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Journal

UCLA Women's Law Journal, 14(1)

Author

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Publication Date

2005

DOI

10.5070/L3141017788

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BOOK REVIEW

INTERWOVEN THREADS: SOME THOUGHTS ON PROFESSOR MACKINNON'S *ESSAY OF MICE AND MEN*

Lee Hall¹

I. INTRODUCTION

Animal rights may draw sustenance and power from the feminist movement; and it must. This is so, I submit, for at least three reasons. First, humans overwhelm and make use of other animals in a manner similar to the methods in which humans overwhelm and make use of other humans on account of sex. Second, the modern animal advocacy movement, which seeks to liberate a class of beings oblivious to the legal arguments surrounding that quest, is thus especially susceptible to conciliation with welfare-oriented charity — a form of paternalism which derails its progress. And third, many of the animal advocacy movement's proponents, and the bulk of its rank and file, were and are, according to historical and contemporary wisdom, women. On various levels, then, this movement presumably stands to learn much of value from the feminist movement.

Thus it is felicitous that Catharine MacKinnon has contributed an essay titled "Of Mice and Men: A Feminist Fragment on Animal Rights" to Cass Sunstein and Martha Nussbaum's re-

1. Lee Hall, a member of the Adjunct Faculty of Law at Rutgers-Newark, and legal director for Friends of Animals, Inc., greatly appreciates the time and care devoted by Maxwell O. Chibundu, who read an early draft of this review and suggested key edits. Kathryn Klinedinst and the UCLA Women's Law Journal combined sensitive editing with uncommon efficiency and good cheer. The author also thanks Priscilla Feral for many invaluable discussions about the questions addressed here, and for safeguarding a space in which the best answers can be envisioned.

cently published *Animal Rights*,² shining the spotlight on issues of relevance to (at least) the first two of the three abovementioned points. MacKinnon's central question is whether "missing the misogyny in animal use and abuse" is detrimental to gaining rights for non-human animals.³ I shall argue in this essay that the question merits serious treatment, and that its answer is yes. Understanding the importance of MacKinnon's question will, I submit, play an indispensable role in the way forward to the day when respect transcends species.

Part II of this response addresses Catharine MacKinnon's observation that pornography using non-human bodies, although currently a multimillion-dollar industry, is a topic barely noticed by animal law scholars. Indeed, pornography in general is rarely confronted in ways that would seriously challenge its role in constructing and perpetuating unequal social relationships. At the same time, our culture is largely comfortable thinking that what we do to non-human bodies does not matter, at least if we do it in regular, institutionalized ways. Part II will examine the ways in which human and non-human bodies are consumed, and the interconnections between them.

In Part III of this response, I shall address Professor MacKinnon's observation that "animal rights are poised to develop first for a tiny elite, the direction in which the 'like us' analysis tends."⁴ While the grant of privileges for a few select members of a systematically oppressed group insulates some individuals from experiencing the full force of that oppression, exceptional treatment for the preferred minority within an oppressed class can come at the expense of the progress of the whole. This is likely to occur in an animal advocacy movement that focuses special resources and time on non-human apes and other animals who remind us of ourselves — often to the detriment of animals who seem unlike us.

In Part IV, I shall examine the traditions of breeding and trading other animals as companions, and how those traditions connect with humanity's domination of animals in other ways. While advocates decry the oppression and destruction in egregious abuse cases, they have long avoided the thoughts that lead

2. Catharine A. MacKinnon: *A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 263-76 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

3. *Id.* at 264.

4. *Id.* at 271.

to oppression and destruction. Viewing domestication as a mutual benefit, most advocates bear out MacKinnon's point that the coercive effects of this socially constructed hierarchy become invisible in the same way the effects of the sexual hierarchy do, and that "love and protection" are invoked as if to negate the domination. Unwilling to focus on hierarchy as a central issue, and even willing to attempt to employ domination as a tactic in activism, many activists fail to perceive the myriad and interrelated injustices that become hallmarks of a patriarchal society. On a closely related note, Part V of this essay will consider the ways in which modern animal welfare groups, often employing celebrity spokespeople, encourage benevolence to owned animals by presenting the idea of pet ownership in ostensibly respectful language. In this way they advocate on behalf of domesticated animals without challenging the dominance inherent in the domestication itself.

If there is a way out of the cyclical pattern of domination and benevolence, MacKinnon's "feminist fragment" raises a question of great significance to those hoping to find it. Thus, in Part VI, I shall make an effort to answer Professor MacKinnon's key question with respect to the animals themselves: "what they want from us, if anything other than to be let alone, and what will it take to learn the answer."⁵ Guided by lessons we can derive from agitation against the social hierarchy that implicates every one of us, we can, I believe, define "animal rights" in the best possible way.

II. THE DOMINATOR PARADIGM

We have heard, at least since the days of Aristotle, that some living beings are inferior to those in the classes under whose control they live and move.⁶ Without women, slaves, and animals,

5. *Id.* at 270.

6. Aristotle connected maleness with the soul and political ability; women, foreigners, and animals were, to Aristotle, inferior as the body is to the soul. See Aristotle, *Animals are for Our Use*, in *POLITICAL THEORY AND ANIMAL RIGHTS* 56-57 (Paul A.B. Clarke & Andrew Linzey eds., 1990). Thus, non-human animals function best "under subjection to man" and

. . . so is it naturally with the male and the female; the one is superior, the other inferior; the one governs, the other is governed; and the same rule must necessarily hold good with respect to all mankind. Those men therefore who are as much inferior to others as the body is to the soul, are to be thus disposed of, as the proper use of them is their bodies, in which their excellence consists; and if what I have said be true, they are slaves by nature, and it is advantageous to them to be

the controlling class could not create itself. Or, in MacKinnon's words, "[M]en's debates among themselves over what makes them distinctively human have long revolved around distinctions from women and animals."⁷ MacKinnon adds: "[B]oth women and animals have been status objects to be acquired and paraded by men to raise men's status among men."⁸ The norm is construction of the female as sexual object (dinner companion), and of the non-human as edible (dinner).

The results of confusing this norm and misusing the object, be it woman or non-human, are jarring, usually deemed aberrational, left in the margins where, one hopes, some specialist will come along to construe such weird incidents. But pausing to inspect crossed wires can give us much useful information about the way we normalize domination that runs its normal, daily course. In other words, when one asserts control over the woman by treating the person "like an animal," or when one asserts human superiority by making some other animal into an instrument of sexual gratification, we may find that these situations reflect, and thus enable us to interrogate, the strangeness in everyday domination.

A. *Bestiality without cruelty?*

In MacKinnon's words, "[n]on-human animals in man's society are more than things, less than people. If the father of all social hierarchies, or the mother of all social distinctions, is the animate-inanimate division, it is quickly followed by the human-

always under government. He then is by nature formed a slave who is qualified to become the chattel of another person, and on that account is so, and who has just reason enough to know that there is such a faculty, without being indued with the use of it; for other animals have no perception of reason, but are entirely guided by appetite, and indeed they vary very little in their use from each other; for the advantage which we receive, both from slaves and tame animals, arises from their bodily strength administering to our necessities. . .

Id.

7. See MacKinnon, *supra* note 2, at 266.

8. *Id.* at 265. This point is not negated by observations that hierarchies have also overlapped — i.e., that humans regardless of sex acquire non-humans as status symbols, that humans regardless of sex have also made use of human slaves, or that many human slaves have not objected to driving mules. This response will touch on the matter of women owning non-human animals at notes 137-42, *infra*, and surrounding text.

animal dichotomy, and then (for present purposes) the male-female line.”⁹

In an essay written at the dawn of the modern women’s movement, Alice Walker described pornography depicting African-American women as resembling non-human animals and even excrement — connecting all three.¹⁰ Readers might have

9. See MacKinnon, *supra* note 2, at 263. As MacKinnon parenthetically indicates, there are other hierarchies. Certainly another lens could bring the focus on the second-class status of the race-based or citizenship-based outsider. One writer recently mused, “[t]oday, for many of us our last real link to the animal world, these pets still seem to me like ingratiating foreign visitors to our world comically out of place, pretending to fit in, to be one of us, trying not to be found out and deported.” MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 5 (2002). Finding amusement in the predicament of one who is forced to evade deportation is the prerogative of the citizen whose papers are in order, and another badge of a hierarchy of legal protection.

10. ALICE WALKER, *Coming Apart: By Way of Introduction to Lorde, Teish and Gardner*, in YOU CAN’T KEEP A GOOD WOMAN DOWN 41, 52-53 (1981). In this short story, Walker describes a person’s awakening to the degrading assumptions and effects of pornography:

He begins to feel sick. For he realizes that he has bought some if not all of the advertisements about women, black and white. And further, inevitably, he has bought the advertisements about himself. In pornography the black man is portrayed as being capable of fucking anything, even a piece of shit. He is defined solely by the size, readiness and unselectivity of his cock. .

Id. In the introduction to the essay, Walker writes that the

[A]ncient roots of modern pornography are to be found in the almost always pornographic treatment of black women, who, from the moment they entered slavery, even in their own homelands, were subjected to rape as the ‘logical’ convergence of sex and violence. Conquest, in short. We need only think of the black women used as breeders, raped for the pleasure and profit of their owners.

Id. at 42.

Professor D. Marvin Jones notes that European philosophers and scientists historically attributed non-human characteristics to Africans, “culminating in controversial conjecture originating in the seventeenth century England that blacks had sprung from apes.” D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 466 (1993) (discussing the historical development of this conjecture and examples of support for related theories). A particular intensity arose in discussions of sexual characteristics. *Id.* at 467 (citing examples catalogued by historian Winthrop Jordan of European reports about African male genitalia). Thus, in 1556, Leo Africanus wrote: “The Negros likewise leade a beastly kinde of life, being vtterly destitute of the vse of reason, of dexteritie of wit, and of all artes. Yea they so behaue themselues, as if they had continually liued in a forrest among wilde beasts.” LEO AFRICANUS, THE HISTORY AND DESCRIPTION OF AFRICA Vol. I 187 (John Pory trans., 1963); *cited in* D. Marvin Jones, *id.*, at 467, n.120. One European wrote of African women’s “temper hot and lascivious, making no scruple to prostitute themselves to the *Europeans* for a very slender profit, so great is their inclination to white men.” D. Marvin Jones, *id.* at 468 (citing WINTHROP JORDAN, WHITE OVER BLACK 35 (1968) (citations omitted). Moreover, natural philosophers cited Europeans’ reports that African women had voluntary

found that Walker's observations cast a disturbing pall over their personal lives as they began to awaken to the everyday distortions of human relations within a patriarchal society. In light of the connections Alice Walker makes, Catharine MacKinnon's comment that the human-animal dichotomy is only one step removed from the animate-inanimate division¹¹ becomes especially stark. In our society, in which animals are widely considered food products, to see the sexual object as non-human is one step removed from the consumption and elimination of that object.

MacKinnon notes with dismay that many people do not stop to contemplate the role of pornography in perpetuating the oppressive male-female dichotomy. Seeing pornographic images of non-human animals, the animal rights activist, like many other people, does not necessarily comprehend the sight as an extension of the more commonly seen domination of women. If our society, and specifically animal advocates, understood pornography as a message that domination is permitted and expected — that is, were advocates informed by feminism — acts of bestiality and the use of non-humans for pornographic gratification would not be assessed as egregious yet rather odd, particularly repulsive and probably uncontrollable forms of maltreatment. Rather, these acts, and the images produced from them, would be understood as a symptom of the broad societal attitude that domination is acceptable — a social attitude that permits us to visit unremitting daily violence upon other animals and be assured that such violence is simply beneath notice.

Unfortunately, the mainstream animal advocacy movement has moved markedly away from that kind of understanding. In 2001, philosopher Peter Singer published an essay condoning certain forms of human sex with other animals. Professor Singer, who is widely credited with ushering in the modern animal advocacy movement through the 1975 book *Animal Liberation*,¹² proposed the idea that animal liberation might include a sexual

intercourse with apes. *Id.* (citing 8 GEORGE BUFFON, NATURAL HISTORY 40, 66 (1978)). The pattern indicates that the Europeans viewed the humans and the non-humans of Africa as part of the territory to be explored, exploited, and conquered.

11. See MacKinnon, *supra* note 2, at 263.

12. PETER SINGER, ANIMAL LIBERATION (1975) (addressing the capacity of animals to feel, following the lead of the 19th-century utilitarian philosopher Jeremy Bentham's moral intuition that we have an obligation to avoid inflicting pain on beings capable of suffering).

revolution in an essay entitled “Heavy Petting.”¹³ Singer concedes that some acts of bestiality are “clearly wrong” because they are cruel to the animal. Because any nonconsensual act of sex fits the common-sense definition of cruel,¹⁴ discerning what conduct exceeds an acceptable mark on some cruelty scale is an exercise in delusion. The point is that all use of other animals for sexual gratification is a badge of domination.

Professor Singer suggests, however, that to close one’s mind to the “mutually satisfying activities” offered by the existence and availability of non-human animals would be to accept an old-fashioned taboo in an era when “[o]ne by one, the taboos have fallen.”¹⁵ After all, begins Singer’s argument, “no one dared suggest that [Clinton] was unfit to be President simply because he had taken part in a sexual activity that was, in many jurisdictions, a crime.”¹⁶ Singer neglects entirely the role of the authority-based relationship in sexual interactions, and the reality that many people did object to President Clinton’s conduct for reasons unrelated to its legal status.

Radical feminists, from the universities to the peace camps, have rightly asked society to think twice before dismissing as prudish or unliberated those who value the maintenance of a respectful public culture alongside the right of free expression. MacKinnon’s work has, over the years, explained quite cogently how sexual liberation in the liberal sense frees male aggression in the feminist sense.¹⁷ Will advocates for non-human interests present effective challenges to bestiality — or, for that matter, any

13. Peter Singer, NERVE (reviewing MIDAS DEKKERS, DEAREST PET: ON BESTIALITY (Paul Vincent, trans., 2000)), at <http://www.nerve.com/Opinions/Singer/heavyPetting/main.asp> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.); <http://www.nerve.com/Opinions/Singer/heavyPetting/> (by subscription only) (last visited June 16, 2004).

