and jail terms under local criminal statutes. Trouble brews, on the other hand, for those advocates who aim farther afield, who demand that animals be granted formal legal rights. Graphics and adjectives alone are vastly insufficient to validate just how that project would operate under the law or how science and logic would support a formal position on animals as “rights-holders.” Unhappily, the animal rights movement, as it takes such aim, has shown that it is weaker, not stronger, for the effort. Separate from its vulnerability to criticism by those politically opposed, a call for legal rights for animals is without justification on the very two pillars on which such a claim presumes to found itself—the precepts of law and of science. The claim’s inherent weaknesses are revealed in the use of terms that are inapplicable given both the way that legal rules work as a practical matter and the current level of our scientific knowledge about animals themselves. This article confronts these two core defects of the animal rights paradigm and seeks to shed the light of law, science, and reason on what seems to be an unreasonable, nonscientific, and yet ill-critiqued phenomenon.*

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I. INTRODUCTION

To the Roman jurist Gaius is attributed the phrase *hominum causa omne ius constitutum*: all law was established for man's sake.<sup>1</sup> Today, some 1,500 years later, Gaius' statement still holds firm: Humans alone possess legal rights, while animals—nonhumans—are denied legal rights, including even rights of personal bodily integrity or personal liberty.

Ancient pronouncements are often eroded over time, but Gaius' proclamation has remained stable, proffering a succinct phrase that readily encapsulates a key distinction between humans and all other animals, as well as a core inquiry: To whom does "law" belong? Animal rights advocates certainly bemoan the fact that the sentiment has persisted and after so many centuries, humans alone continue to enjoy legal rights in contrast to all other animals. Animal rights advocates squint down history's long corridor, adamant that jurisprudential advancements should surely have already resulted in the establishment of *some* laws for animals' sake. What has delayed the progress, they lament, that should have occurred to establish a few of the same legal rights for animals that humans have granted for themselves?

Animal rights advocates' upset stems from a form of academic myopia and a shift in perspective might help. In particular, this shift must be toward a viewpoint that instructs and broadens awareness of the qualitative effect of time. Prehistory can and does illuminate and inform history, and in order for the disdainful to eventually appreciate Gaius' statement, they must first come to appreciate the passage of time in two respects.

The first is the passage of large-scale *prehistoric* time, specifically the several million years of hominid evolution preceding Gaius' statement. Fueled by a constantly changing natural environment, it took the beatifically rich and intricate process of genetic transmission of adaptations that entire time to select for humans to be fundamentally distinct from all other animals by reaping the benefits of "social exchange[s]."<sup>2</sup> This process of evolution engineered all of Gaius' ancient and immediate ancestors (and of course Gaius himself) with the astonishing ability to express thought in the form of "speech."<sup>3</sup> The fact that

<sup>1</sup> *The Digest of Justinian* vol. 1, 15–16 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., U. Penn. Press 1985).

<sup>2</sup> See e.g. Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Exchange*, in *The Adapted Mind: Evolutionary Psychology and the Generation of Culture* 163, 164 (Jerome H. Barkow, Leda Cosmides & John Tooby eds., Oxford U. Press 1992) (discussing research program exploring the theory that the human mind contains algorithms specifically to understand social exchanges).

<sup>3</sup> R. J. Andrew, *Evolution of Intelligence and Vocal Mimicking*, 137 *Science* 571–632 (Aug. 24, 1962); see also MacDonald Critchley, *The Evolution of Man's Capacity for Lan-*

Gaius wrote and spoke at all is not to be overlooked and is a central factor in support of law being “established” for anyone’s sake; law has become established through the evolved mechanisms of writing, reading, and speaking (i.e., manifestations of human language). The capacity for language is the fundamental and founding principle grounding all law.<sup>4</sup>

Scientific studies have primarily developed the idea of the evolving process of thought and speech through the fields of physical and cultural anthropology.<sup>5</sup> From Charles Darwin to Richard Dawkins, evolutionary biology researchers interested in human evolution have demonstrated that evolutionary forces constructed humans not as anything necessarily better or worse than any other animal, but simply as something vastly *different* from all other animals.<sup>6</sup> Anthropological research, in particular, demonstrates that speech and writing have played massive roles in accomplishing this change during prehistory:

However much we tend to be obsessed by them, our cognitive capacities, epitomized by our linguistic abilities, do indeed mark us off distinctly from all of the millions of other creatures on the planet. . . . Well over three billion years after life established itself on Earth, we, alone among the millions of descendants of our ancient common ancestor, somehow acquired not just a large brain—the Neanderthals had that—but a fully developed mind. This mind is a complex thing, not in the sense that an engineered machine is, with many separate parts working smoothly together in pursuit of a single goal, but in the sense that it is a product of ancient reflexive and emotional components, overlain by a veneer of reason. The human mind is thus not an entirely rational entity, but rather one that is still conditioned by the lone evolutionary history of the brain from which it emerges.<sup>7</sup>

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*guage*, in *Evolution After Darwin* vol. 2, 289 (Sol Tax ed., U. Chi. Press 1960) (discussing an argument that the inception of species notably parallels the genealogy of language and, like the struggle for life among species, a struggle for survival occurs among languages); see also Charles F. Hockett & Robert Ascher, *The Human Revolution*, *Current Anthropology* 135, 135 (June 1964) (incorporating the evolution of language, from sign to symbol, into a discussion of the emergence of humans from prehuman ancestors).

<sup>4</sup> E.g. Geordie Duckler, *Animal Wrongs: On Holding Animals to (and Excusing Them from) Legal Responsibility for Their Intentional Acts*, 2 *J. Animal L. & Ethics* 91, 91 (May 2007) (arguing that because social mandates allow the exercise of rights and concurrent imposition of obligations, extending such rights to animals creates procedural enforcement dilemmas).

<sup>5</sup> Hockett & Ascher, *supra* n. 3, at 135.

<sup>6</sup> See generally Daniel C. Dennett, *Kinds of Minds: Toward an Understanding of Consciousness* 147 (Basic Bks. 1996) (“There is no step more uplifting, more explosive, more momentous in the history of mind design than the invention of language. When *Homo sapiens* became the beneficiary of this invention, the species stepped into a slingshot that has launched it far beyond all other earthly species in the power to look ahead and reflect.”).

<sup>7</sup> Ian Tattersall, *Becoming Human: Evolution and Human Uniqueness* 233–34 (Harcourt Brace & Co. 1998).

The second helpful lesson for the animal rights activist might be a quick tutorial in appreciating, in all of its fine detail, the passage of *historic* time, specifically the 1,500 years or so of complicated social rules development that occurred subsequent to Gaius' famous statement.<sup>8</sup> This time span primarily comprises the rich and intricate sociological process of the development of the common law.<sup>9</sup> This sociological process enables modern readers to appreciate the social significance of both the particular words Gaius ultimately chose to utter and Gaius' mindset when he crafted those words.

Historical studies reflect the evolution of social rules primarily through the fields of jurisprudence and cognitive psychology.<sup>10</sup> From Thucydides to Carlyle to Dennett, legal historians and linguistic psychologists have demonstrated that sociological forces accumulated over historic time have constructed humans not as any more communicative or more organized than other species, but as something intricately social at several orders of magnitude above such "social" groups as bees, termites, seagulls, beavers, or chimps.<sup>11</sup> The historical, recorded past demonstrates that the human species is enmeshed within a communication- and idea-driven social web and expresses itself most formally and most thoroughly through the rule and operation of law.<sup>12</sup>

Multiple lessons abound from both human history and human prehistory, and a suite of scientific studies can more than adequately explain why animals should not be treated like humans, or why legal rules should not be applied to animals as if they were no different than humans.<sup>13</sup> It may well be true that an effort can always be made to tweak and restructure some of the more antiquated rules regarding animals, or that further legislation and litigation may accommodate and reflect more enlightened schema by which animals are valued or conveyed, especially in the roles they play as domestic companions or educational tools.<sup>14</sup> Nevertheless, the most valuable and legitimate in-

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<sup>8</sup> See Alexander Marshack, *The Roots of Civilization* 369–75 (McGraw-Hill Bk. Co. 1972) (discussing anthropologic comparison of human cognition development with the use of, or capacity for, symbolic thinking).