14. Like children, non-human animals are unable to be fully informed, communicate consent, or to speak out about their abuse. Thus, Dr. Frank Ascione has stated that “bestiality may be considered cruel even in cases when physical harm to an animal does not occur (this is similar to the case of adult sexual activity with children where consent is presumed to be impossible).” Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychology*, ANTHROZOËS Vol. 6 (4), No. 4 (1993) at 229 (parenthetical in the original).

15. Singer, *supra* note 13.

16. *Id.*

17. See CATHARINE MACKINNON, FEMINISM UNMODIFIED 15 (1987). Professor MacKinnon has observed that “the status quo has real risks, not just dangerous sexy thrills.” Anyone who wonders whether the same dynamic is in effect when non-human animals are involved need only check the reader feedback to NERVE following Singer’s book review and commentary, at <http://www.nerve.com/Opinions/>

other forms of domination and control over the non-human body — if it has never occurred to them to challenge the assumption of male hegemony over female bodies?¹⁸

Singer also misses the egalitarian mark when positing that “[s]ex with animals does not always involve cruelty.” This is a normative point, and inappropriate even within the argument that moral consistency requires those who object to bestiality to similarly object to other forms of consumption of animal flesh.¹⁹ Singer’s argument would presumably permit vivisection and omnivorous diets if appropriate anti-cruelty standards were in place; but even if those acts were ruled out, human beings could nevertheless enjoy certain forms of intimate contact with other animals without drawing censure from ethical philosophers. In that structure, perhaps there would be room for non-human beings to be treated to the same inequality that women experience now. As MacKinnon puts the point, “we are not eaten, but then that is not

Singer/heavyPetting/main.asp (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.).

18. A related concern appears in an observation by Debra J. Saunders in the comment *One Man’s Animal Husbandry*, SAN FRANCISCO CHRON., Mar. 20, 2001, at A21:

How does PETA, People for the Ethical Treatment of Animals, feel about its ideological father endorsing six-legged sex? PETA president, Ingrid Newkirk, said of the piece, “It’s daring and honest and it does not do what some people read into it, which is condone any violent acts involving an animal, sexual or otherwise.” Newkirk wants America to know that Singer does not advocate sex that kills or damages animals or requires them to be restrained. Indeed, Singer condemns sex between men and hens because it is “usually fatal to the hen.” But can an animal consent to sex? Newkirk answered, “It sounds like this is an attempt to make this so narrow and so unintellectual in its focus. You know, Peter Singer is an intellectual, and he looks at all nuances of an issue. The whole concept of consent with animals is very different.”

I would suggest that advocates require a basic understanding of why respect between human groups is important to be capable of understanding animal rights. A sexist message in an animal advocacy campaign is, logically, a tip-off that the group leaders promoting it actually lack respect for the non-human animals whose interests they claim to champion. Newkirk’s acceptance of Professor Singer’s treatment of bestiality can be seen, in this view, as intertwined in a long pattern of misogynist campaigning. For a cogent discussion of misogyny in Ingrid Newkirk’s campaigns see Geov Parrish, *Treating Women Like Meat*, WORKINGFORCHANGE.COM, available at <http://www.workingforchange.com/printitem.cfm?itemid=12999> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.).

19. Singer’s essay parenthetically indicates that fatal acts of bestiality would be “no worse than what egg producers do to their hens all the time.” See *Heavy Petting*, Singer’s review and commentary of Midas Dekkers’s *Dearest Pet*, *supra* note 13.

our inequality problem.”²⁰ Freedom from being eaten — from being completely consumed by the capitalist hierarchy that treats non-humans as fungible goods — is not a matter to be taken lightly. But MacKinnon’s argument implies that a largely vegetarian society that retains the other trappings of hierarchy may ultimately be no bargain.

B. *The Message of Violent Pornography*

Far from describing a scene of liberation from outdated and oppressive norms, Singer draws from the worst elements of those norms in a disrespectful treatment of both women and animals, describing illustrations in Dekkers’s book as “a Swedish rock drawing from the Bronze Age of a man fucking a large quadruped of indeterminate species” and “a Japanese drawing of a woman enveloped by a giant octopus who appears to be sucking her cunt, as well as caressing her body with its many limbs.”²¹ The objectifying effect of these descriptions is made more troubling still by Singer’s choice of words, which focuses interest on a body part, in terminology often invoked to describe the person as a thing. Such language in no way advances Singer’s stated goal of breaking down taboos rooted in the “Judeo-Christian tradition, which imagines a wide, unbridgeable gulf separating us from the other animals.”²² Nor does Singer’s connection of the social resistance to bestiality with prejudice against human sexual minorities.²³ If other animals are entitled to the protection of the fundamental rights that protect humans, sex with them, without consent, is rape.²⁴ Whether they are capable of abstract thought, complex cognition, and the formation of social structures does not influence this question, for once non-human animals are within human society they all become property by operation of law. It is difficult to imagine a more vulnerable condition.

20. MacKinnon, *supra* note 2, at 271.

21. Singer, *supra* note 13.

22. *Id.*

23. Singer writes, “In many of the world’s great cities, gays and lesbians can be open about their sexual preferences to an extent unimaginable a century ago.” *Id.*

24. Singer, although associated with a utilitarian philosophy rather than individual rights, has indicated that some non-human animals ought to be extended fundamental rights. Specifically, Singer advocates the right to life, liberty, and freedom from torture for three identified species: chimpanzees, orangutans, and gorillas. See *THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* 1-7 (Paola Cavalieri & Peter Singer eds., 1993).

Not infrequently, rape defendants have claimed that incapacitated people consented to their physical exploitation.²⁵ But to be meaningful, consent must be voluntarily given and it must be understood. Consent is a concept we claim to apply to these situations precisely in order to prevent people in positions of control from unilaterally setting the terms for interactions with those whom they consider available, from using those others instrumentally, and from deliberately degrading them.²⁶ Professor Singer's answer to the consent objection is evident in the review itself, which asks, "[w]ho has not been at a social occasion disrupted by the household dog gripping the legs of a visitor and vigorously rubbing its penis against them? The host usually discourages such activities, but in private not everyone objects to being used by her or his dog in this way, and occasionally mutually satisfying activities may develop."²⁷

Thus Singer accepts the use of non-humans for sexual gratification by deciding that the dog, in effect, asks for the encounters, going so far as to claim that the dog is using the human. But rather than signifying the equivalent of consent, such rubbing — on human legs or any other surface — is likely the result of frustration imposed on a dog by domestication and the concurrent, deliberate thwarting of the dog's nature.²⁸ Dogs originate from wolves, who, for reasons that go without saying, would not likely be chosen by a human for purposes of sexual gratification.

25. See, e.g., *In re B.G.*, 589 A.2d 637, 640 (N.J. Super. Ct. App. Div. 1991). The lawyer for the defendants in that case, which involved a trial for gang rape, referred to the mentally disabled adolescent whom they admitted luring into a basement as "ready, willing, able, and anxious" to engage in the acts at issue, and as one who "would do it again." Christine Schaack McGoe, *When 'Regular Guys' Rape: The Trial of the Glen Ridge Four*, ON THE ISSUES, Fall 1993, at 13 (noting that the teen's face "registered emotions in response to questions with the kind of directness and intensity typical of children") (cited in Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, U. ILL. L. REV. 315, 364 (1997)). Professor Denno's article provides an analysis which relies on context to differentiate the rape in this case from consensual sex involving mentally disabled people.

26. *But see* note 54 *infra* and surrounding text.

27. Singer, *supra* note 13.

28. Although all mentally disabled individuals are susceptible to sexual harm, those residing in institutions or residential homes are considered particularly vulnerable. See Denno, *supra* note 25, at 380. Virtually all domesticated animals live in situations tantamount to institutionalization — whether on farms, in laboratories, in zoos or other entertainment contexts, as pets in homes, or in any other situation in which they rely on humans for food and shelter. Non-humans are domesticated in the first place in order to be used instrumentally.

Wolves live in complex social groups with other wolves, and usually only have sexual urges once a year, in late winter.²⁹

In no context is consent the equivalent of frustration, or even of interest or desire.³⁰ Sexual activity between human beings and non-human animals occurs largely, if not exclusively, within the unnatural relationship of domestication; and domesticated animals have been bred and trained to adapt to a human environment, to be of use to human beings, and, in the case of pets, to be anxious to please. Successful domestication of cats and wolves is based on neoteny — the retention in the adult animal of the juvenile characteristics that prompt an animal to need and solicit care.³¹

Professor Singer's essay deals mostly with the paradigmatic domesticated animals: dogs, and calves bred as farm property. But Singer also includes the story of a volunteer at Camp Leakey in Borneo who was "suddenly seized by a large male orangutan" and lacked the strength to resist the "intentions made obvious by [the ape's] erect penis."³² Although Singer declines to point out the significance of the context, the incident is purported to have occurred at a rehabilitation camp for apes suffering from the trauma imposed by human interference and deforestation. The apes at Camp Leakey have been raised by humans or have yet to gain the coping skills essential to a normal orangutan's life.³³ The actions of one beleaguered orangutan living in a dependent relationship with humans cannot realistically be considered instruc-

29. See *Wolf Basics*, at <http://www.wolf.org/wolves/learn/basic/faq.asp#6> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

30. That an individual can experience sexual desire, curiosity or frustration does not mean that the person cannot be assaulted. Professor Denno, writing with regard to the B.G. case, emphasized "that Betty experienced sexual desire and a need for consensual sexual relationships like anyone else her age but that men could still sexually assault her." Denno, *supra* note 25, at 368.

31. For references addressing domestication, see Danielle LaBruna, *Columbia University Introduced Species Summary Project: Domestic Cat (Felis catus)*, at http://www.columbia.edu/itc/cerc/danoff-burg/invasion_bio/inv_spp_summ/Felis_catus.html (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.). More commentary on neoteny is available in TEMPLE GRANDIN & MARK J. DEESING, *Genetics and the Behavior of Domestic Animals*, in BEHAVIORAL GENETICS AND ANIMAL SCIENCE (1998), available at <http://www.grandin.com/references/genetics.html> (last visited Mar. 7, 2005).

32. Singer, *supra* note 13.

33. For related information, see the Internet site of Orangutan Foundation International, at <http://www.orangutan.org/tours/11day.php> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

tive about morals or about nature.³⁴ Perhaps Singer included this anecdote, with its relatively large non-human actor and all the mythical connotations of "wildness" long associated with male apes,³⁵ to fend off objections that the essay was condoning human predatory sexuality against non-human animals. If so, the bid fails, and it shows a lack of respect regarding both the orangutan and the female human volunteer.

Singer reports that the camp's director, Dr. Biruté Galdikas, assured the volunteer that the orangutan was harmless, and as "further reassurance" pointed out that orangutans have small penises.³⁶ Singer concludes this anecdote by noting that the orangutan's "advances" do not offend our status and dignity as human beings, because we are also great apes.³⁷ If this is the

34. THE GREAT APE PROJECT, co-edited by Peter Singer, incorporates the view that chimpanzees, gorillas, and orangutans have the cognitive capacities to interact with humans only on the level of small children. See THE GREAT APE PROJECT, *supra* note 24; specifically, in the chapter *Language and the Orang-utan: The Old 'Person' of the Forest*, H. Lyn White Miles writes: "We carried out tests of Chantek's mental ability using measures developed for human children. Chantek reached a mental age equivalent to that of a two- to three-year-old child, with some skills of even older children." *Id.* at 49. Miles suggests that "Chantek has met the Cartesian definition of person, at least at the level of a young human child." *Id.* at 51. Singer neglects to mention this point anywhere in his essay, which leaves open the troubling question of whether Singer would censure an adult who seeks sexual gratification with young human children.

35. Indeed, the publication of Singer's essay arguably fuels the myth that large apes, if not subdued, would or could exhibit sexually predatory conduct in the midst of female humans. At no point did the orangutan in this story actually sexually assault the volunteer; yet Singer reports on the ape's "intentions made obvious by his erect penis." Singer, *supra* note 13. Presumably the volunteer was clothed, yet Singer believes that these "intentions" had to do with "penetration" of the "object of sexual interest."

As it happened, the orangutan lost interest before penetration took place, but the aspect of the story that struck me most forcefully was that in the eyes of someone who has lived much of her life with orangutans, to be seen by one of them as an object of sexual interest is not a cause for shock or horror.

Id.

36. *Id.* (Singer writes: "Fighting off so powerful an animal was not an option, but Galdikas called to her companion not to be concerned, because the orangutan would not harm her, and adding, as further reassurance, that 'they have a very small penis.'"). The quote does not necessarily indicate Galdikas's support for Singer's view of the interaction. In *Reflections of Eden*, Galdikas writes: "Wild orangutans virtually never imitate human beings. Rather wild orangutans imitate their mothers, and perhaps their elder siblings and the males that are attracted to their mothers. But, lacking orangutan mothers of their own, ex-captive orangutans pay attention to humans." BIRUTÉ M.F. GALDIKAS, REFLECTIONS OF EDEN: MY YEARS WITH THE ORANGUTANS OF BORNEO 374 (1996).

37. Singer writes, "[W]e are animals, indeed more specifically, we are great apes. This does not make sex across the species barrier normal, or natural, whatever

case, no uninvited “advances” from male *Homo sapiens* (particularly those with small penises) should disturb our sense of ethics.³⁸ Some cases of forced sex, to Singer’s mind, must be natural. This is the message of violent pornography.