<sup>9</sup> Oliver Wendell Holmes, *The Common Law* xvii–xxiv (Mark DeWolfe Howe ed., Harvard U. Press 1963) (in discussing the Harvard lectures, which in part became this treatise, the Editor introduces the theme that moral language, through which rules of law are spoken, is inherited from the primitive illusion of animism).

<sup>10</sup> Cosmides & Tooby, *supra* n. 2, at 222 (in discussing models of social exchange, the authors reiterate the basic conclusion of this section in that, "reciprocation is necessary for the evolution of social exchange").

<sup>11</sup> See Elaine Morgan, *The Descent of the Child: Human Evolution from a New Perspective* 137 (Souvenir Press 1994) ("Once the child has learned the meaning of the words 'why' and 'because' he has become a fully paid-up member of the human race.").

<sup>12</sup> See generally H. L. A. Hart, *The Concept of Law* (2d ed., Clarendon Press 1994) (analyzing the nature of law through a discussion of social rules, obligations, morality, and convergent behavior).

<sup>13</sup> See e.g. R. Burling, *The Selective Advantage of Complex Language*, 7 *Ethology and Sociobiology* 1, 1–16 (1986) (stressing the uniqueness of symbolic communication).

<sup>14</sup> See James Serpell, Raymond Coppinger & Aubrey H. Fine, *The Welfare of Assistance and Therapy Animals: An Ethical Comment*, in *The Animal Ethics Reader* 524,

teractions humans can have with animals are those founded on clear scientific principles, interactions and understandings that employ scientific reasoning and take into account lessons from biology, anatomy, anthropology, and paleontology as to just what animals are to humans and what humans are to them.<sup>15</sup>

It should come as no surprise, then, that a better informed point of view reveals Gaius' remark as an insight to be appreciated rather than as an insufficiency to be remedied. Curiously, and despite the fact that their topic demands a strong grasp on the gritty mechanics of how organisms in the natural world operate, animal rights advocates tend to be mired in naiveté as to what humans and animals actually are and what they do. Moreover, animal rights advocates seem to be plainly befuddled as to how both sets of entities came to separate out of a mutual past. Animal rights advocates' concept of animal life and development is fundamentally inconsistent with modern scientific knowledge.<sup>16</sup>

Nonscientific detritus—in particular, political or religious agendas—should not, but do, infect discussions as to what animals are, how animals are treated, and the logic of what laws and rules should apply to them. It is unfortunate that the animal rights movement seeks to impose such a nonscientific framework on what would otherwise be a wise and workable structure of rules centering around animal ownership as a function of personal property rules, animal owners as responsible under tort law, and animal conveyances as mediated by the principles of contract.

The animal rights movement suffers from two basic failures. First, Part II of this article discusses the movement's disregard for the classification *Animalia* and the resulting inconsistent views about what animals are. Part II also addresses the movement's failure to acknowledge that the distinctions between humans and all other animals affect the development and characterization of legal rights. Second, Part III of this article discusses the movement's failure to recognize how the law operates to define legal rights and make those rights useful. Finally, Part IV concludes that the movement's efforts to obtain legal rights for animals may, in effect, leave animals more exposed by undermining the legal mechanisms that currently provide them some measure of protection.

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524–27 (Susan J. Armstrong & Richard G. Botzler eds., Routledge 2006) (detailing harm to and unrecognized needs of service animals, arising from the conflict between human use of an animal and the subsequent prevention of the animal from satisfying its own needs).

<sup>15</sup> See Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. Rev. of Biology 35, 39 (Mar. 1971) (presenting a scientific model for interspecies altruistic behavior as favored by natural selection because such behavior will benefit the organism performing it).

<sup>16</sup> See e.g. Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* 8 (Perseus Bks. 2002) (professing anecdotal evidence to be “deeply anchored in scientific fact”); *id.* at 38–39 (advocating for a presumption of animal autonomy where facts are uncertain).

## II. BEWILDERED BY BIOLOGY: A FAILURE TO ACCEPT WHAT TRULY CONSTITUTES AN ANIMAL

The animal rights movement has failed to be scientific in the standard and valuable sense of determining whether “a finite set of relevant data [is] ‘in accord with’ the hypothesis and thus constitute[s] confirming evidence for it.”<sup>17</sup> Similarly, the movement has failed to then recognize “that the purpose of scientific inquiry is to provide a good justification for believing either that [a hypothesis] is true or that it is false.”<sup>18</sup> For engaging in a topic that demands a clear understanding of a large and complicated component of the natural world, the animal rights movement has persistently displayed an embarrassing lack of adherence to the rigors of the scientific method or to the constraints of scientific analysis about what animals are in general.<sup>19</sup> Anthropomorphism is regularly substituted in place of taxonomy, such that the parameters within which animal rights movement adherents talk about and address animals are essentially undisciplined about—and often inconsistent with—what is actually known about animals.<sup>20</sup>

An ignorance of the taxonomic classification of the members of the kingdom *Animalia* results in advocacy and writings by animal rights activists almost exclusively about mammals alone, and a small percentage of mammals at that. An ignorance of the internal (i.e., anatomical and physiological) composition of animals results in a basic lack of appreciation for the intimate relations between animal function and form, and how organismal organization tracks phyletic organization. An ignorance of the evolutionary development of the various taxa within *Animalia* results in a disregard for the complex branching of the *Animalia* lineage into its variously organized classes, orders, families, and genera. This, in turn, results in soapy tubfuls of non-scientific nonsense, such as: “we are not all that far removed from our animal ancestry”; penguins are “our Antarctic cousins”; “dogs make great fathers to human cubs”; animals are “distant kin” and “animal parents”; humans have a “deep psychological kinship” with wolves.”<sup>21</sup>

The consequences of such ignorance are stark. The sciences of anatomy, taxonomy, organismal evolution, and cladistics are fluid and rich fields of inquiry and are self-constrained by the intellectual rigor of actual laboratory research and peer-reviewed publication. These sci-

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<sup>17</sup> Carl G. Hempel, *Aspects of Scientific Explanation and Other Essays*, in *The Philosophy of Science* 4 (The Free Press 1965).

<sup>18</sup> Ronald N. Giere, *Understanding Scientific Reasoning* 32 (2d ed., CBS College Publ. 1984) (emphasis deleted).

<sup>19</sup> Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* 151–66 (Temple U. Press 2000).

<sup>20</sup> See Bernard E. Rollin, *Scientific Ideology, Anthropomorphism, Anecdote, and Ethics*, in *The Animal Ethics Reader*, supra n. 14, at 67, 70 (declaring a need to use “ordinary empathic experiences” of animals’ lives in order to address questions about them).