C. *Quintessential Sex Object*

As an interaction between individuals with dramatically unequal standing, bestiality presents a model of domination in paradigmatic form. It is arguably *because* Singer deems it acceptable to write disrespectfully of women that Singer can take the same attitude when regarding non-human animals. “Heavy Petting” describes a peculiarly male vision of sex; it observes that women rarely have unstaged sex with animals while reporting that twentieth-century rural men commonly did such things as “take advantage of the sucking reflex of calves to get them to do a blowjob.”³⁹

As MacKinnon writes, “Surely animals could be, and are, trained to make it appear that they enjoy doing what people

those much-misused words may mean, but it does imply that it ceases to be an offence to our status and dignity as human beings.” Singer, *supra* note 13. It might be notable here that Thomas Jefferson gave credence to the notion of coitus between non-human apes and human women when discussing Africans, writing:

Is not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138 (William Peden ed. 1954), cited in D. Marvin Jones, *supra* note 10, at 511, n.124.

38. Singer’s essay says that the scenario “may have been disturbing” to the person experiencing it because of the “potential violence of the orangutan’s come-on” in a parallel to language earlier in the same essay:

Some men use hens as a sexual object, inserting their penis into the cloaca, an all-purpose channel for wastes and for the passage of the egg. This is usually fatal to the hen, and in some cases she will be deliberately decapitated just before ejaculation in order to intensify the convulsions of its sphincter. This is cruelty, clear and simple . . .

But sex with animals does not always involve cruelty.

Taking Singer’s logic on its own terms, if there is an uninvited advance from an ape in the group *Homo sapiens*, as long as it’s not “cruel” or fatal (as in the case of the hen, where the penis definitely isn’t small enough), there is no ethical wrong. *Id.* at 13.

39. Singer, *supra* note 13.

want them to do, including have sex with people.”⁴⁰ But a non-human animal within human society has no understanding of the right to say “no,” and it is not respectful to treat individuals as though they are exercising capacities that they do not possess.⁴¹ Intellectual tolerance for sexual contact with other animals, then, supports the very outlook that will perpetuate their subjugation.

D. *Crushing the Other*

Professor MacKinnon points to the anomaly in which videos depicting the abuse of non-humans are denounced through the law, whereas so much work has been and continues to be done protecting videos showing the sexual abuse of female humans.⁴² Typically, crush videos graphically depict scantily-dressed women, sometimes barefoot but usually in stiletto heels, stepping on and killing a variety of small animals.⁴³ Noting that the U.S. Congress has made crush videos a federal crime through a bill providing “punishment for depiction of animal cruelty” into in-

40. MacKinnon, *supra* note 2, at 268.

41. Professor Singer has suggested that “preference utilitarianism” is a particularly useful basis for moral decisions. The approach encourages acts that maximize the satisfaction of preferences. *See generally* PETER SINGER, PRACTICAL ETHICS (1993) (stating that “there is a long-standing approach to ethics that is quite untouched by the complexities that make simple rules difficult to apply. This is the consequentialist view. . . . The best-known, though not the only, consequentialist theory is utilitarianism.”). *Id.* at 3. He also states that “preference utilitarianism. . . directs us to maximize the satisfaction of preferences. . .” and explaining that preference utilitarianism, as distinct from classical utilitarianism, is capable of assigning special value to benefits comprehended by a specific set of beings who are classified, based on cognitive complexity, as “persons,” and illustrating the point by differentiating a human person whose future is endangered from a fish in similar circumstances because the struggle of the latter being. *Id.* at 94-95.

indicates no more than a preference for the cessation of a state of affairs that is perceived as painful or frightening. Struggle against danger or pain does not suggest that fish are capable of preferring their own future existence to non-existence. The behaviour of a fish on a hook suggests a reason for not killing the fish by that method, but does not in itself suggest a preference utilitarian reason against killing a fish by a method that brings about death instantly.

Id. Paying limited attention to the social context, preference utilitarianism focuses mainly upon direct responses to given situations to measure the well-being of individuals. Thus, the approach does not contemplate a need for informed consent. (The concepts of “consent” and “informed consent” do not appear in the Index of Singer’s book. *Id.* at 381-95.) Ironically, doing away with such consent can enable theories that promote vivisection and our continued consumption of flesh.

42. *See* MacKinnon, *supra* note 2, at 268 (internal citation omitted).

43. *See* Martin Kasindorf, *Authorities Out To Crush Animal Snuff Films*, USA TODAY, Aug. 27, 1999, at A4.

terstate or foreign commerce for commercial gain,⁴⁴ Professor MacKinnon further points out that no such laws bar “depicting cruelty to women, a multibillion-dollar industry with considerable constitutional protection.”⁴⁵

Opponents of the crush video ban had a great advantage: They could, and did, use the same language that is used to keep violent pornography legal.⁴⁶ They said that the bill would interfere with First Amendment guarantees of freedom of expression, constitute an unnecessary federal intrusion into state affairs, and divert prosecutors from more serious misconduct.⁴⁷ In response, sponsor Elton Gallegly amended the bill to exempt depictions with “serious religious, political, scientific, educational, journalistic, historical or artistic value.”⁴⁸ Thus, films of bullfights are legal, and significant recent episodes of torture and killing of non-human animals have been defended on the grounds of artistic expression.⁴⁹

44. President Clinton signed P.L. 106-152, the “Crush Video” bill, into law on the 9th of December 1999. The bill’s sponsors were Rep. Elton Gallegly (R-CA) and Sen. Jon Kyl (R-AZ). Proponents of the bill argued that federal legislation is necessary because of the difficulty in proving that the cruelty featured in the video occurred within the state’s animal cruelty law statute of limitations; it also is difficult to identify people in the videos because often only legs and feet are shown. Richard Simon, *House Votes to Criminalize Interstate ‘Crush Video’ Sales*, LOS ANGELES TIMES, Oct. 20, 1999, at A5. Pub. L. 106-152, 113 Stat. 1732 (1999).

45. MacKinnon, *supra* note 2, at 268.

46. In *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court set out to define “obscenity” and its relation to the First Amendment. It is not surprising, given the Court’s treatment of pornography under the “obscenity” category, that arguments over the issue focus on concerns over censorship rather than about the concept of dividing society into two classes with one domineered by the other. The traditional test for obscenity, set out by the Supreme Court in *Miller v. California*, exempts pieces with “serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). MacKinnon has argued, “If a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work’s value among men enhances its injury to women.” CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 202 (1989) (internal citation omitted).

47. Simon, *House Votes to Criminalize Interstate ‘Crush Video’ Sales*, *supra* note 44. Critics also said the bill could limit films on hunting or bullfighting or television advertisements for pesticides; supporters answered that the measure would deal only with acts prohibited by state animal cruelty laws. *Id.*

48. The amendment to the Federal Criminal Code on the prohibition of depictions of cruelty to animals thus exempts material with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” See 18 U.S.C.S. § 48 (2005).

49. See Statement of the American Civil Liberties Union, *Freedom of Expression in the Arts and Entertainment* (stating that “the commitment to freedom of imagination and expression is deeply embedded in our national psyche, buttressed by the First Amendment, and supported by a long line of Supreme Court decisions” and that “[p]rovocative and controversial art and in-your-face entertainment put our

In 1993, for the exhibit "Pyramid of Animals" at the Warsaw Academy of Fine Art, Katarzyna Kozyra used the bodies of a horse, a dog, a cat, and a rooster, with part of the work including directing and filming the horse's death⁵⁰ — an act which would be legal under bill sponsor Elton Gallegly's artistic exemption. In a society that endorses the ownership and use of other animals, the law does more to codify the human right to perpetrate cruelty through its exceptions than it does to prohibit it. MacKinnon's core point holds, however: This exemption for works of serious religious, political, scientific, educational, journalistic, historical or artistic value derives from the traditional list that has exempted imagery depicting violent treatment of women from the weight of the law. A society that fails to confront the issue of domination in pornography using women is ill-equipped to confront the same problem when non-human animals become victims.

"In California," recounts Professor MacKinnon, "a bill was introduced in February 2000 that would have prohibited both

commitment to free speech to the test") available at <http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=9462&c=42> (dated Feb. 27, 2002) (on file with the UCLA WOMEN'S L.J.).

50. See Katarzyna Kozyra, "Pyramid of Animals: Life-Size Sculpture, Video," available at <HTTP://WWW.KATARZYNAKOZYRA.COM.PL/PYRAMID.HTML> (last visited Mar. 22, 2005). The artist's degree piece, "Pyramid of Animals" was presented at the Department of Sculpture of the Academy of Fine Arts in Warsaw. *Id.* The work consists of four stuffed animals: a horse, a dog, a cat and a rooster, and of a video documenting the process of the horse being killed and skinned. In April of 2002, the *New York Times* reported that the animals had been killed for the art project although they already were scheduled for slaughter, and that Kozyra's work "represented for her the hypocrisy of expressing outrage over killing animals while enthusiastically eating them at home and in restaurants." See Michael Rush, *A Renegade's Art of the Altogether*, *NEW YORK TIMES*, Apr. 21, 2002, Section 2 at 31. Kozyra confirms this analysis; see Katarzyna Kozyra, text of a publication accompanying the display of The Pyramid of Animals, Academy of Fine Arts, Warsaw, Jun. 4, 1993, available at http://www.katarzynakozyra.com.pl/pyramid_txt.html (last visited Mar. 22, 2005). Similarly, Nathalia Edenmont kills and then photographs animals. See Ellie Maldonado, *Killing For Art*, *FRIENDS OF ANIMALS ACTIONLINE* (Spring 2004) at <http://www.friendsofanimals.org/actionline/spring-2004/killing-for-art.html> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.). Bjoern Wetterling, of the Wetterling Gallery, makes the inherently contradictory claim that Edenmont's art supports animal rights as Edenmont "slays" the animals humanely. See Wetterling Gallery Statement, at <http://www.wetterlinggallery.com/newsletter/newsletter.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.). Wetterling further insists that because humans kill for food, they can also kill for art. See *Animal Killer Artist Unrepentant*, *SUNDAY TIMES* (Australia), available at <http://www.news.com.au/common/printpage/0,6093,8150834,00.html>. See also *Dying For Art*, *OOZE ONLINE* (2004), at <http://www.oozemagazine.co.uk/dyingforart.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

crush videos of animals and torture and snuff films of human beings . . . A massive public First Amendment hue and cry, principally by the ACLU, was raised about the human part of the bill only.”⁵¹ MacKinnon explains:

Instructively, the joint crush/snuff bill had a consent provision only for people. Welcome to humanity: While animals presumably either cannot or are presumed not to consent to their videotaped murder, human beings could have consented to their own intentional and malicious killing if done to make a movie, and the movie would be legal. Even that was not enough to satisfy the avatars of freedom of speech. One wonders anew if human rights are always better than animal rights.⁵²

MacKinnon’s argument underscores the disservice done to non-human beings by those who would characterize bestiality as “mutually satisfying activities.” If non-human beings were presumed capable of offering the equivalent of consent to being used for sexual gratification, why would that presumption be disallowed when the people making the video reach some particular level of cruelty? If they are treated as human sex objects are treated, they will end up with the results of a treacherous bargain. The human society itself has not yet come to grips with the unremitting objectification of women; if proponents of animal rights cannot get to grips with it, the idea that we can have “equality beyond humanity” is sadly presumptuous.⁵³ The consent paradigm has not enabled equality *within* humanity; and as long as the social field is systematically slanted, legal definitions of consent will be less than satisfactory in actual situations. When a society has been structured according to the concept of male dominance, and “[i]f sex is normally performed as something men do to women,” the issue, MacKinnon has posited it, “is

51. MacKinnon, *supra* note 2, at 268-69.

52. MacKinnon, *supra* note 2, at 269 (internal citation omitted). Although I am not entirely comfortable confirming Professor MacKinnon’s working suspicion that non-human animals, in some respects, are treated better by humans than women are treated by men, insofar as the point helps us to see the folly of attempting to bring non-human beings into the social world of humans and expect them to ever obtain the benefits of an egalitarian culture, it has substantial instructive value to the animal rights activist. *Id.* at 264 (asking: “Under existing law, are animals in any respects treated better than women are?” and tentatively answering that “the operative suspicion is yes.”).

53. “Equality beyond Humanity” is the subtitle of *THE GREAT APE PROJECT*, a book endorsing rights for non-human apes. See *supra* note 24.

less whether there was force than whether consent is a meaningful concept."⁵⁴

"Women are doubtless better off with rights than without them," Professor MacKinnon states, "But having rights in their present form has so far done precious little to change the abuse that is inflicted on women daily, and less to alter the inferior status that makes that abuse possible."⁵⁵ And if this is so, the position of non-humans, who are one step closer to the animate-inanimate divide, will undoubtedly be a precarious one when the concept of animal rights is accepted. At the core of the matter, for those identified as other-than-male or as non-human, is the idea, built up over centuries, that those so identified count for less, and that their interests pale in comparison to the needs of the class that controls them. Are animal rights activists up to the task? Some promote tactics of intimidation as the way forward into an effective movement; many others channel substantial portions of their resources into strengthening animal welfare laws which reinforce the concept of non-human inferiority. To work for serious change means taking the idea of non-human independence seriously; but more than that — following Professor MacKinnon's argument to its logical conclusion — it would mean advocating change that would serve as a model for respectful interaction between humans themselves.

54. MACKINNON, *supra* note 46, at 174, 178. Rape statutes prohibit acts that they define as nonconsensual. Yet there are situations in which formally consensual activity is problematic, due to cultural norms dictating male dominance. For related discussion see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 58, 83 (1987)[hereinafter *DISCOURSES ON LIFE AND LAW*]; see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L. J.* 1281, 1300 (1991), observing:

Much sex inequality is successfully accomplished in society without express legal enforcement and legitimation. Yet the law is deeply implicated in it. Law actively engages in sex inequality by apparently prohibiting abuses it largely permits. Most of the sexual assaults women experience do not fit the legal model of the ideal violation. Most rapes are by familiars not strangers, by members of one's own ethnic group not others, at home not on the street. The notion of consent here, the law's line between intercourse and rape, is so passive that a dead body could satisfy it. The law of rape is designed so that rape is what somebody else does and what almost never happens: so that what is done all the time, presumably including by those who design and interpret and enforce the laws, can be done.