<sup>21</sup> See generally e.g. Alfred Sherwood Romer, *Vertebrate Paleontology* 1–14 (3d ed., U. Chi. Press 1966) (giving examples of animal classifications and genetics research in the sciences, specifically regarding vertebrates).

ences reflect the current state of knowledge about complex phylogenies, genetic and developmental links, and the passing of physical and physiological traits between interbreeding animals over time.<sup>22</sup> In contrast, animal rights rhetoric is static and intellectually impoverished. Unconstrained by the need to rely on laboratory, fieldwork, or museum research or studies, animal rights rhetoric is a product of a disconnected set of random filtrations through the sieves of each author's individual prejudice, private guilt, moral imperative, religious preference, personal anecdote, selective statistics, or childhood fantasy.<sup>23</sup>

The animal rights movement's inconsistency about what animals truly are can be divided into two polar aspects. One aspect is a refusal to address all members of the entire *Animalia* kingdom, to account for every animal. It is unwillingness, in other words, to lump the earthworm in with the elephant in a bold discussion about how all animals have or deserve to have rights.<sup>24</sup> The second aspect is the related failure to account for the fundamental distinction between humans and all other animals, in other words, it is a failure to remove from the group the one animal species, *Homo sapiens*, which is evolutionarily distinct.

#### A. *The Distinction Between Certain Animals in the Kingdom Animalia*

Animal rights advocates such as Peter Singer subjectively pick and choose among animals and separate those animals deserving of rights from those animals which are too unfamiliar, too unattractive, or just too poorly viewed to merit the application of rights.<sup>25</sup> For instance, Singer identified animals most worthy of rights as "nonhuman animals [that] appear to be rational and self-conscious beings, conceiving themselves as distinct beings with a past and a future."<sup>26</sup> To the extent that such resoundingly nonscientific criteria are used to identify useful distinctions in a supposedly scientific grouping, the winners of Singer's lottery are mostly mid- to large-sized mammals, either the larger primates or more familiar cetaceans.<sup>27</sup>

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<sup>22</sup> Jeffrey Moussaieff Masson, *The Emperor's Embrace: Reflections on Animal Families and Fatherhood* 6, 27, 45, 55, 57 (Pocket Bks. 1999).

<sup>23</sup> See generally e.g. Francione, *supra* n. 19, at 151–66 (using unscientific methods to support an animal rights agenda).

<sup>24</sup> See Marc Bekoff, *Deep Ethology, Animal Rights, and The Great Ape/Animal Project: Resisting Speciesism and Expanding the Community of Equals*, in *The Animal Ethics Reader*, *supra* n. 14, at 119–23 (proposing that all animals should be afforded the same rights).

<sup>25</sup> See generally e.g. Francione *supra* n. 19, at 6–7 (comparing sentient animals and their feelings to human feelings); Peter Singer, *Practical Ethics* 103 (Cambridge U. Press 1979) (arguing for protection of animals such as "apes, whales, and dolphins" and maybe "monkeys, dogs and cats, pigs, seals, and bears").

<sup>26</sup> Singer, *supra* n. 25, at 103.

<sup>27</sup> *Id.*; Bekoff, *supra* n. 24, at 119; Mary Midgley, *Is a Dolphin a Person?*, in *The Animal Ethics Reader*, *supra* n. 14, at 166–74.

Writers such as Singer do not engage the term “animal” but toy with the term “person.” The resulting classifications shoehorn the more aesthetically appealing apes and marine mammals into a “personhood” category, and this category is manipulated rhetorically to such a degree that “person” is devoid of any real meaning.<sup>28</sup> For Singer, possessors of rationality and self-consciousness (or at least of their sporadic appearance) are rewarded with legal rights because humans are rational and self-conscious.<sup>29</sup> This argument is supported by the underlying idea that anything similar to humans should also get rights resembling those of humans. However, this assertion is neither law nor science but is instead an appeal to a casual and prejudicial belief system called anthropomorphism.<sup>30</sup> Animal rights advocates regularly present this prejudice in place of anatomy, taxonomy, or biology to explain animal acts and relationships.<sup>31</sup> The overall result is that earthworms are ignored and apes are celebrated. Yet, other than the subjective appeal that complicated central nervous systems and their emergent sensory epiphenomenon seem to have to some lay people, an answer is still needed as to what is either the logical or scientific reason that earthworms (simple, senseless, and irrational though they may be, yet animals they most certainly are) are left out in the legal cold.

This earthworm omission problem necessarily forms part of the intellectual landscape on which the animal rights argument rests, and the exclusion of animals with simple nervous systems from rights related arguments has the effect of eroding the terrain precariously toward meaninglessness because of the advocates’ refusal to account for *every* animal. Only a slight semantic shift may cause the argument to border on logical absurdity, such as with this plea for universal inclusion:

In order to make a case for “animal rights,” some philosophers, lawyers, ethologists, and others are eager to demonstrate that other nonhuman species have some degree of humanlike self-awareness. Such an approach in the final analysis is humanocentric and “species-bound” since it assumes that only humanlike (or suprahuman) beings are worthy of being accorded rights. Surely all living creatures of creation, by virtue of their existence and being an integral part of the interdependent whole which constitutes the biosphere, have the basic right to exist, live, reproduce and fully actual-

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<sup>28</sup> See generally e.g. Michael P.T. Leahy, *Against Liberation: Putting Animals in Perspective* 24–26 (Routledge Press 1991) (analyzing Singer’s distinctions between personhood and non-personhood in animals).

<sup>29</sup> Singer, *supra* n. 25, at 68.

<sup>30</sup> Stewart Guthrie, *Anthropomorphism: A Definition and a Theory*, in *Anthropomorphism, Anecdotes, and Animals* 51–53 (Robert W. Mitchell & Nicholas S. Thompson eds., St. U. N.Y. Press 1997).

<sup>31</sup> See generally e.g. John B. Cobb, Jr., *Beyond Anthropocentrism in Ethics and Religion*, in *On the Fifth Day: Animal Rights & Human Ethics* 137–53 (Richard Knowled Morris & Michael W. Fox eds., Acropolis Bks. Ltd. 1976) (ruminating on consciousness, ethics and religion in relationship to human and animal rights, and proposing an anthropomorphic view versus an anthropocentric view).



ize their natural potentials (within the natural constraints of ecological harmony rather than under the constraining forces of human dominion).<sup>32</sup>

If rights are to be accorded to “all living creatures of creation, by virtue of their existence and being . . . part of the biosphere,”<sup>33</sup> the scientific classification *Animalia* is instantly drained of any academic or linguistic meaning and merely becomes a convenient, but content empty, term on which to drape the implementation of a moral, not legal or scientific, policy. Even more problematic, such a moral position presents an irrational and unworkable moral policy. Its religious phraseology aside, the phrase “all living creatures” delineates a massive group to which one billion squared members belong, with barely a single valuable distinction to divulge between a blue whale and a dust mite.<sup>34</sup> The massiveness of this group presents a practical application problem that would make the determination of war crime reparations seem, in comparison, like county fair pie judging.<sup>35</sup>

### B. *The Distinction Between Humans and All Other Animals*

The second inconsistency within the animal rights movement’s disregard of the taxonomic classification of *Animalia* is that animal rights advocates generally do not acknowledge that distinctions—which affect the development and characterization of legal rights—do exist between humans and all other animals; they are distinctions that ground the significance of a legal right as something that can apply only to humans.<sup>36</sup> Advocates are unwilling to accept that, while non-human animals can certainly accomplish extraordinary tasks without recourse to the conscious thought that arises from language,<sup>37</sup> the manner of thought that produces language appears only in humans. Advocates disagree that language forms a critical dividing line between rights-holders and non-rights-holders.<sup>38</sup> They dislike the idea that rights are embodied in some form of linguistic expression.<sup>39</sup> In another sense, they disagree that to have a right means to be responsible for one’s actions and an entity incapable of accepting responsibility, like a child or animal, can be accorded only protections, not rights.<sup>40</sup>

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<sup>32</sup> Michael W. Fox, *Species Identity and Self-awareness: Some Ethical and Philosophical Issues*, in *Species Identity and Attachment: A Phylogenic Evaluation* 347, 351 (M. Aaron Roy ed., Garland STPM Press 1980).