Id. (internal citations omitted). In the same article, MacKinnon cites *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984) (woman's passivity supports finding of insufficient force for rape conviction). *Id.* n.91.

55. MacKinnon, *supra* note 2, at 271 (internal citation omitted).

E. *Conspicuous Consumption: The Possession of Flesh*

Cannibalism is usually discussed as a shocking form of anti-social conduct, an aberration that completely separates the offender from the rest of the community. An act of cannibalism is more accurately described as a logical, if thoroughly unacceptable, extension of control and domination clearly evident in the use and abuse of sentient individuals as sexual objects.

While studying at the Sorbonne in Paris, Issei Sagawa was drawn to another student, Renée Hartevelt.⁵⁶ In 1981, a month after they met, Sagawa shot Hartevelt dead, raped her body, and, with the assistance of an electric carving knife, consumed bite-size parts of her flesh, reportedly, at times, thumbing through pornography.⁵⁷ Sagawa would announce that the experience was akin to eating tuna sushi.⁵⁸

Sagawa was arrested in France,⁵⁹ later to be deported and institutionalized in Japan, where he reportedly told a Japanese writer, "If I am freed, I will eat another woman. Renée was very appetizing."⁶⁰ Yet, as a criminal psychiatry professor named Yamagami stated, "The Japanese justice system does not regard a sexual disorder as a mental illness" requiring treatment or deten-

56. Julian Ryall, *Taste In Women that Takes Some Swallowing*, THE SCOTSMAN (Jul. 18, 2004), at <http://scotlandonsunday.scotsman.com/international.cfm?id=820632004> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

57. See Katherine Ramsland, *Sagawa Strikes*, Courtroom Television Network LLC., at http://www.crimelibrary.com/serial_killers/weird/sagawa/3.html?sect= (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.) (drawing on Sagawa's first book, *In the Fog*, which the author calls a "fictionalized account" of the killing).

58. See *id.* Sagawa's first book describes how Hartevelt's flesh "melted in my mouth like raw tuna" and how "nothing was so delicious." See Jonathan Annells, *Cannibal Puts his Desires on Video*, TIMES (London), Nov. 27, 1994. After being arrested, Sagawa reportedly said, "The meat was finer than maguro [red tuna sushi]." From the Japanese "Sagawa" Web site, at <http://pine.zero.ad.jp/~zac81405/sagawa.htm> (last visited Aug. 26, 2004), as translated by Christopher Gunson, lecturer of Political Science at the Center for Global Security and Democracy at the Political Science Department of Rutgers University at New Brunswick. Since then, Sagawa has written numerous other books, including *Cannibalistic Fantasies*. See Jonathan Annells, *Cannibal Puts his Desires on Video*, TIMES (London), Nov. 27, 1994; also Leslie Helm, *Seeing Japan 'Through the Eyes of a Cannibal': Confessed Killer Is Free — Even Popular*, LOS ANGELES TIMES, June 28, 1992, at A12, and Terry McCarthy, *Japan's Dr. Lecter: No Straitjacket Required*, INDEPENDENT (London), Feb. 9, 1992, at 12.

59. Sagawa's family submitted disputed medical evidence purporting to show a faint scarring of the killer's brain tissue from a childhood bout of encephalitis, while Sagawa's lawyer portrayed the victim as having provoked the attack. See Tony Allen-Mills, *A Mother's Worst Nightmare*, TIMES (London), Nov. 21, 1993.

60. *Id.*

tion.⁶¹ So Sagawa was freed. And in the two decades that followed, Sagawa would attain celebrity status in Japan.⁶² Sagawa's letters to novelist Juro Kara appeared in "Letters from Sagawa-kun" — the suffix is a term of endearment reserved for young friends — and the book won the 1983 Akutagawa Prize, Japan's most prestigious literary award for a new writer.⁶³ "Many don't think of him as a criminal because the victim was a foreign woman and it happened far away," said the writer Ryu Otomo.⁶⁴ It happened fairly close to England, but the same nonchalance was evident there as well, where one writer lyrically recalled:

61. Helm, *supra* note 58. Author Shinobu Yoshioka reportedly suggested that Sagawa's case represents a healthy exploration of the dark side of Japanese culture. *See id.* Under Japanese law, a Japanese national may be charged in Japan for crimes committed abroad, but Japan's Justice Ministry declined, citing France's refusal to send the Sagawa dossier. *See* Robert Whyment, *Crime Pays for a Japanese Cannibal*, THE GUARDIAN (London), Feb. 18, 1986. Japanese observers believe the main motive of the French authorities in trying to bury the affair was to avoid any embarrassments that might ruffle trade relations with Tokyo. *Id.* Doctors at Tokyo's Matsuzawa Hospital, who monitored Sagawa for fifteen months after his repatriation from France, concluded that Sagawa was mentally unstable, but did not diagnose insanity, and the hospital superintendent concluded that Sagawa was sane. *See* Robert Whyment, *A Star Ate in Paris*, HERALD SUN (Australia), Sept. 29, 1992.

62. Jonathan Watts, *Japan Reviews Policy on Mental Illness and Crime*, THE LANCET, Vol. 358, July 28, 2001 at 305. *See also* John Collee, *And the Foe was Soundly Eaten: Dr. John Collee Chews Over the Issue of Cannibalism*, OBSERVER (London), Mar. 19, 1995, at 75 (observing: "Trading on the story of his crime he has since become a media celebrity in his own country, both as an artist with a penchant for nude European models and as food critic on the Japanese magazine Spa.") In December 1991, Sagawa wrote an article for the trendy magazine *Takarajima*, headlined "I Ate Her Because of Fetishism." *See* McCarthy, *supra* note 58. In the film *Unfaithful Wife, Disgraceful Assault*, Sagawa "plays a clumsy seducer who bites the buttocks of a woman friend." *See* Whyment, *supra* note 61. And promotional material for *The Bedroom*, a film in which Sagawa played a starring role, announces:

An oddly beautiful work in the Japanese "Pink Cinema" genre, which combines a fetishistic pornography aesthetic with an avant-garde visual sensibility, *The Bedroom* is a tale of drugs, prostitution, and murder. Kyoko, a prostitute, belongs to a club called "The Bedroom," in which the entire cartel of whores use a hallucinatory drug called "Hallusion." As woman after woman disappears, it comes to light that the Bedroom members are systematically being murdered and mutilated. Oddly, the film stars a real-life murderer, Issei Sagawa, who killed and partially consumed his Dutch girlfriend in 1981.

The Bedroom (Hisayasu Sato, dir., 2001) (promotional announcement on the Tower Records site, at <http://uk.towerrecords.com/product.aspx?pfid=2530492&urlid=E6c0e0b01c0947e96893> (visited Aug. 9, 2004) (on file with the UCLA WOMEN'S L.J.).

63. *See* Helm, *supra* note 58.

64. *See* Whyment, *supra* note 61. But Sagawa boasted to one interviewer: "Actually, I have a lot of female fans. The ones who didn't follow the incident at the time it happened regard me as something of a fairytale prince." *See* Mark Butler, *Dinner With a Ghoul*, THE AUSTRALIAN, July 5, 2001, at M20.

In Paris, he stared at the bare arms of girls in cafes, and dreamed of how they would taste. Finally, with only a few weeks to go before he returned to Japan, he felt it was now or never. That was when he bought a carbine, and invited Renée Hartevelt back to his flat.

On a later visit to Tokyo, I agreed to do a long interview with Issei for a magazine. It took place in my hotel suite. Joy was horrified at the idea of meeting him, and went out for the afternoon. But when she returned, Issei was still there. As I introduced her she shrank away and did not offer her hand. And when she heard me inviting Issei to the Press Club for dinner, she drew me aside and whispered: "If they recognise him they'll order you both to leave."

She was wrong. We had an excellent dinner — I think Issei ate raw lamb — and Joy sat next to him. He was small, with hands like a child, and obviously shy and nervous. And after we had put him in a taxi, she said: "What a delightful man!" She had recognised — what I knew from the beginning — that Issei was not a monster, but simply a man who, for reasons he did not even understand, had been hypnotised by the sexual illusion.⁶⁵

Thus did English journalist Colin Wilson recount the memory of meeting Issei Sagawa, giving us a view of how the spectator metabolizes contempt. For Issei Sagawa, pornography taken to its logical conclusion is the consumption of the dominated.⁶⁶ And for Colin Wilson, flesh-eating becomes a normal response on the part of Sagawa — who is "simply a man" caught up in the "sexual illusion" — and so it is Issei Sagawa, not the murdered Hartevelt, who is deemed the rightful focus of an empathetic society.⁶⁷ The acceptance of Sagawa is rooted in his audience's per-

65. COLIN WILSON, *DREAMING TO SOME PURPOSE: THE AUTOBIOGRAPHY OF COLIN WILSON* 341 (2004). Wilson's book *Cannibal*, now in its fifth printing, is considered the definitive book on Sagawa in Japan. Personal correspondence with Christopher Gunson, lecturer of Political Science at the Center for Global Security and Democracy at the Political Science Department of Rutgers University at New Brunswick (on file with author).

66. Amongst Sagawa's own paintings and glossy homemade pornography are two of his works showing naked female buttocks next to chopsticks. See Annells, *supra* note 58; Ryall, *Taste In Women*, *supra* note 56.

67. A search of Lexis for the Sagawa case (on Aug. 17, 2004) brought up 81 articles. Most focus on interviews with Sagawa; two early reports discuss an investigation into the deputy editor in chief of *Paris-Match*, responsible for the December 1983 publication of an insert containing forensic pictures of Hartevelt's mutilated corpse; just two — *The Times* on November 21, 1993 and *The Sunday Mirror* on February 23, 1997 — lavish more than one line of ink on the feelings or views of Hartevelt family; some never mention Renée Hartevelt's name in conjunction with the case. Several make jokes of the issue in the headlines or in the text. One reviewer of a documentary featuring Sagawa writes "Strictly byof (bring your own

ception of his victim as less than a person, which is what a sex object is. "The point of cannibalism is to demonstrate total power over the victim," one crime writer has stated, and "[t]o eat and then eliminate the victim is a demonstration of ultimate contempt."⁶⁸

Animals other than the human kind, of course, are eaten with unremitting regularity. Consumers demonstrate total power over them and eliminate them as a matter of routine. That their sexuality is controlled and exploited is a matter so institutionalized that most people in modern industrial society need never give it a thought. In this context, a domination more striking is the *purposeful* use of those animals for sexual gratification, including in pornography.⁶⁹ Evidence of the sexual abuse of ani-

fork)." See Brendan Christie, *Pulp Non-Fiction: Production Briefs Straight from the Source*, REALSCREEN, Jan. 01, 1998, at 10. There are various expressions, however, of Sagawa's own woes, including the "weariness and wariness" Sagawa experiences when trying to sense an identity separate from his public image. See Helm, *supra* note 58. Japanese diplomats have even framed Japan as the victim; in the words of one Foreign Ministry spokesperson, "This case has given Japan a terrible name. It seems it will never go away." Whymant, *supra* note 61.

68. *Challenging Centipede*, THE GUARDIAN (London), June 3, 1993, at 11 (quoting Brian Marriner, author of the 1997 book *Cannibalism: The Last Taboo* (an historical survey of the subject)). Marriner also authored a text on text in forensic medicine, *ON DEATH'S BLOODY TRAIL: MURDER AND THE ART OF FORENSIC SCIENCE* (1993), with an introduction by Colin Wilson.

69. As common as this is, it is typically missed, as MacKinnon points out — permitting scholars and activists to miss the misogyny in the exploitation of other animals. Arguably, we also miss the misogyny through the common use of the word "vegetarianism" to mean the avoidance of flesh foods, without regard to the exploitation of non-human reproductive systems which result in milk, eggs, cheese — and, due to the continual pregnancies imposed to produce lactation — the transformation of many more young animals' flesh into food.

An examination of magazines that promote hunting would make the connection between misogyny and interspecies violence as abundantly clear as would an analysis of those which promote pornography. For a detailed discussion and insightful analysis, see Brian Luke, *Violent Love: Hunting, Heterosexuality, and the Erotics of Men's Predation*, FEMINIST STUD., Fall, 1998, available at <http://www.academycarmageddon.co.uk/library/hunt.PDF> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.). Luke quotes trophy hunter Ali Ustay, who opines that "hunting includes killing, like sex includes orgasm. Killing is the orgasm of hunting. But like in making love — talking and touching and, you know, looking in the eyes, and just smelling — the long story is the real lovemaking, and orgasm is the inevitable end of it. That is the killing of hunting, but only one part of it." See *id.* (internal citation omitted). Similarly, Luke cites a passage from *In Defense of Hunting* author James A. Swan, who compares the "hunter's high" to the "payoff of an orgasm," and Paul Shepard's book *The Tender Carnivore & the Sacred Game*, which describes killing as the "ecstatic consummation" of the hunter's "love" for his prey. See *id.* (internal citations omitted). Rock musician and hunter Ted Nugent typifies this connection, often making remarks such as: "Music is always raved about as the universal communication especially the tribal scream and the tribal rhythms, the dynamic

mals is not infrequent, despite the secrecy and the silence that shrouds such abuse,⁷⁰ and pornography involving non-human animals has become a multimillion-dollar industry.⁷¹ And yet, notes Catharine MacKinnon, it's an industry barely noticed by animal law scholars.⁷²

Moreover, MacKinnon observes that when members of a community confront imagery of non-human animals as available for human sexual gratification, they do not approach it with an understanding of its pornographic element; that is, they do not focus on it as something that announces, reflects, and perpetuates domination. Objections to, and prohibitions of, interspecies sexual abuse traditionally focus on its potential to debase the human community.⁷³ Some members of the public, and legislators in

of sex, meat and overwhelming your enemy: That's life, baby, and that's what I feel when I pick up the guitar or the bow." See Steve Miller, *Rocker Skewers Critics with Homage to Grilling: Nugent's Cookbook Goes for the Kill*, WASHINGTON TIMES, May 16, 2002 at A01. And a video promoter named Michael Burdick easily convinced a Las Vegas television station that he was selling reservations to men willing to pay thousands of dollars to hunt down naked women and shoot them with paintballs powerful enough to break the skin; in Burdick's video, an actor appears to shoot one woman and says, "I got the one with the biggest rack." See LuAnne Sorrell, *Bizarre Game Targets Women: Hunting for Bambi*, CBS EYEWITNESS NEWS, at <http://www.klas-tv.com/Global/story.asp?S=1356380&nav=168XGqk0> (last visited Aug. 21, 2004) (on file with the UCLA WOMEN'S L.J.); *Hunt for Bambi Turns Out to Be Hoax*, SYDNEY MORNING HERALD, July 29, 2003. After officials investigated, and Burdick admitted that the woman-hunting business didn't exist but was a ploy intended to promote Burdick's "Hunting for Bambi" videos, the mayor of Las Vegas, apparently oblivious to any of the messages of violence in Burdick's enterprise, stated: "I'll do everything I can to see this man is punished for trying to embarrass Las Vegas." *Id.*

70. Computer technology has enabled people who use other animals for sexual gratification to communicate and share materials while retaining a desired degree of anonymity. Participants often call themselves "zoophiles." A minute with this keyword and an ordinary Internet search engine will lead to numerous sites graphically describing and promoting the sexual abuse of animals.

71. See Simon, *supra* note 44 (discussing the growth of the crush fetish into a multimillion-dollar, Internet-dominated video sales industry).

72. "Relatively little attention has been paid by animal law scholars to the sexual use and abuse of animals." MacKinnon, *supra* note 2, at 267.

73. See *id.* (stating that the colonial roots of laws prohibiting the sexual use non-human animals "indicate a preoccupation with the debasement of the self, a lowering of the human to the animal realm"). Modern lawmakers also typically point out that violent treatment of non-humans forewarns a danger to the human community. "What do serial killer Ted Bundy and Unabomber Ted Kaczynski have in common? They tortured animals before killing people," said Rep. Elton Gallegly, a California Republican who authored a bill to ban crush videos. Simon, *supra* note 44. Tom Connors, in the capacity of deputy district attorney of Ventura County, California, stated: "We have some stills of a baby doll they're crushing. So our feeling is that in time, like all perversions, buyers will get desensitized and it'll get to be a baby." See Martin Kasindorf, *Authorities Out to Crush Animal Snuff Films*,

turn, might also reprehend this conduct as an especially abhorrent form of cruelty to animals, but rare is the activist who is prepared to explain it as a symptom of a hierarchical order, one of whose tiers they themselves also occupy. "Most states have provisions against bestiality," writes MacKinnon, "which in substance are laws against doing sexually to animals what is done to women by men on a daily basis."⁷⁴

III. THE LIKE-US TRAP

*[W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated. Gone. You aren't just deprived of language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come.*⁷⁵

A. *In Their Master's Voice*

It is essential, if we are to advocate a culture respectful of other conscious beings, that we be keenly aware that other animals cannot consent to being used for sexual gratification, to making themselves available to us for the benefit of our entertainment, or to being used in experiments carried out by biomedical or psychological researchers.⁷⁶ Yet advocacy often falls into a dreary pattern as rights proponents insist that non-human beings resemble human beings in their physical and cognitive make-up, and often insist that they actually perform humanness,

USA TODAY, Aug. 27, 1999 at A4. Such arguments imply that the abuse of non-human animals is taken seriously only insofar as intervention could potentially protect the human community from harm, instead of focusing on the abusive act itself. Potential harm to the human community is undoubtedly a serious connection. To focus on the act, arguably, is the better ethical route, as to do so would protect anyone who could suffer harm.

74. Mackinnon, *supra* note 2, at 267 (internal citation omitted). See also note 52, *infra*.

75. DISCOURSES ON LIFE AND LAW, *supra* note 54, at 39.

76. The International Primatological Society explicitly states that "[p]rimates of many species can be trained for sample procedures, such as presenting a limb for a blood collection," and advocates such training "whenever possible." IPS INTERNATIONAL GUIDELINES FOR THE ACQUISITION, CARE AND BREEDING OF NONHUMAN PRIMATES, (J.G. Else ed., 1988) (prepared by the Captive Care Committee, International Primatological Society); available at http://www.enviro.co.za/vervet/care_and_breeding.htm#CONTENTS (last visited Aug. 24, 2004) (on file with the UCLA WOMEN'S L.J.). Primates are also taught to co-operate with vivisectors using restraint chairs. *Id.*

in order to qualify for the basic legal protections that have been extended to all humans. So, as Professor MacKinnon observes,

[T]he question becomes: Are they like us? The issue is not the answer; the issue is, is this the right question? 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?"⁷⁷

To demonstrate that they do resemble human beings in morally significant ways, advocates rely on researchers to carry out experiments in laboratories. The irony here is obvious, although such a catch-22 situation is not altogether surprising. Some examples of advocacy for non-human interests are focused on training to the point where it is virtually impossible to tell if advocates are asking that other animals actually be freed from human society, or really advocating greater protections for those animals who become increasingly adept at doing what humans want them to do. A notice about "the Intellectual Chimp Ai" from the Discovery Channel described Ai in the following way:

The Intellectual chimp Ai, a female chimpanzee, has been learning — and "teaching" — at the Primate Research Institute of Kyoto University for about 20 years. She can grasp abstract concepts such as colour and numbers and now she's tackling money, accepting coins as payment for successful work and using them to buy apple slices. Primatologist Jane Goodall believes that Ai is beginning to reveal the full potential of chimpanzee intelligence.⁷⁸

In context, this seems to say that Ai is able to be habituated to the capitalist values of her tutors, and for that reason is revealing "the full potential" of chimpanzee intelligence. From a rights perspective, however, Ai could have only reached this "full potential" in the chimpanzees' territory — not in a laboratory in Japan. Moreover, non-human beings should not have to learn to buy slices of apples to be protected from the indignities which human beings would continue to impose on them. One of those indignities is twenty years in a lab. Thus MacKinnon touches on

77. MacKinnon, *supra* note 2, at 267 (internal citation omitted).

78. Primetime Primates, Discovery Channel Canada, Mar. 12, 2002, available at <http://www.exn.ca/Stories/2002/03/12/52.asp> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.) (describing television feature aired Apr. 7, 2002). For discussion of this promotion, see Lee Hall, *Theory of Mind*, GRASP: GREAT APE STANDING AND PERSONHOOD (Apr. 29, 2002) available at <http://www.personhood.org/personhood/theory-of-mind.html> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

a key point when expressing a suspicion that “the primary model of animal rights to date — one that makes animals objects of rights in standard liberal moral terms — misses animals on their own terms, just as the same tradition has missed women on theirs” and adds: “If this is right, seeking animal rights on a ‘like-us’ model of sameness may be misconceived, unpersuasive, and counterproductive.”⁷⁹

One argument of the type MacKinnon describes is propounded by Steven Wise. In *Drawing the Line*, Wise compares non-human characteristics with those of human rightsholders, using his four-year-old son’s cognitive skills as the yardstick for the “autonomy value” that is a baseline for rights.⁸⁰ If other individuals exhibit human-like “autonomy” they qualify for legal rights; although, due to genetic differences, such animals will rank numerically below the human child.⁸¹ With a numerical ranking just lower than the author’s child at the humanlike end of the spectrum is Kanzi, a bonobo ape who (although this is not discussed in *Drawing the Line*) was deliberately conceived and born at the Yerkes Field Station laboratory as an experimental subject, and partly raised by a bonobo called Matata, who had been trapped in a net from the freedom of the Congo and flown, with two other bonobos, to “a small, cramped, and dim cage one the end of the Yerkes great ape wing” at the behest of the U.S. National Academy of Science.⁸² After people at the Yerkes Center decided that Matata should be taken and used for breeding purposes, Kanzi was forcibly weaned, and was thereafter trained intensively to associate English words with symbols on a keyboard.⁸³

Next — a .95 on the scale in comparison with Kanzi’s .98 and the human four-year-old’s 1.0 — comes Koko, the only living gorilla able to communicate in American Sign Language,⁸⁴ who,

79. MacKinnon, *supra* note 2, at 264.

80. STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 49-72 (2002).

81. *Id.* at 181-82, 186-88, 205, 216, 228-29, 241.

82. SUE SAVAGE-RUMBAUGH ET AL., *APES, LANGUAGE, AND THE HUMAN MIND* 3-9 (1998). Kanzi’s biological mother gave birth while “on loan to the Yerkes Center from the San Diego Zoo.” See *The Apes*, at the Georgia State University Language Research Center Internet site, available at <http://www2.gsu.edu/~wwwlrc/Apes/GreatApes/Ape%20bios/Apesmatatab.htm> (last visited Mar. 23, 2005).

83. *Id.* at 21-23.

84. *Drawing the Line* indicates a disappointment in Koko’s failure to procreate in captivity. See WISE, *supra* note 80, at 207-230, 241. Wise describes a second gorilla, Mike — who was born free in Africa — as Koko’s “intended mate, but it had

like Kanzi, is kept on a leash on outings.⁸⁵ And so it goes through a variety of other animals: an overweight orangutan stuck in a cage in Zoo Atlanta to be alternately isolated and gawked at;⁸⁶ two Atlantic Bottlenose dolphins living in a laboratory setting;⁸⁷ moving downward numerically through Alex, a captive parrot and also an experimental test subject;⁸⁸ Echo, “the most famous living elephant in the world;”⁸⁹ Wise’s dog Mar-

just never worked out. Instead, he became her playmate, conversation partner, occasional pupil, and, alas, baby brother.” *Id.* at 208. Mike’s history included witnessing the slaughter of his parents, being sold by poachers, and winding up in a Stanford University laboratory. See Anthony Rose, *Tony’s Journal: Wed. 1/30/02 (Grist 3)*, at <http://www.koko.org/help/africa-update.phtml?offset=5> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.) (explaining that “Michael died a sudden death just after his 28th birthday, in April 2000. His heart gave out, as happens with many male gorillas in captivity in the prime of their lives” and observing that “all his life he felt threatened by unfamiliar humans”). Patterson has also been trying to obtain a pregnancy for years using another gorilla, Ndume. See Bilen Mesfin, *Gorilla Seeks Help Using Sign Language*, Aug. 9, 2004, at <http://www.msnbc.msn.com/id/5649239> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.).

85. FRANCINE PATTERSON AND EUGENE LINDEN, *THE EDUCATION OF KOKO*, 7 (1981), available at http://www.koko.org/world/teok_ch2.html (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.). For a photo of Kanzi out of the laboratory setting and held on a leash, see SUE SAVAGE-RUMBAUGH, *supra* note 82, at 7, 33 (discussing the lead as a tool of necessity, but avoided as long as possible, “since the more freedom Kanzi had, the more he encountered and elected to talk about at the keyboard.”).

86. WISE, *supra* note 80, at 179-206, 241. Wise describes orangutans as falling just below bonobos and chimpanzees on the scale in line for rights because the subject at issue, Chantek, outperforms dolphins and elephants in the mirror recognition test, and because of the orangutans’ “negligible economic value.” *Id.* at 205.

87. *Id.* at 131-58, 241. Wise describes tension between himself and the laboratory chief, Louis Herman, who believed Wise to have an “anti-captivity bias.” *Id.* at 131. Yet Wise heavily relies on the studies co-ordinated by Herman, which entailed training in a “‘dolphinized’ gestural language, distantly related to American Sign Language,” to make the case for positioning them just lower than the apes in the numeric scale. *Id.* at 138-50, 241. It is unclear whether Wise objects to the captivity or the “cruel” nature of it, which has involved “barren concrete tanks — too small, too shallow.” *Id.* at 140 (citing without critical analysis a press release issued by a group named Animal Rights Hawai’i). Wise faults the scientist for not allowing the dolphins to be treated as “ambassadors” in the traditional legal definition of the term. *Id.*

88. *Id.* at 87-112, 241.

89. *Id.* at 159-78, 241. Wise states that “[e]lephant memory has passed into legend, exemplified by H.H. Munro’s epigram (writing as Saki): ‘Women and elephants never forget an injury.’” *Id.* at 165. Wise relies heavily on tool use anecdotes from U.S. zoos to make a case for Echo, who lives in an African camp. Wise is ambivalent about Echo’s having a strong claim to rights, and places Echo “just below [laboratory parrot] Alex” because Echo has not demonstrated, to Wise’s satisfaction, the language abilities of the parrot, and given that “no African elephant has yet passed” a mirror self-recognition test and Echo’s success in that test so far “remains just a probability.” *Id.* at 178.

bury;⁹⁰ and on down to an indefinite number of honeybees who were trained to negotiate a variety of mazes and otherwise tested by a number of scientists.⁹¹

B. *Chains of Being*

Like the Great Chain of Being, an idea dating back at least as far as classical Greece, Wise's paradigm accepts a hierarchical idea of creation. The Great Chain "commenced with inanimate things and ranged upwards through the lowliest forms of life, through the more intelligent animals until it reached man himself; but it did not stop with man, for it continued upward through the myriad ranks of heavenly creatures until it reached its pinnacle in God."⁹² Its original function "served to formulate men's vague sense of the beast within themselves and their capacity for rising above bestiality."⁹³ The concept, in a general sense, is not alien to the modern era of scientific thought. Com-

90. *Id.* at 113-30, 241. The dog Marbury falls below .70 on Wise's "practical autonomy" scale. As .70 is the cut-off point for consideration for any basic rights under the Wise's expanded "moderate reading of the precautionary principle," Wise declines to make a case for Marbury's legal personhood. Cows, sheep, and chickens make no appearance in Wise's individuals book; it is doubtful Wise would argue for serious protection of their interests given Marbury's ranking combined with the apparent belief that dogs belong in the domestic setting. *See infra* notes 99-103 and surrounding text. Even animals ranked higher than .70 only get into Category Two — a sort of rights limbo. *Id.* at 241. Only the (great) apes and Atlantic bottle-nosed dolphins get into Category One. *Id.* That's the group whose members score .90 and above — the cut-off for basic rights "using a narrow reading" of Wise's "precautionary principle." *Id.* As judges must respect legal precedent, therefore tending to pick the most narrow reading in times of decisions about expanding fundamental rights, this principle gives judges a formula to lock out everyone but the elite five ape species and one dolphin species. In any case, as Professor MacKinnon puts it, the "bottom line" is that we eat them. MacKinnon, *supra* note 2, at 270 ("What is the bottom line for the animal-human hierarchy?" asks MacKinnon, regarding the fundamental level true respect would have to reach. "The place to look for this bottom line is the farm, the stockyard, the slaughterhouse."). As long as we are eating other animals, it is difficult to imagine how discussions of "liberty rights" could consist of anything more than meaningless platitudes.