<sup>33</sup> *Id.*

<sup>34</sup> See Claus Nielsen, *Animal Evolution: Interrelationships of the Living Phyla* 6 (Oxford U. Press 1995) (outlining a cladistic analysis encompassing all the phyla in *Animalia* and tracing taxonomic characters to their evolutionary origins).

<sup>35</sup> *Id.*

<sup>36</sup> *Supra* n. 3.

<sup>37</sup> Midgley, *supra* n. 27, at 166–74.

<sup>38</sup> *Id.* at 169.

<sup>39</sup> Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* 158–62 (Perseus Bks. 2000).

<sup>40</sup> See Tom Regan, *The Case For Animal Rights*, in *The Animal Ethics Reader*, *supra* n. 14, at 17–21 (discussing the principle of “moral patients,” both animal and human,

Perhaps the advocates dislike that the difference between a right and a protection is significant because the former requires an entity to make its own decisions, while the latter requires someone to make decisions for another. Indeed, the idea of empirically proving the existence of independent decision-making among animals is a nightmare from which animal rights advocates seem desperate to wake.

Animal rights advocates especially dislike that humans make the decisions on which law is founded because humans can distinguish between right and wrong in a moral sense, and can do so solely because language enables it.<sup>41</sup> The basic ability to communicate—an activity in which even unremarkable non-rights-holders such as car alarms and toaster ovens frequently engage—is far below the rich and complex activity of true human language.<sup>42</sup> To get past this hurdle, rights advocates may toy with the terms “language” and “communication,” but ultimately cannot surmount the extensive observation-based scientific evidence about the massive evolutionary difference between the two terms.<sup>43</sup>

Nonetheless, it remains undeniably true that the requisite manner of thought required for language in animals is simply absent in nonhuman animals.<sup>44</sup> That absence, in turn, draws a critical dividing line that, while it cannot logically be denied, *is* denied:

All non-human animals are constrained by the tools that nature has bequeathed them through natural selection. They are incapable of striving towards truth; they simply absorb information, and behave in ways useful for their survival. Both their knowledge of the world, and their behavior towards it, has been largely preselected by evolution. . . . Language, in other words, helps turn humans into conscious agents: individuals with distinct personalities and abilities who only ‘realise’ themselves through their interactions with each other, and with the social and natural world. Humans are individual personalities, but they are equally social beings.

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who may lack prerequisites (i.e. language) enabling them to control their own behavior in ways that would make them morally accountable for their actions).

<sup>41</sup> See R.G. Frey, *Rights, Interests, Desires and Beliefs*, in *The Animal Ethics Reader*, *supra* n. 14, at 50–53 (“Animals do not have desires, because having desires requires the having of beliefs. Beliefs require that the creature be able to distinguish between true and false beliefs, and for this distinction language is required.”).

<sup>42</sup> Stephen Anderson, *Doctor Dolittle’s Delusion* (Yale U. Press 2004); see also Michael Bright, *Animal Language* 233–34 (B.B.C. 1984) (recognizing that animal communication does not utilize complicated series of symbols).

<sup>43</sup> See generally Steven Pinker, *The Language Instinct* 366–69 (Harper Perennial 1995) (noting the distinction between non-human animal communication and adult human language and asserting that adult human language is the product of evolutionary pressures); Kenan Malik, *Man, Beast, and Zombie: What Science Can and Cannot Tell Us About Human Nature* 349 (Weidenfeld & Nicolson 2000) (“All non-human animals are constrained by the tools that nature has bequeathed them . . . [t]hey are incapable of striving toward truth . . . their knowledge of the world . . . has been largely preselected by evolution.”).

<sup>44</sup> Malik, *supra* n. 43, at 350 (arguing language makes humans “conscious agents” able to realize their personhood through interactions with each other and their environment).

Animals are neither truly individual, nor truly social. They are not truly individual because, while they may have distinct personalities, they lack the capacity to take individual responsibility. They are not truly social because while they may live within groups, those groups cannot take collective decisions (whether conscious or unconscious) to transform themselves.<sup>45</sup>

Symbolic thought—as a biologically evolved process that has occurred in humans alone—takes humans from their past as simply another genera of mid-sized Neolithic primate, and into a new life as uniquely social creatures.<sup>46</sup> We have moved from wilderness to metropolis in a breathlessly short span of time, and language, not simply communication, has enabled us to make that journey.<sup>47</sup> In assessing language, rights advocates' ignorance of the rigorous application of linguistic and behavioral studies transforms what could be a healthy recognition of the limits of objective observations about the conduct of animals in nature and captivity, into subjective accounts of animal behavior.<sup>48</sup> For instance, compare the following two passages, the first a snippet of impersonal scientific restraint, the second an imaginary conversational exchange projected by the author onto his dog:

[I]t is not always easy to decide what counts as communication in animals. As one researcher notes, "Students of animal behaviour have often noted the extreme difficulty of restricting the notion of communication to anything less than every potential interaction between an organism and its environment." So that, at the very least, sticklebacks mating, cats spitting, and rabbits thumping their back legs must be taken into consideration[—]and it isn't at all clear where to stop. . . . There is no way yet in which we can be sure about making the right decision when it comes to interpreting such a phenomenon.<sup>49</sup>

I love dogs; it has always been clear to me that they lead extremely intense emotional lives. "No, Misha, no walk just now." *What?* The ears would cock. *Can I have heard right?* "Sorry, Misha, but no." Unmistakable. The ears flop. Misha would throw himself onto the floor. There was no mistaking the pure disappointment he was feeling. Just as unmistakable was his intense joy when I would say, "Okay, get your leash, we're going for a walk," and the sheer pleasure Misha felt on his walks, his delight at racing ahead,

<sup>45</sup> *Id.* at 349.

<sup>46</sup> Phyllis Dolhinow, *Tactics of Primate Immaturity*, in *Man and Beast Revisited* 146–49 (Micheal H. Robinson & Lionel Tiger eds., Smithsonian Instn. Press 1991); Hockett & Ascher, *supra* n. 3, at 135.

<sup>47</sup> Hockett & Ascher, *supra* n. 3, at 135 (discussing how our ancestors acquired language through steps and stages but these drastic changes "can validly be regarded as 'sudden' in view of the tens of millions of years of mammalian history that preceded them").

<sup>48</sup> See Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* xvi–xvii (Delacorte Press 1995) (arguing that many animals must have emotional lives, based on the personal experiences of people who train and work with animals).

<sup>49</sup> Jean Aitchison, *The Articulate Mammal: An Introduction to Psycholinguistics* 25–26 (4th ed., Routledge Press 1998) (internal citation omitted).

chasing leaves, doubling back, tearing off into the forest and returning behind and ahead of me.<sup>50</sup>

While the second passage simply shares the author's opinion in a wish-fulfillment fantasy, the first passage instead posits a healthy caution about research goals on, and legitimate knowledge of, the meaning of an animal's conduct.<sup>51</sup> In their conjunction, the two passages create a forceful reminder that behavioral and ecological interactions between animals can be incredibly sophisticated, and disentangling their myriad influences has occupied field scientists for the better part of three centuries, with no end in sight. In their contrast, the two passages reflect the fact that most animal behavior explanations are not understood or appreciated by animal rights advocates.

Animal rights activists glance askew at research and translate the science actually being done into an unworkable grouping of moral concerns, shifting the attention from the science itself to the treatment of certain animals by scientists.<sup>52</sup> For instance, this focus may concern chimpanzees in captivity, the impacts on biodiversity by industry, modern farming technologies creating inroads in natural environments, or the subjugation or reintroduction of captive wildlife by field biologists.<sup>53</sup> Yet, activists themselves fail to engage in scientific inquiry, or look further than the last decade of nature writing and personal opinion on what it all means.<sup>54</sup> Proposals that rights for animals

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<sup>50</sup> Masson & McCarthy, *supra* n. 48, at xvi–ii.

<sup>51</sup> See e.g. Sara J. Shettleworth, *Constraints on Learning*, in *Advances in the Study of Behavior* 1, 4, 58 (Daniel S. Lehrman et al. eds., 1972) (positing “important limitations on what and how animals learn”).

<sup>52</sup> Andrew N. Rowan, *The Use of Animals in Experimentation: An Examination of the “Technical” Arguments Used to Criticize the Practice*, in *Animal Rights: The Changing Debate* 104–22 (Robert Garner ed., N.Y.U. Press 1996) (assessing some of the history and case studies on critiques of animal experimentation).

<sup>53</sup> See Michael Fox, *To Farm Without Harm and Choosing a Humane Diet: The Bioethics of Humane Sustainable Agriculture*, in *Animal Rights: The Changing Debate*, *supra* n. 52, at 92–103 (arguing that socioeconomic, environmental, and ethical concerns should mandate an end to intensive factory farming).

<sup>54</sup> The following is an example of two very different writers both examining insect intelligence. First, an animal rights advocate's speculative single sentence conclusion that honeybees must be given legal rights since they are sentient, wherein the author's sole authority is a personal communication with a psychologist: “Do their tiny brains produce sentience? Apparently so.” Wise, *supra* n. 16, at 81. Second, an evolutionary biologist's well-supported explanation of how the rigors of the scientific method might generate answers about insect interactions using, as his example, co-evolutionary behaviors of wasps and figs:

Much of the deciphering of the wasp-pollination story would simply have involved slicing figs open and looking inside. But “looking” gives too laid-back an impression. It wasn't a passive gawping but a carefully planned recording session yielding numbers to be fed into calculations. Don't just pluck figs and slice them. Systematically sample figs from a large number of trees, from particular heights, and at particular seasons of the year. Don't just stare at the wasps wriggling inside: identify them, photograph them, accurately draw them, count them and measure them. Classify them by species, sex, age and location in the fig. Send specimens to museums for identification by detailed comparison with internation-

might remedy this deficiency tend to arise from authors who do not consider scientific journals and research studies on animal behavior.

### III. BEWILDERED BY LAW: A FAILURE TO ACCEPT WHAT TRULY CONSTITUTES A “RIGHT”

Once again, the animal rights movement needs to address two basic failures. The second of these is a failure to adhere to the parameters within which law operates to define rights and make those rights useful.

The legal rights that society considers fundamental are considered such not simply because they implicate deeply personal and private considerations, but because they have been identified as “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>55</sup>

Fundamental legal rights are, therefore, both *historically* derived intellectual concepts, as well as *prehistorically* derived cognitive artifacts.<sup>56</sup> Even ignoring personal privacy and personal autonomy—areas that seem fundamental but are not—any basic right to liberty is denominated a right only as a result of legal actions taken over time, which slowly assign a value to liberty that only became apparent over time and because of historical events.<sup>57</sup> Because the concept of legal rights for animals lacks the history, tradition, and perceived value underpinning human legal rights, animals have no legal rights.<sup>58</sup>

Nevertheless, a call to respect the rights of animals similar to the respect accorded the rights of humans has resounded through the voices and actions of animal rights authors and activists ever since Singer made the assertion thirty years ago.<sup>59</sup> Singer and adherents to his philosophy have consistently discounted the law’s acknowledgment that a discussion of rights concerns matters that are basic to a human

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ally recognized standards. But don’t make measurements and counts indiscriminately just for the sake of it. Make them in the service of testing stated hypotheses. And when you look to see if your counts and measurements fit the expectations of your hypothesis, be aware, in calculated detail, how likely it is that your results could have been obtained by chance and mean nothing.

Richard Dawkins, *Climbing Mount Improbable* 308 (W.W. Norton & Co. 1996).

<sup>55</sup> *Williams v. Atty. Gen. of Ala.*, 378 F.3d 1232, 1235 (11th Cir. 2004).

<sup>56</sup> See e.g. James B. Reichmann, *Evolution, Animal “Rights,” & the Environment* 256–63 (Catholic U. of Am. Press 2000) (discussing Aquinas’ view that rights and duties reside within those of an intellectual or rational nature and therefore animals are not legitimate subjects of rights because they are not intellective, self-appropriating, or self-determining).

<sup>57</sup> *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997) (Only fundamental rights and liberties “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” are entitled to substantive due process protection).

<sup>58</sup> See e.g. *Kihlstadius v. Nodaway Veterinary Clinic*, 697 F. Supp. 1087 (W.D. Mo. 1988) (albeit more specifically than legal rights generally, holding that dogs do not have civil rights).

<sup>59</sup> Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* 1–28 (Random House 1975).

conception of justice, which defines a community sense of fair play.<sup>60</sup> It seems to matter little to animal rights advocates that animals do not have a concept of “justice” or of “fair play” at all, much less a communal one.<sup>61</sup> This requisite “collective conscience” is, embarrassingly enough, missing.<sup>62</sup> In omitting the need to first show a sense of justice, fair play, or social conscience, Singer and adherents to his philosophy also discount the corollary, that to have a right means also to be responsible for one’s actions.<sup>63</sup> It is for that very reason that an entity incapable of accepting responsibility, such as a child, can be accorded protection, and only certain restrictive rights.<sup>64</sup> A right requires the entity to make personal conscientious decisions, while common law and statutory protections require rights-holders to make conscientious decisions for another.<sup>65</sup> Once again, the effect of language is absolutely key here: Humans, as rights-holders, make conscientious decisions because we can distinguish between right and wrong in a moral sense, and we can do that because of language. In contrast, the generic ability to communicate does not rise to the requisite level. This difference—between language specifically and communication generally—is immense:

Animals use communication in a fashion that appears to seek influence over the behavior of others, but not the thoughts or knowledge of others. Humans, by contrast, from infancy show an understanding that other humans have minds that work roughly the same way their own do, and whose knowledge can be altered by words and actions.<sup>66</sup>

Animal rights advocates earnestly but mistakenly believe that rights are disconnected from duties, but only for animals other than

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<sup>60</sup> *State v. Amini*, 175 Or. App. 370 (Or. App. 2001); see also *Dowling v. U.S.*, 493 U.S. 342, 353 (1990) (stating that principles of fundamental fairness, aside from those in the Bill of Rights, are narrow in scope and concern matters basic to ideas of justice, which define community sense of fair play, such that a failure to protect the principles in a case would deprive a defendant of a fair trial).

<sup>61</sup> See e.g. Francione, *supra* n. 19, at 123 (claiming that many people also lack a sense of social justice).

<sup>62</sup> Cf. *Smith v. State*, 6 S.W.3d 512, 517 (Tenn. Crim. App. 1999) (affirming dismissal of defendant’s petition for post-conviction relief because defendant had no fundamental right to engage in incest, the court reasoned that a right not logically deduced from the Constitution can be sought in the “collective conscience of our people” to determine if it is fundamental); *King v. S. Jersey Nat. Bank*, 66 N.J. 161, 179 (1974) (affirming summary judgment for a car dealer because a car buyer’s option not to pay and dealer’s option to retrieve the car involved no breach of fundamental right, but was instead a private contractual relationship in which the court must not interfere or risk encroaching on that fundamental right by removing traditional freedom to contract).