91. *Id.* at 73-86, 241. Of bees, Wise says that "[a] scientific investigation continues" evidence for their "practical autonomy might be strengthened," and if it is, "their entitlement to basic rights will have to be revisited." *Id.* at 86.

92. WINTHROP JORDAN, *WHITE OVER BLACK* 219 (1968) (cited in D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, *supra* note 10, at 479). *See generally* ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* (1960) (tracing the idea of a world in which every being was related to every other in a continuously graded scale, from its conception in classical Greek philosophy through subsequent religious thought, in the fields of metaphysics, ethics, aesthetics, astronomical and biological theories, and in literature).

93. *See* JORDAN, *supra* note 92, at 220.

pare Jane Goodall's view, presented in the book *In the Shadow of Man*:

It has come to me, quite recently, that it is only through a real understanding of the ways in which chimpanzees and men show similarities in behavior that we can reflect with meaning on the ways in which men and chimpanzees *differ*. And only then can we really begin to appreciate, in a biological and spiritual manner, the full extent of man's uniqueness.⁹⁴

On human IQ tests, the caged gorilla scores between 70 and 95 — which, in Wise's view, is "slow but not retarded."⁹⁵ Wise's writings also mention Lucy, "a 6-year-old chimpanzee legally kept as a pet and test subject," who draws kudos not only for having a great deal of DNA in common with her owners, but also for being "personable."⁹⁶ At least one commentator who opposes animal rights nevertheless seemed impressed, when reading Wise's writings, that "Lucy even regularly prepared tea for researchers and masturbated to pictures of naked men in *Playgirl* magazine."⁹⁷

Wise also presents a description of a laboratory parrot, Alex, who shows off a remarkable repertoire of mathematical and verbal skills, the likes of which got the apes into the highest class of

94. HUGO AND JANE VAN LAWICK-GOODALL, *IN THE SHADOW OF MAN* 236 (1971) (emphasis in the original).

95. See WISE, *supra* note 80, at 212.

96. See *Beastly Behavior?*, WASHINGTON POST, Jun. 5, 2002, at C1 (citing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000)).

97. Damon Linker, *Rights for Rodents*, COMMENTARY No. 4, Vol. 111, April 1, 2001, at 41 (commenting on descriptions of Lucy in WISE, *supra* note 96). Wise's uncritical reports of such stories calls for attention to the subject of animal law demonstrate disinterest in the connection between feminism and other social equality movements, and arguably thwart serious jurisprudence in the area of non-human personhood. Consider the circus-like elements in a commentary published in 1999 through a variety of media outlets:

Sometime soon, according to animal-rights activists, a great ape will testify in an American courtroom. Speaking through a voice synthesizer, or perhaps in sign language, the lucky ape will argue that it has a fundamental right to liberty. "This is going to be a very important case," Duke University law Prof. William Reppy, Jr. told the *New York Times*. Reppy concedes that apes can talk only at the level of a human 4-year-old, so they may not be ready to discuss abstractions like oppression and freedom. Just last month, one ape did manage to say through a synthesizer: "Please buy me a hamburger."

John Leo, *Another Monkey Trial*, U.S. NEWS & WORLD REPORT 19, Sept. 20, 1999. (Versions with minor editing variations were printed in three other newspapers: including the *Dallas Morning News*, the *Washington Times*, the *Chattanooga Times Free Press*, and the *U.S. News and World Report*.)

Wise's numbered graph.⁹⁸ But at the end of Wise's analysis of the bird's attributes, Alex is summarily excluded due to parrots' evolutionary distance from humans; besides, Alex never proved an ability to acknowledge his own existence by reacting to his reflection in a mirror (a meaningless deficiency given that Alex was never actually given the mirror test).⁹⁹ Wise opts for reconciliation with the prospect that "[u]nusual political barriers in the form of organizations of parrot owners might resist attempts to grant their parrots rights against them."¹⁰⁰

If animal rights boils down to nothing more than granting captive animals rights against pet owners, cognitive ethologists, or others who own or use non-humans, rights will have virtually no meaning. But many advocates frame the issues in terms of the interests of domesticated or captive animals, which may indicate that the bulk of advocates are willing to accept the perpetuation of domestication or captivity as long as the animals therein are not treated as "mere" objects.¹⁰¹ Likewise, Steven Wise notes that advocating for non-human interests will meet "resistance from those who breed dogs for biomedical research, use dogs in biomedical research, or race them."¹⁰² "On the other hand," Wise writes, "a hefty majority of Americans who live with dogs see them as family. This is why in a case involving a dog one Texas Appeals Court judge urged that the courts 'not hesitate to acknowledge that a great number of people today treat their pets as family members.'"¹⁰³ Wise goes on to say: "That there are so many dogs and that such a large percentage of people embrace

98. See WISE, *supra* note 80, at 87-112.

99. *Id.* at 112.

100. *Id.*

101. Public commentary (not to mention the "victory" announcements of animal advocates themselves) routinely focuses on husbandry issues and leaves vast institutions of animal use unchallenged. The words of one writer are representative:

But the biggest victory so far for the animal-rights movement came last October, when the U.S. Department of Agriculture (USDA) agreed to settle a lawsuit filed by a group called the Alternatives Research and Development Foundation that was seeking to expand the scope of the Animal Welfare Act of 1966. Since its passage, this act had been interpreted as empowering the USDA to oversee the treatment in laboratory experiments of large animals like dogs, cats, and primates. Left out of this regulatory regime were birds and, most importantly, mice and rats, which account for 95 percent of all animals used in scientific tests.

Linker, *supra* note 97, at 41.

102. See WISE, *supra* note 80, at 130.

103. See *id.*

them as family, even as children, may make it easier for judges to place them where they belong.”¹⁰⁴ For Wise, evidently, a dog’s place is in the home, while the many of the remaining wolves in North America are being gunned down with state government permission and collaboration.¹⁰⁵ Wise does not mention their right to live freely anywhere in *Drawing the Line*.

In a government-funded project called “The Embedding of Language in Culture,” Sue Savage-Rumbaugh, who is cited with approval in numerous non-human advocacy writings,¹⁰⁶ has proposed to “expand our understanding of the way in which culture promotes skill development in art and music” “by continuing and expanding the bi-species culture” — a study dependent upon the availability of a second generation of captive-born bonobo apes.¹⁰⁷ The grant pays for the use of eight non-human great apes — seven bonobos (including Kanzi), and an orangutan. The youngest bonobo involved, Nyota, was deliberately conceived in captivity by researchers.¹⁰⁸ “Those that have linguistic compe-

104. See *id.* at 130. See also Jill Serjeant, *Animals Have Rights Too, Says Legal Eagle*, Reuters, May 21, 2002, at <http://www.enn.com/arch.html?id=1253> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.) (reporting: “‘There are some non-human animals who obviously have such complex minds and such strong personalities that they are indeed like our children, and they deserve to be treated with respect,’ said Wise, who has four-year-old twins.”).

105. See Mary Pemberton, *Alaska Judge Refuses to Block Wolf Control*, DESERT NEWS, Dec. 7, 2003, at A02.

106. See, e.g., KRISTEN ANDREWS, *The First Step in the Case for Great Ape Equality: The Argument for Other Minds*, in ETICA & ANIMALI: THE GREAT APE PROJECT, Aug. 1996, at 131-41; see generally STEVEN M. WISE, *RATTLING THE CAGE*, *supra* note 96.

107. *Studies of Language, Cultures and Tools*, a grant from the National Institute of Child Health and Human Development (Grant No. NICHD-06016) at <http://www.gsu.edu/~wwwlrc/CurrResearch/Grants/LangCultTools.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.). See also the Georgia State University Language Research Center Internet site, *supra* note 82, available at <http://www.gsu.edu/~wwwlrc/research-culture.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN’S L.J.).

108. Nyota is the offspring of long-term laboratory primate Panbanisha and P-Suke, the latter being loaned to the language laboratory from the Japan Monkey Center. See *The Apes*, and *Studies of Language, Cultures and Tools* at the Georgia State University Language Research Center Web site, *supra* note 82. Variations on this theme of bi-species enculturation using deliberately-bred apes include the studies done by Daniel Povinelli, a researcher at the University of Louisiana at Lafayette in the U.S., who planned to study the differences between the reasoning methods of human and non-human apes by taking eight baby chimpanzees out of human foster homes once they have bonded, and installing them in a laboratory setting. Povinelli believes that the disoriented apes will exhibit mental states approximating mental disabilities in human children, whose parents would benefit from the work. Povinelli has predicted that there will be no non-human great apes alive in 40-50 years out of

tencies,” states the abstract for the grant, “are part of an emerging Pan/Homo cultural group that is being compared with the Pan *paniscus* diagnostic cultural group.”¹⁰⁹ Rumbaugh trained the apes to produce sentences using a keyboard, and investigated “the potential for weaving, music, and drawing in a bonobo infant that is exposed to these activities from birth in a cultural setting.”¹¹⁰ The study was also intended to “determine the capacity of bonobos to produce human-like speech and to communicate novel semantic information through the vocal channel.”¹¹¹ Further, it was designed to “develop new theoretical paradigms regarding the factors that make learning and the transmission of culture possible and new methodologies for documenting the capacities of apes engaged in cultural processes.”¹¹²

The disturbing implications of having apes “engaged in cultural processes” because human scientists have trained them to mimic human activities and exhibit them to an audience have gone virtually unnoticed by animal rights advocates.¹¹³ Many members of the general public first heard of bonobo apes through interviews of rock singer Peter Gabriel shown on pop outlets including MTV News.¹¹⁴ The reporters and the public ap-

laboratories, and that, therefore, experimenters will be in the best position to ensure the apes' survival. Correspondence from Daniel Povinelli to Anthony Smith of the Fauna Foundation (on file with author).

109. *Studies of Language, Cultures and Tools*, a grant from the National Institute of Child Health and Human Development (Grant No. NICHD-06016), at <http://www.gsu.edu/~www/lrc/CurrResearch/Grants/LangCultTools.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

110. *Id.*

111. *Id.*

112. *Id.*

113. Currently, The Chimpanzee Collaboratory, described on its web site as “[c]onceived and initially funded by The Glaser Progress Foundation” and supportive of “individual projects of member organizations while fostering joint endeavors to more rapidly achieve the goals of protecting the lives and establishing the legal rights of chimpanzees” does not address the matter. The Chimpanzee Collaboratory, at <http://www.chimpcollaboratory.org/> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.). The major concern of the group and its coordinator Sarah Baeckler, judging by a regular stream of press releases and its Web site, seems directed at use of apes that relies on “abject fear” training for television commercials, films, and circuses. See, e.g., Sarah Baeckler with Charles Spano, *This is entertainment? Chimp-sploitation in Hollywood*, CLAMOR MAGAZINE, May/June 2004, available at <http://www.chimpcollaboratory.org/news/clamor.asp> (last visited Aug. 25, 2004) (on file with the UCLA WOMEN'S L.J.) (concluding that “Things will only start to change when the individuals who make Hollywood tick defend chimpanzees and their well-being.”).

114. MTV News, *Peter Gabriel Teaching Monkeys To Play Keyboards*, Jul. 12, 2001, at <http://www.mtv.com/news/articles/1445116/20010712/story.html> (last visited

peared more interested in entertainment than in respecting the apes themselves (who were regularly and erroneously called “monkeys”).¹¹⁵ After spending some time in laboratories, Peter Gabriel wrote the song *Animal Nation*, with these lyrics: “I didn’t meet you in the jungle; Swinging from a tree; I sat down at the piano; You were playing with me; I couldn’t believe all the things you could do; The apes I’ve seen were in the zoo.”¹¹⁶ Gabriel’s song later suggests the hope that similar experimentation will take place using “[d]olphins, cats, and elephants.”¹¹⁷ But at this time, most of the activists and lawyers developing the personhood subject have dealt with non-human primates and the concept of “hominid rights.”¹¹⁸

“Like women’s rights,” Catharine MacKinnon notes, “animal rights are poised to develop first for a tiny elite, the direction in which the ‘like us’ analysis tends. Recognizing rights for chimpanzees and bonobos, for instance, would be like recognizing them for the elite of women who can preach in public — perhaps at the expense of, and surely in derogation of, the rights of that rest of women who are most women.”¹¹⁹ “Predicating animal rights on the ability to suffer is less likely to fall into this trap,” writes MacKinnon, and it might just be the kind of leader-

Aug. 4, 2004) (on file with the UCLA WOMEN’S L.J.). Gabriel has had Savage-Rumbaugh’s captive apes play keyboards in the laboratory. *See id.*

115. *See, e.g.*, MTV News, *supra* note 114.

116. Peter Gabriel, *Animal Nation*, on THE WILD THORNBERRYS MOVIE Sound-track Audio CD (Jive Records 2002).

117. *Id.*

118. *See, e.g.*, Rowan Taylor, *A Step at a Time: New Zealand’s Progress Towards Hominid Rights*, ANIMAL L. (2001) (describing the legislative process through which the Great Ape Project is pursuing “hominid rights” in New Zealand). The distinct category carved out in this essay — which lacks even a fleeting mention of sentience — may reinforce the very prejudices that it presumably seeks to overcome. Non-human apes are rarely seen in New Zealand, and they are certainly not eaten there; a key part of Rowan’s argument relies on how little is required by the proposal: The taxonomical hierarchy is kept intact and no one’s property rights are disturbed. *Id.* The danger, as Professor MacKinnon puts the point, is as follows:

If qualified entrance into the human race on male terms has done little for women — granted, we are not eaten, but then that is not our inequality problem — how much will being seen as humanlike, but not fully so, do for other animals? What law resists doing is taking anything they want away from those at the top of hierarchies.

MacKinnon, *supra* note 2, at 271.

119. *See id.* Referring to one historical comment that “condescends to women and animals at once,” Professor MacKinnon recounts a quote attributed to Samuel Johnson: “Sir, a woman’s preaching is like a dog’s walking on his hind legs. It is not done well but you are surprised to see it done at all.” *Id.* at 265 (citing JAMES BOSWELL, I BOSWELL’S LIFE OF JOHNSON (1922)).

ship that can make the non-human advocacy movement universally relevant, for, as MacKinnon also points out, "it leads more directly to a strategy for all. Indeed, capacity to suffer may be closer to women's bottom line than liberal legal approaches to women's rights have yet reached."¹²⁰

And if so, the capacity to suffer also leads more directly to a respectful strategy for any currently rightless individual, including the most human-like. It is important to remember that the human-like category is a two-edged sword. The more "like us" a certain defined group is, often the more useful the group's members are thought to be to the class which controls them. Just as human slaves and prisoners have been considered fruitful models for smallpox and other research,¹²¹ non-human primates are highly valued as models in psychological testing, language studies, hepatitis research, aeronautics experiments, and HIV studies, to name a few areas.¹²²

In a *Wall Street Journal* article that focused on non-human apes, constitutional scholar Laurence Tribe argued that "[n]onhuman animals certainly can be given standing."¹²³ And

120. MacKinnon, *supra* note 2, at 271. Samuel Warren and Justice Brandeis called the tort of battery "recognition of the legal value of sensations." See Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), at note 1 and surrounding text; available at http://www.lawrence.edu/fac/boardmaw/Privacy_brand_warr2.html (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

121. Thomas Jefferson personally conducted smallpox vaccination experiments on his slaves. See Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1, 62 (2000) (citing Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Sociopolitical Choices*, 11 HARV. BLACKLETTER L.J. 115, 120 (1994)). Some such experiments surely increased life expectancies in the United States, but the price paid by the slaves was often irreversible damage, or death. *Id.*

122. MacKinnon describes one example of the results of being so valued: Harry Harlow and Stephen J. Suomi created models for abusive motherhood by placing female monkeys in "an isolation chamber for up to eighteen months after birth, so all they felt was fear" and then impregnating them with "a device they called the 'rape rack.'" See MacKinnon, *supra* note 2, at 274, n. 14 (internal citations omitted). MacKinnon notes that the selection of primates for this experiment was intended to induce a psychopathology as human-like as possible, and further notes the "multi-layered sexism" in this experiment designed to focus on bad motherhood as a cause of pathology while simultaneously forcing female rhesus monkeys to endure rapes — in short, "an antifemale notion directed equally at humans and non-human animals." *Id.* Significantly, MacKinnon notes that the misogyny aspect was not addressed by James Rachels, the philosopher and advocate whose work describes the experiments. *Id.*

123. "With legal standing," reported the *Wall Street Journal*, "chimpanzee plaintiffs could seek injunctions against researchers, Hollywood animal trainers and operators of roadside attractions who might harm them physically or psychologically.

yet, Professor MacKinnon's point that "[h]ow to avoid reducing animal rights to the rights of some people to speak for animals against the rights of other people to speak for the same animals needs further thought" is well taken.¹²⁴ Much of the debate so far has focused on the right of some groups to represent non-humans against other groups, rather than on how to withdraw from trading in animals.

Of Jerom, a 13-year-old chimpanzee who died alone in 1996 in an Atlanta laboratory after being used in HIV experiments, Professor Tribe has declared, "Clearly, Jerom was enslaved."¹²⁵ Tribe added here that "recognizing that a being is entitled to being treated with respect, not wanton cruelty, and an eye to its own flourishing by no means translates into an absolute right, an absolute veto, over any possible use of that entity to save a human life, or achieve a higher goal."¹²⁶ The reporter immedi-

They might seek compensatory damages to cover medical expenses or to provide for a comfortable retirement." David Bank, *Is a Chimp A Person With a Legal Right To a Lawyer in Court*, THE WALL STREET JOURNAL, Apr. 25, 2002, at A1. The article correctly notes that so-called retirement of a non-human ape typically involves government funding, and thus lifetime control over the title to the individual by research interests. *Id.* Animal welfare groups and individual animal welfare proponents have consistently supported such compromises, giving the term "retirement" an increasingly euphemistic quality. See Lee Hall, *A Primer on the CHIMP Act*, FRIENDS OF ANIMALS ACTIONLINE, Spring 2002, at 28.

124. MacKinnon, *supra* note 2, at 270 (internal citation omitted).

125. 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, 4 (2001), available at http://www.animallaw.info/journals/ajo_pdf/lralvol_7p1.pdf (last visited Mar. 7, 2005). Tribe continues:

I am not suggesting that today's judges would so read the Thirteenth Amendment; I am simply pointing out that our constitutional apparatus and tradition includes devices for protecting values even without taking the step of conferring rights on new entities — by identifying certain things that are simply wrong.

Id.

126. Bank, *supra* note 123. Tribe has written, with regard to the prospect of conferring rights on a chimpanzee or other non-human animal, that "rights are almost never absolute." See Tribe, *supra* note 125, at 2. Tribe continues:

Arguing for constitutional rights on behalf of non-human beings, which some people viscerally oppose, shouldn't be confused with giving some non-human interests absolute priority over conflicting human claims. Recognizing rights is fully consistent with acknowledging circumstances in which such rights might be overwritten, just as human rights themselves sometimes come into conflict. . . if it could really be shown, for example, that performing a particular experiment on chimpanzees would be the only means of relieving some terrible form of human suffering, then recognizing the chimps' right of integrity, wouldn't necessarily end the argument under our constitutional tradition. It would be open to argument that, in that circumstance,

ately reassured the *Journal's* readers: "In other words using chimps for medical research would remain possible."¹²⁷ This begs the question, for research on apes such as Jerom would remain possible precisely because they are enslaved. Rights might not be absolute — it is true, in other words, that rights between equal rights-holders sometimes conflict — but if a class of living constitutional persons can be used in involuntary medical research for the benefit of another class, then the achievement of securing standing in court to challenge the enslavement would be devalued beyond recognition.¹²⁸ For invasive biomedical research, when it is neither therapeutic nor voluntary, is torture.¹²⁹ The United Nations General Assembly has recognized a prohibition of torture under international *jus cogens* norms that can neither be waived nor excused.¹³⁰ Exceptional circumstances such as a state of war or any other public emergency may not be invoked as a justification.¹³¹

In an essay also included in *Animal Rights: Current Debates and New Directions*, Steven Wise insists, "We can believe in hier-

perhaps the right should give way. It wouldn't follow that it *ought* to give way, but those who oppose [non-human rights] often do so on the basis of a myth — the myth that conferring rights on non-human beings would be a conversation-stopper — that it would, in effect, preclude the possibility of arguing for exceptions.

Id.

127. Bank, *supra* note 123.

128. For an argument regarding the importance of physical integrity and freedom from torture in the case of a non-human ape claiming constitutional standing, see Hall & Waters, *supra* note 121, at 43-63.

129. *Id.* at 43. Torture can be aimed at extracting information as well as, or instead of, being designed to punish or humiliate. See *id.* The General Assembly of the United Nations has defined torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons." See *The Declaration on the Protection of All Persons from Being Subjected to Torture*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975, art. I.). The Declaration expressly prohibits any state from permitting or tolerating torture or other cruel, inhuman or degrading treatment or punishment. *Id.* at art. III.

130. See *id.* A *jus cogens*, or peremptory, norm is defined by article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 53, (entered into force Jan. 27, 1980) art. 53.

131. *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment*, *supra* note 129, art. III.

archy. We can believe the universe was made just for us. The problem occurs when we treat those whom we believe lie beneath us as slaves."¹³² It is naïve to think that humans can believe that they're superior and uniquely important and *not* treat other animals accordingly.¹³³ Human history, right up to events in today's news, demonstrates the unlikelihood of such a scenario.

IV. EDIBLE COMPANIONS

"What is the bottom line for the animal-human hierarchy?" asks Professor MacKinnon. "The place to look for this bottom line is the farm, the stockyard, the slaughterhouse."¹³⁴ Here at the bottom line, our relationship with other animals is the starkest hierarchical nexus: the animate-inanimate dichotomy. When we consume them, they have become inanimate. Non-human animals, by the billions, in a systemic, quotidian way, are not only enslaved in our markets, but completely consumed in them. Only a radical change in perspective will enable us to view the level at which such deeply-rooted exploitation could be successfully challenged.

To see that this radical change is set in motion, the majority of both scholars and activists would be obliged to stop focusing prolonged, fascinated attention on the pornographic results of our social ideas — posters of primates in restraint chairs, bound in gauze; news clips about a cat found lifeless after sexual abuse; photos of dogs chained to trees; videos of injured cattle being dragged to the abattoir — and to start to study and question the concepts that continually create such events.¹³⁵ The same is true

132. Steven M. Wise, *Animal Rights, One Step at a Time*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS*, at 23-24.

133. I am appreciative to Joan Dunayer for articulating this insight.

134. MacKinnon, *supra* note 2, at 270.

135. Focusing on extreme examples of maltreatment of slaves is not necessarily effective, as a general matter, in dismantling slavery; a focus on the severe symptoms of enslavement are susceptible to eliciting responses aimed at ameliorating certain conditions of slavery rather than abolishing slavery itself. Particularly egregious treatment of human slaves in the U.S. did draw some humane welfare measures. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 188-99* (1978). Early eighteenth-century South Carolina lawmakers dealt with extreme neglect or maltreatment due to a concern for preserving property interests in slavery rather than an interest in dismantling slavery, expressing concern that some slaves had run away "for want of a sufficient allowance of provisions." *Id.* at 190. Justice is hardly advanced by providing "sufficient provisions" for the slave to be able to survive inside the system of slavery.

of pornography itself. Here we come to the traditional problem of charity: While we decry the oppression and destruction, we do not wish to consider the thoughts that lead to oppression and destruction. Many activists, with the support of some scholars, are willing to wage a "war" on those that have the thoughts, as though intimidation or violence upon the people that hold oppressive ideas could halt or reverse the oppression.¹³⁶ Unwilling to focus on domination as a central issue, and even willing to attempt to employ domination as a tactic in activism, many activists fail to perceive the myriad and interrelated injustices that become hallmarks of a patriarchal society.

In a variation on the theme, even those who claim feminist backgrounds miss the central importance of domination, so that what usually gets dubbed "ecofeminism" within the animal rights movement is actually a paternalistic ethic of care. In a book subtitled "A Feminist Caring Ethic for the Treatment of Animals," chapter author Rita Manning accepts the continued breeding and ownership of horses "because horses make wonderful friends and because they are unique parts of the natural world."¹³⁷ Ironi-

136. See, e.g., Steve Best, *Thinking Pluralistically: A Case for Direct Action*, SATYA MAG., Apr. 2004, available at <http://www.satyamag.com/apr04/best.html> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.) (referring to "a new civil war" between exploitive corporations on one hand and non-human advocates and environmentalists on the other). Best writes: "'War entails violence, hatred, bloodshed, and an escalation of conflict when dialogue fails. In the battle over animal liberation, significant gains are being made through education, legislation, and dialogue, but there are also impasses where negotiations break down or fail.'" *Id.* Best decides that advocates for non-human interests should be "commended for exercising moderation and restraint" and for attacking property rather than people "however righteous their anger against animal exploiters." *Id.* Best further argues that the psychological intimidation used by some groups is not violence:

Moreover, the ALF [Animal Liberation Front] only targets individuals directly involved in animal exploitation and thus avoids those who qualify as "innocent" or "non-combatants." According to just war criteria, "collateral damage" in a war is expected and unavoidable, but combatants must seek to minimize it, as does the ALF. SHAC [Stop Huntingdon Animal Cruelty], interestingly, has a different tactic that blurs the line between combatant and non-combatant. By pressuring companies and individuals who do not directly work for HLS but provide financial backing or other services, such as cleaning, SHAC sees those indirectly associated with HLS as legitimate targets.

Id. When Best concludes that "[t]here is a new face of animal rights activism, a new militancy entirely appropriate to the dire suffering of animals," one might well wonder whether Best means that the public should see the face of the animal advocacy movement leadership as male-identified.

137. See Rita C. Manning, *Caring for Animals*, in BEYOND ANIMAL RIGHTS: A FEMINIST CARING ETHIC FOR THE TREATMENT OF ANIMALS 113 (Josephine Donovan & Carol J. Adams eds., 1996).

cally, it is the domestication, the breeding, and the owning of these animals — while their natural habitat is cleared away to make room for racecourses, show grounds, and rodeos — that pulls them from the natural world.¹³⁸ Yet Manning claims that the end of domestication would be a tragedy for horses who “flourish” in domestic service to humans as “willing partners.”¹³⁹

Manning’s position that horses are our willing partners illustrates MacKinnon’s point that the coercive effects of the social hierarchy we construct out of human sex and between species are made invisible,¹⁴⁰ and that the “denial of social hierarchy in both relations is further supported by verbiage about love and protec-

138. For a detailed critique of Manning’s position, see Gary L. Francione, *Ecofeminism and Animal Rights; A Review of Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals*, 18 WOMEN’S RTS. L. REP. 95 (1996) (book review/commentary).