<sup>63</sup> *Williams*, 378 F.3d at 1239.

<sup>64</sup> *Doe v. Irwin*, 441 F. Supp. 1247 (W.D. Mich. 1977) (recognizing that many rights fundamental to adults depend upon the capacity of the person seeking to exercise those rights and may be denied in certain instances to minors).

<sup>65</sup> Reichmann, *supra* n. 56, at 261, 270.

<sup>66</sup> Stephen Budiansky, *If A Lion Could Talk: Animal Intelligence and the Evolution of Consciousness* 161 (The Free Press 1998).

humans.<sup>67</sup> Somehow, humans are required to fulfill duties to respect the rights of animals to life and freedom (from human-induced pain and confinement), but animals are not required to reciprocate with similar duties.<sup>68</sup> This inequity is a strong reflection of the movement's misconstruction of "rights." If the animal rights movement wishes rights to be accorded to "all living creatures of creation, by virtue of their existence and being . . . part of the biosphere," then not just animals, but "rights" as well, become illusory objects.<sup>69</sup> Rights become as amorphous and ethereal as do "creatures," as objects determined to exist by the sheer force of the beholder's desire for their existence.

In subverting any rational employment of those terms, the animal rights movement must account for fostering such philosophical monstrosities as Illinois' *Humane Care For Animals Act*, which defines "animal" as "every living creature, domestic or wild, but does not include man."<sup>70</sup> Subsequent to challenge, an Illinois appellate court in *People v. Shanklin* applied the definition to a criminal defendant's acts of cruelty to an animal "regardless of the type of animal."<sup>71</sup> *Shanklin* thereby set a path for applying unscientific terminology (using the non-scientific phrase "type of animal") that brooks no logical obstacle to protecting every ant and worm within the geographical boundaries of the entire state of Illinois. In a world in which trial courts are now unblinkingly upholding cruelty convictions for killing a goldfish,<sup>72</sup> the time seems overripe for holding the animal rights movement hard to task for jettisoning good science in favor of bad politics. A renewed theme of restraint in effectuating workable animal welfare may be made meaningful by starting with a bracing dose of biological reality.

First, a law that criminalizes the intentional destruction of "every living creature" would paralyze the most basic human social activities just as surely as a law that prohibits eating, walking, or sleeping indoors. It is not just that applying the law of *Shanklin* to the real world would instantly have everybody in jail for the horrific murders of innumerable ants, mosquitoes, and spiders. It is that the liberty and ownership rights of the entire populace would be impaired. Additionally, the agriculture, hunting, farming, recreation, and construction industries on which humans rely would be eviscerated if litigators strained the microcosm of all social and biological relations through the ludicrous sieve of *Shanklin*.

Even worse, true animal welfare (in the sense of the welfare of *all* animals) would easily be as contravened as it would be advanced by rigorous application of a rule such as that in *Shanklin*: For each insect

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<sup>67</sup> Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life*, in *Animal Rights: Current Debates and New Directions* 285 (Sunstein & Nussbaum eds., Oxford U. Press 2004).

<sup>68</sup> *Id.*

<sup>69</sup> Fox, *supra* n. 32, at 351.

<sup>70</sup> 510 Ill. Comp. Stat. 70/2.01 (1973).

<sup>71</sup> *People v. Shanklin*, 329 Ill. App. 3d 1144, 1147 (Ill. App. 4th Dist. 2002).

<sup>72</sup> *People v. Garcia*, 812 N.Y.S.2d 66, 69 (N.Y. App. Div. 1st Dept. 2006).

“saved,” some bird or fish’s next meal must be placed in jeopardy, and for each mid-level feeder deprived by human intervention, some higher level member of the trophic pyramid must go hungry as well. In that sense, the rule in *Shanklin* merely substitutes one animal’s problem for another’s. In addition, the rule in *Shanklin* turns a dangerously blind eye to the relativistic nature of law—the fact that every law in some way impacts another, such that until choices are made as to which animal should be more protected, the protection of all starts to sound as nonsensical as the protection of none.

More importantly, however, the rule in *Shanklin* ignores the millennia-long development of (and historically agreed-upon reliance on) rules about “owning” some pieces of the world to the exclusion of other pieces—and it does so at a legal price. Unless and until humans commit to dismantling *all* of property and contract laws, the protection of *all* animals both as property and as objects of contract saves “animals” only at the expense of destroying the concept of “welfare” itself.

Animal rights advocates’ beliefs about the necessity of granting rights tend to spring from two axioms: Freedom confers greater happiness and less suffering on animals than does encroachment, and animal happiness trumps any interests humans might have in curtailing that happiness.<sup>73</sup> The idea that animal happiness is a function of freedom, which is a distinctly human-oriented concept,<sup>74</sup> is itself a non sequitur. The idea that animals would be happier if they were more free is as illogical as the idea that animals would be better artists if they had opposable thumbs. Opposable thumbs being a hallmark of primate anatomy, and artistic appreciation being a hallmark of human culture, the only animals that have opposable thumbs *and* an appreciation for art happen—not by chance, but by definition—to be humans.<sup>75</sup> The same goes with concepts such as freedom. The only animals that could appreciate what “freedom” is, are those who “happen” to have the ability to conceive of the concept of freedom in the first place:

Rights and duties, then, are corollaries of freedom, and all those who are the subjects of rights are persons, for a person is “whatever subsists in an intellectual or rational nature.” It is because the nonhuman animal does not have an intellective or rational nature that it is not a person and cannot, therefore, be considered the subject of rights. To apply the term “person” to the nonhuman animal, as Singer and others do, on the basis of its being conscious, is to play word games, since it undermines the true, authentic meaning of personhood and of consciousness. If a living thing is a

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<sup>73</sup> See e.g. Bernard E. Rollin, *Animal Rights and Human Morality* 70 (Prometheus Bks. 1992) (“It would also seem to be clearly wrong for us to take an animal that was by nature free-roaming . . . and condition it to prefer living in a tiny cage and to abhor or fear open space.”).

<sup>74</sup> Reichmann, *supra* n. 56, at 258, 260–61.

<sup>75</sup> Paul R. Ehrlich, *Human Nature: Genes, Cultures, and the Human Prospect* 221–24 (Is. Press 2000) (“[L]anguage and art, because of their shared symbolism and iconicity, require similar mental gymnastics to use and appreciate.”).



person simply because it possesses sensory consciousness, then there is little point in referring either to animals or to humans as “persons” in the first place, since “person” would add absolutely nothing not already contained in the term “animal.”<sup>76</sup>

Semantic competitiveness often reflects a secret need to promote a biased viewpoint, and nowhere is that bias or subjectivity more transparent than where animal rights advocates argue from the basis of what should be straightforward and objective analyses of the natural world. In that arena, the abuse of linguistic terms is minor in comparison to the abuse of field studies. For one thing, unless forcibly reminded of the cruelty inherent in nature, animal rights advocates tend to heavily romanticize both wildlife as well as life in the wild.<sup>77</sup> They blind themselves to the fact that animals in the wild are not free at all, but are prisoners of space and time.<sup>78</sup>

It is crucial to animal rights advocates’ general theme that they deliberately overlook that evolution shaped the wild with abusive, cruel, predatory, and destructive activities through natural selection. While observations of the natural world can certainly be ignored over the short term, the truths they convey cannot ultimately be eluded over the long term. It cannot be denied that animals, whether in the wild or in enclosed environments, must live through a constant bevy of unavoidably vicious experiences: microscopic predators erode them; parasites weaken them; vegetation restricts them; substrates degrade them; other animals pirate their resources; toxins invade them; hunger shadows them; their abiotic physical environment strains them; their biotic organic environment burdens them; and conspecifics, kin, and potential mates exploit them.<sup>79</sup>

Through evolutionary processes, the natural world is an environment in which competition for resources makes life unrelentingly harsh and terminate early. It brooks no permanent relief from pain and decay. The careless and intentional acts of other living things, in trying to keep their own bodies alive, are regularly the cause of each trouble encountered.<sup>80</sup> An artificial enclosure such as a home, zoo, lab-

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<sup>76</sup> Reichmann, *supra* n. 56, at 261 (internal citation omitted).

<sup>77</sup> See e.g. Bart Gruzalski, *The Case Against Raising and Killing Animals for Food*, in *Ethics and Animals* 254–55 (Harlan B. Miller & William H. Williams eds., Humana Press 1983) (“[A]nimals in the wild do not have to experience the frustrations and anxiety of confinement or the terror of waiting passively ‘in line’ to be killed.”).

<sup>78</sup> David Hancocks, *A Different Nature: The Paradoxical World of Zoos and Their Uncertain Future* 55–56 (U. Cal. Press 2001).

<sup>79</sup> As one author observed:

Biological studies tell of a world of continual struggle, disease, and stress. . . . The struggle between species is a grim reality of the world, and the evolutionary advantages that led to the “domestic alliance,” Coppinger’s term for the ecological relationship between man and domesticated animals, underscore some genuine improvements in the lives of species that cast their lot with man’s.

Stephen Budiansky, *The Covenant of the Wild* 133–45 (Yale U. Press 1992).

<sup>80</sup> *Id.*

oratory, or kennel, may indeed reduce those impacts or, at worst, perhaps simply replace those impacts with different ones. Whatever the enclosure, opening its door and allowing the animal “to go free” does not send the animal into any more free or favorable environment in any respect worth describing.

The animal rights movement would rather “bowdlerize” evolution by natural selection or nature (often unrealistically defined as animal life outside of human influences) through what science writer Matt Ridley has called “condescending sentimentalism” by “desperately play[ing] up the slimmest of clues to animal virtue . . . and clutch[ing] at straws suggesting that humankind somehow caused aberrant cruelty.”<sup>81</sup> Animal rights advocates work hard to discount the *reduction* of the natural horrors that captivity, farming, and ranching has effected on animals. They prefer instead to trumpet the benefits that freedom has brought to humans and then apply the false syllogism that those benefits are readily translatable to animals. In doing so, they mistake what life is like for an animal who is “truly free.” This in turn, threatens to expose animals to higher levels of pain and suffering than they currently experience in captivity, on farms, on ranches, and in our homes.<sup>82</sup>

All animals, human and otherwise, are both liberated and constrained by the traits bestowed on them by evolution by natural selection, as well as by the biotic and abiotic environments of which they form an integral part. Because such observations are distasteful to their ultimate political goals, animal rights advocates are inclined to substitute fantasy traits and fantasy environments instead. Illustrative of this approach is a recent passage written by the animal rights advocate Joyce Tischler:

Those of us at the heart of the animal law movement envision a world in which the lives and interests of all sentient beings are respected within the legal system, where companion animals have good, loving homes for a lifetime, where wild animals can live out their natural lives according to their instincts in an environment that supports their needs—a world in which animals are not exploited, terrorized, tortured or controlled to serve frivolous or greedy human purposes. This vision guides in working toward a far more just and truly humane society.<sup>83</sup>

A workable definition of “sentience” or “sentient beings” notwithstanding, one would have to ignore the last hundred and fifty years of accumulated rigorous scientific study of how evolution by natural selection actually works in the natural world to sincerely make such a

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<sup>81</sup> Matt Ridley, *The Origins of Virtue: Human Instincts and the Evolution of Cooperation* 215 (Viking 1996).

<sup>82</sup> See e.g. John R. Campbell & John F. Lasley, *The Science of Animals That Serve Humanity* (3d ed., McGraw-Hill Bk. Co. 1998) (comprehensive analysis of the uses and lives of livestock and farm animals).

<sup>83</sup> Joyce Tischler, *Toward Legal Rights for Other Animals* in *Animal Law: Cases and Materials* 693 (Sonia Waisman, Pamela D. Frasch & Bruce A. Wagman eds., Carolina Academic Press 2006).

plea.<sup>84</sup> A world “in which animals are not exploited, terrorized, tortured or controlled to serve frivolous or greedy human purposes”<sup>85</sup> is an unobtainable, inherently biologically impossible world. Moreover, the world of nature to which Tischler fervently hopes to return animals already *is* a world in which animals *are* “exploited, terrorized, tortured or controlled”<sup>86</sup> to serve the frivolous or greedy purposes of other animals, including conspecifics and kin.

Proponents of legal rights for animals also tend to create nearly insolvable ethical dilemmas in the real world. For example, a quite serious ethical dilemma is created by the double standard that activists apply to prohibitions against animal mistreatment under the weak rubric that “allows” animals to be cruel to each other but prohibits humans from being cruel to animals.<sup>87</sup> If animals are rights-holders, then animal cruelty laws should apply to them. Yet when animal rights activists are confronted with the possibility of truly adjudicating competing rights among all rights-holders as an intrinsically defined group, they falter. They know in their hearts that the lion is not planning on laying down with the lamb any time soon, yet, neither can they imagine having to hold the lion legally accountable for its natural acts invariably involving intentional violations of every animal cruelty law ever imaginable and then some. The activist refuses to make necessary choices: If the lion attacks the human infant and one must choose whom to save, an animal rights position creates an irrational impasse.<sup>88</sup>

Another example of ethical conflict created by the animal rights position is that the entire animal world must be seen to be inherently immoral because the new “rights” will never be respected *between and among* animals other than humans.<sup>89</sup> God help the activist who tries valiantly to hold long onto the argument that it is *morality* that demands legal rights for animals: A basic biology text would stop them absolutely cold at the early chapter describing the major division of all

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<sup>84</sup> See e.g. Daniel Dennett, *Darwin's Dangerous Idea: Evolution and the Meaning of Life* 190 (Simon & Schuster 1995) (a comprehensive analysis of historical and modern scientific support from biological studies for Darwinian evolution).

<sup>85</sup> Tischler, *supra* n. 83, at 693.

<sup>86</sup> *Id.*

<sup>87</sup> See e.g. Rollin *supra* n. 73, at 101 (a survey of theoretical and practical issues raised by modern philosophers related to animals and moral choices).

<sup>88</sup> See Daniel A. Moros, *Taking Duties Seriously: Medical Experimentation, Animal Rights, and Moral Incoherence*, in *Birth to Death: Science and Bioethics* 315 (David C. Thomasma & Thomasine Kushner eds., Cambridge U. Press 1996) (discussing two forms of the claim that animals have rights and the problem of competing rights; when a wolf attacks an infant it is exercising its right to hunt and eat (life) but is also clearly violating another's right to life).

<sup>89</sup> See generally Frans de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* 3 (Harvard U. Press 1996) (discussing the field of cognitive ethology, in terms of whether animals show behavior that parallels the “rules and regulations of human moral conduct”).

life into prokaryotes and eukaryotes.<sup>90</sup> If activists gleaned their information from a college science lesson instead of from a religious tome, they would find that prokaryotes engage in immoral acts: Throughout earth history, prokaryotes have created immense global “crises of starvation, pollution, and extinction”<sup>91</sup> that make human parallels appear trivial in comparison. Prokaryotes destroy other organisms by the great multitude, routinely transfer genetic material freely from individual to individual, fool around with genetic engineering, create “chimeras” at a level that our most ill-advised laboratory technicians could only dream about, and fundamentally alter the biotic and abiotic world in doing so.<sup>92</sup>

Any movement undoubtedly implies at least three basic assumptions: Political power fuels its goals, its goals serve a social good, and its adherents use the political power to become beneficiaries of the power (or alternatively that the movement’s adherents work to help a group of beneficiaries who cannot use the political power themselves). Certainly, the animal rights movement uses political power to fuel its goals, which, similar to religious or political movements, claim to serve a social good.<sup>93</sup> It is a movement blemished by an overly earnest use of vaudeville and almost childish concept of public relations,<sup>94</sup> and a serious susceptibility to market forces affecting all small business operations.<sup>95</sup> A few courts have begrudged some merit to what the

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<sup>90</sup> See Colin Patterson, *Evolution* 125 (2d ed., Cornell U. Press 1999) (Prokaryotes are the most primitive and the most ubiquitous of organisms, single-celled entities with no nuclear membrane and classically exemplified by *E. coli*, the common bacteria of the gut. They were the dominant form of life on the planet for billions of years. Eukaryotes, entities with more complicated cell structure, arrived late in the life game, and include all the multicellular organisms one finds on the planet today.).

<sup>91</sup> Lynn Margulis & Dorion Sagan, *Microcosmos: Four Billion Years of Evolution from Our Microbial Ancestors* 15 (Summit Bks. 1986).

<sup>92</sup> *Id.* at 15–17.

<sup>93</sup> Wesley V. Jamison, Casper Wenk & James V. Parker, *Every Sparrow That Falls: Understanding Animal Rights Activism as Functional Religion*, in *The Animal Ethics Reader*, *supra* n. 14, at 556–62 (arguing that the animal rights movement is like a religion).

<sup>94</sup> In 2006 alone, for instance, animal rights advocates sought public recognition for a) a pet fashion show in California proclaiming that “Animal Law is in Fashion” and awarding prizes to dogs in human costume, b) a court ruling in Philadelphia directing a farm to stop referring to its chickens as “happy and well-treated” but to call them “contented and well-treated” instead, and c) proposed legislation in Connecticut that would remove the definition of an invasive monk parrot species as “invasive.” For more historical shenanigans, see generally James Jasper, *The American Animal Rights Movement*, in *Animal Rights: The Changing Debate*, *supra* n. 52, at 129 (discussing the puzzling nature of animal rights’ position within the political landscape and outlining several recent examples of “outrage”: attaching microscopic trackers to hairs of bees, experimentation with a one cell microbe killing crickets, and mistreatment of rattlesnakes and banana slugs).

<sup>95</sup> See e.g. *In the Matter of Am. Socy. for Prevention of Cruelty to Animals v. Bd. of Trustees of St. U. of N.Y.*, 568 N.Y.S. 2d 631, 635 (N.Y. App. Div. 1991) (“Furthermore, while the humane treatment of animals may well constitute public business, it is firmly established that not every bit of public business constitutes a governmental function.”).

movement hopes to accomplish.<sup>96</sup> In most courts, however, the movement's intellectual rigor has not withstood serious scrutiny.

To the extent that the animal rights movement entangles moral judgments with political agendas and expends energies advancing political causes by appealing to moral outrage, a disciplined application of the rule of law is not really impacted by those types of actions, regardless of the level of their stridency. To the extent that authors and writers in the movement use or abuse specific legal terminology to express their opinions, there is no actual effect on the operation of law in our courts or legislatures, in spite of how vehement are the writers themselves. The integrity of many interlocking legal concepts—property, tort, contract, and constitutional command, is jeopardized only when animal rights activists take on a litigation or legislation role and propose to a fact finder or legislative body that it formally memorialize the proposition that a nonhuman animal should be granted a “right.”

#### IV. CONCLUSION

Immensely lengthy evolutionary processes have slowly, but inexorably, crafted the natural objects known as humans and have invested humans with a remarkable adaptation: The ability to construct and comprehend abstractions called “laws.” Laws are the intellectual concepts produced by language and forged in the fire of intricate social entanglements. In a remarkably short span of geologic time, the ability to use those abstractions has uniquely benefited humans and has allowed humans to inhabit and exploit every imaginable niche on the planet.<sup>97</sup>

Where laws result from humans having developed the unique trick of language and where human rights result from humans having enfolded laws into detailed procedures that require language to accomplish, who else other than humans might reasonably be invited in to warm their hands at that uniquely constructed fire? The cognitive scientist Daniel Dennett, in his book *Kinds of Minds*, envisioned, as a rhetorical device, a “charmed circle” within which might be magically brought all creatures finally recognized to be deserving of human moral and legal protection.<sup>98</sup>

Animal rights activists who embrace definitions such as that found in *Shanklin*, rather than deal with the messier and stickier realities of animals proffered by evolutionary biology, do so because they want Dennett's charmed circle created and expanded—by being codified as law.<sup>99</sup> Forget what science might have to say; what is the harm,

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<sup>96</sup> *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 434 (1995) (“Although we recognize a degree of merit in the animal rights movement, we feel working within the needs and sentiments of the community yield far greater participation and progress.”).

<sup>97</sup> Hockett & Ascher, *supra* n. 3, at 135.

<sup>98</sup> Dennett, *supra* n. 6, at 162.

<sup>99</sup> Wise, *supra* n. 16.

they muse, in simply legislating out an enormous area that encompasses *all* entities, regardless of taxonomic type, economic utility, evolutionary history, or biological interaction?<sup>100</sup>

Theodore Geisel, in a slightly different classic of cognitive reasoning, *The Sneetches*, has already answered one form of that question (in anapestic tetrameter, no less), and did so a little less dreamily. He explained a portion of the inherent logical absurdity in such an expansion: Rules protecting those with stars on their bellies, as well as those without, eventually reveal that the broadest type of protection is often no more than a trap for the logically inconsistent<sup>101</sup>—a ruse in which none are protected and made free, but in which all are instead immobilized and left exposed.

The animal rights movement's laudable goals include, patently enough, protecting the welfare of a few familiar animals. The movement's methods to reach those goals include the promulgation of legislation that penalizes the neglectful, the abusive, and the downright malicious. The movement contributes unevenly to the ongoing public debate over what to do with and about animals.<sup>102</sup> The moment the movement flounders into rights territory, it misapprehends the police power of the state and the protection of the citizenry and exponentially compounds problems by offending the biological understanding of what is an animal. At that moment, the movement's methods immediately outstrip and disserve its goals. The problem is not that the movement's analysis in this area is somehow faulty; the problem is that there is no analysis at all. Tort, property, contract, and ownership laws, respecting the objective value of a smallish amount of animal life at the expense and allowance of the destruction of many other animals, serve law, science, logic, and "animal welfare" far better by embracing the realities and necessities of complex animal-environmental interactions and attending to the welfare of humans through the vehicle of law.

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<sup>100</sup> *Id.*

<sup>101</sup> Theodore Geisel, *The Sneetches and Other Stories* 3 (Random H. 1961).

<sup>102</sup> See *Ouderkirk v. People for Ethical Treatment of Animals, Inc.*, 2007 WL 1035093 (E.D. Mich. Mar. 29, 2007) (in granting defendant's motion for summary judgment the court discussed plaintiff's harassment from the public after People for Ethical Treatment of Animals published an expose on plaintiff's chinchilla farm practices but determined that while plaintiffs have a right to engage in activity for profit, defendants have a right to object publicly).