139. Manning, *supra* note 137, at 113.

140. MacKinnon writes:

The hierarchy of people over animals is not seen as imposed by humans because it is seen as due to animals’ innate inferiority by nature. In the case of men over women, it is either said that there is no inequality there, because the sexes are different, or the inequality is conceded but said to be justified by the sex difference, that is, women’s innate inferiority by nature.

MacKinnon, *supra* note 2, at 264. On the matter of male domination throughout the professions, Peter Singer is willing to accept sex-based hierarchies in business and politics as the expected social result of a natural biological imperative:

If Darwinian thinking tells us that we have been too ready to assume a fundamental difference in kind between human beings and non-human animals, it could also tell us that we are too ready to assume that all human beings are the same in all important respects. While Darwinian thought has no impact on the priority we give to equality as a moral or political ideal, it gives us ground for believing that since men and women play different roles in reproduction, they may also differ in their inclinations or temperaments, in ways that best promote the reproductive prospects of each sex. Since women are limited in the number of children they can have, they are likely to be selective in their choice of mate. Men, on the other hand, are limited in the number of children they can have only by the number of women they can have sex with. If achieving high status increases access to women, then we can expect men to have a stronger drive for status than women. This means that we cannot use the fact that there is a disproportionately large number of men in high status positions in business or politics as a reason for concluding that there has been discrimination against women.

PETER SINGER, *A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION* 17-18 (1999) (citing with approval another book in the “Darwinism Today” series, KINGSLEY BROWNE, *DIVIDED LABOURS: AN EVOLUTIONARY VIEW OF WOMEN AT WORK* (1999)).

tion” as though it mitigates the domination.¹⁴¹ Accepting a paradigm long ago worn threadbare by the defenders of chattel status for women and for human slaves, Manning proceeds to discuss the importance of the “ritual” involving “the economic transaction involved in buying a horse: the pre-purchase exam, the bill of sale, the check” in conveying “a new sense of responsibility toward the animal.”¹⁴²

Many more activists are willing to focus on the slaughter of horses for food than are willing to question the breeding and breaking of horses.¹⁴³ Indeed, one of the common arguments against the slaughter of horses is that they are our companions or that we owe them better treatment for their history of service to humankind. We don't want to be confronted with the bottom line when it involves our “willing partners.” Yet it is the treatment of horses as commodities to be exchanged that makes them available for slaughter. And it is our acceptance of the riding of horses in the first place that causes hundreds of horses to die every year on racetracks worldwide,¹⁴⁴ and that prompts the racing industry to invest in vivisection on lesser-valued horses in order to investigate the treatment of racing-induced injuries.¹⁴⁵ The plight of ex-racing horses, and any owned horses who pass

141. See MacKinnon, *supra* note 2, at 264-65. MacKinnon further notes that “[i]n 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.” *Id.* at 264.

142. See Manning, *supra* note 137, at 115.

143. A notable exception is Priscilla Feral, president of Friends of Animals, who has written on the vital importance of protecting the “natural homelands” of free-living non-human populations, adding:

Humans have imposed harnesses and saddles of African wild asses, just as we have done with North American wild horses, for domestic work. Breeders have caused horses and donkeys to interbreed, creating mules — to do even more work for us. But attempts to domesticate zebras have failed, as these animals have an unknown quality that defies domestication. Friends of Animals admires this quality, and seeks to protect it. With knowledge that we cannot control everything, we may learn to control ourselves.

144. PRISCILLA FERAL, *Supporting Freedom for Animals from A to Z in WHO WE ARE* (2003) (on file with author).

Yates et al., *Horse Maiming in the English Countryside: Moral Panic, Human Deviance, and the Social Construction of Victimhood*, SOCIETY AND ANIMALS, VOL. 9 No.1, 2001, at 17 (citing MARK GOLD, ANIMAL RIGHTS: EXTENDING THE CIRCLE OF COMPASSION 115 (1995) (discussing the death of over 200 annually in Britain alone), available at <http://www.psyeta.org/sa/sa9.1/yates.shtml> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

145. *Id.* at 18 (citing Mark Gold, *Racing's Dead End*, OUTRAGE MAG., Dec-Jan. 1996/97, at 11).

their primes or the primes of their owners, may be a chain of sale, resale or donation to charity, neglect, and finally slaughter.¹⁴⁶

What is the message of a campaign to ban the human consumption or the transport of horsemeat? Is the point of advocacy to run hither and thither to ensure that horses, who are constantly being brought into the stream of commerce by human breeders, die of old age and get decent burials? If they are not slaughtered for human consumption, one might assume, it will be for glue or dog food. If the factor of demand for animal flesh is not contemplated and effectively addressed, some other animal will appear on the same Belgian or Italian menu that would have featured horsemeat — a dish that should arouse no more ethical outrage than the average North American pizza.

By denouncing acts we consider particularly egregious — the eating of horses, the barbaric customs of foreigners — the humane community routinely enables its members to miss the meaning of what is done at home, and the benefits derived in their own regions from the pervasive commodification of other animals. With regard to an issue that parallels that of horse slaughter, North American activists often direct invective at the horrid conditions of Asian cat and dog flesh markets. Frank Wu notes that “[d]og-eating is an international urban legend with some truth to the tale.”¹⁴⁷ Professor Wu describes a 1989 Long Beach, California case in which Cambodian refugees fatally bludgeoned a puppy.¹⁴⁸ The judge who considered the refugees’ acts found that “they had not inflicted unreasonable pain on their meal.”¹⁴⁹ Although the refugees probably hadn’t inflicted unreasonable pain by meat industry standards, animal advocates expressed particular outrage over this ruling.¹⁵⁰ The case prompted the California legislature to enact a statute making it a misdemeanor to eat dog or cat flesh.¹⁵¹ No one sponsored any similar law on behalf of pigs, cows, or chickens. Wu argues that the improved case against eating dogs, “possibly the only case that merits notice,” is the case for a vegetarian lifestyle. “The prohibition

146. *Id.* (citing GOLD, *supra* note 144, at 115).

147. FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 218 (2002) (in Chapter 6, *The Best ‘Chink’ Food: Dog-Eating and the Dilemma of Diversity*).

148. *Id.*

149. *Id.* at 219.

150. *Id.* at 219, 223.

151. *Id.* at 219.

against eating dogs," writes Wu, "becomes only a particular example in that line of reasoning."¹⁵²

Any marketplace where animals are caged and sold as food products then warrants criticism, yet we might take Professor Wu's logic further. Our traditions of breeding and trading other animals as companions — the form of domination over cats and dogs and horses that we accept and even regard as virtuous — certainly connects with humanity's domination of these same animals in other ways. We can point the finger at the barbaric eating of dogs without noting that our habit of making toys or companions out of dogs who have no say in the matter sets the stage for training dogs to go into exploding buildings, to make them the objects of Internet pornography, and to kill them by the millions in shelters and in laboratories each year. The notion that these more familiar conventions are substantially less barbaric than the customs of the foreign marketplace is unlikely to withstand the scrutiny of logic.

V. ROMANTIC PATERNALISM

*There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.*¹⁵³

Perhaps we could gain an insight into our love of animals owned in the private sphere by considering U.S. Supreme Court Justice Brennan's observation that our long history of patriarchal dominion "was rationalized by an attitude of 'romantic paternalism.'"¹⁵⁴ Personal affection for individual women, however sincere, does not disprove the existence of institutionalized oppression. We rationalize a traditional tendency to oppress animals in part by making ourselves their benefactors. In practical effect, this does not put them in a loftier place; it keeps them forever in cages.

Consider the circular rationale presented by Matthew Scully in *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*.¹⁵⁵ "Someone has to assume dominion, and

152. *Id.* at 226.

153. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (internal citation omitted).

154. *Id.*

155. SCULLY, *supra* note 9.

looking around the earth we seem to be the best candidates,” states the author.¹⁵⁶ Elsewhere in the same book, Scully states: “It is our fellow creatures’ lot in the universe, the place assigned to them in creation, to be completely at our mercy, the fiercest wolf or tiger defenseless against the most cowardly man.”¹⁵⁷ Having summarily degraded the big cat and wolf, Scully proceeds to consider the term pet “exactly right in capturing the creatures’ utter reliance on our goodwill, and indeed their sheer, delightful uselessness to us apart from mutual affection.”¹⁵⁸ Scully continues, “That dependence and the trust it instills are the whole point, the fun of it.”¹⁵⁹ According to Scully, the tame animal is “the most natural of all, displaying qualities hidden within his or her own nature that only human kindness can elicit.”¹⁶⁰ Here again is the argument made many times by missionaries and heads of state throughout humanity’s violent history of creating and subduing the other: that domination is a noble way of developing those who know not what is good for them, but later will thank us for giving them true freedom from their savage or archaic or debased way of life. The rush by the animal protection community to sing Matthew Scully’s praises is cause for alarm, for although this version of animal advocacy might seem to have relatively good chance of appealing to mainstream values, it inevitably promotes the very thinking that has objectified non-human animals. The acceptance of subjugation enabled us to own other animals in the first place, and then presented us with the spectrum of possible cruelties to inflict upon them. It then left to us the decision about just what degree of humane protections we ought to extend.

Pet ownership is often defended on the grounds that the pets benefit from a symbiosis with humanity that developed naturally over millennia. Notably, though, most modern breeds of cat

156. *Id.* at 12.

157. *Id.* at 9.

158. *Id.* at 5.

159. *Id.*

160. *Id.* at 115. Those hidden qualities include the diseases and deformities that have been inbred into many pets. All of nature’s risks and perils notwithstanding, would some ancestral wolf ever have opted to spawn such progeny as modern bulldogs, unable to give birth without surgery? Would some ancestral cat ever have traded freedom for the chance to become a Manx, susceptible to bearing kittens with spina bifida, or a Peke-faced Persian, whose eyes and sinuses may be so deformed that they require antibiotics for life? These breeds are but examples of what is permitted to us once we accept domestication.

have been produced within the last century,¹⁶¹ and intensive breeding by humans over the last 500 years is responsible for the dramatic differences in appearance among modern dogs.¹⁶² An essay displayed on a popular pet-food industry website states that pet ownership was uncommon in Europe until the end of the 17th century, and rarely seen outside of aristocratic households until the late 18th century.¹⁶³ The essay explains, "Pet keeping in its present form is probably a 19th century Victorian invention. At this time, it was perceived as a link with the natural world, which itself was no longer seen as threatening. It also allowed a visible demonstration of man's domination over nature."¹⁶⁴ The essay is not signed. But if its anonymous author is correct, the serious advocate for non-human rights would answer resoundingly in the affirmative to Professor MacKinnon's question: "Is the fact that, from the human side, the animal-human relation is necessarily . . . a relation *within* human society more problematic than it has been seen to be?"¹⁶⁵

Within human society, MacKinnon observes:

Both women and animals are seen as needing to be subdued and controlled. Both are imagined as dangerously powerful so must be kept powerless; if not locked up and kept down and in place, and killed when they step out, they will take over, overrun civilization, make chaos, end the known world. They can be subjected to similar treatment, often by the same people in the same course of conduct, including torture, battering, terrorizing, taunting, humiliation, and killing.¹⁶⁶

161. See Leslie A. Lyons, *Developing Genetic Management Programs for Feline Breeds*, Proceedings of the Tufts' Canine and Feline Breeding and Genetics Conference (2003) at <http://www.vin.com/proceedings/Proceedings.plx?CID=TUFTSBG2003&PID=5104&O=Generic> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.).

162. Recent research published in the journal *Science* indicates that the myriad breeds of pet dogs originated in just a handful of wolves tamed by humans living in or near China less than 15,000 years ago, and concludes that intensive breeding by humans over the last 500 years is responsible for the dramatic differences in appearance among modern dogs. See Peter Savolainen et al., *Genetic Evidence for an East Asian Origin of Domestic Dogs* SCIENCE, Vol. 298, Nov. 22, 2002 at 1610-13.

163. The Evolution of Pet Ownership, PEDIGREE.COM at <http://www.pedigree.com/PedigreeCenter/Articles/Behavior/Facts+about+dogs/The+evolution+of+pet+ownership.asp?FILTER=puppy> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.) (explaining that prior to that time, pet ownership was peculiar to royalty and the most wealthy).

164. *Id.*

165. MacKinnon, *supra* note 2, at 263 (emphasis in original).

166. MacKinnon, *supra* note 2, at 266 (internal citation omitted).

Women in various cultures have, moreover, been systematically controlled in obvious physical ways, through brain surgery and various non-therapeutic interventions under the guise of medical treatment, foot-binding, extremes of restrictive and highly sexualized clothing, genital mutilations, the industries that traffic in female flesh, the massive amount of rape and attempted rape,¹⁶⁷ infanticide, starvation, denial of permission to engage in physically strenuous social activities, and other coercive actions.¹⁶⁸ Women, too, have been stripped of their sense of self-esteem and, often, of their requirements for survival by being deliberately disrespected and treated as playthings, as man's companions, as helpers, as pets. The disrespect and the denial of the basic requirements for survival still go on, and, on a planet of finite resources now teeming with six billion people, can be expected to intensify. And yet throughout various cultures, the inequities are largely rendered invisible by the philosophy of natural difference.¹⁶⁹ As humans have not renounced the dominator culture in our social relationships, it's unsurprising that the paradigm flows over to the human relations with the other animals of the planet.

Transcending our culture's dominator mentality will entail taking a fresh look at our everyday and apparently benign forms of domination, including the multi-billion dollar pet industry. Imagine a human rights activist speaking of female people the way Gretchen Wyler, Vice President of the Hollywood Office of the Humane Society of the United States, speaks of other animals: "It is truly time for all of society to see animals as more than mere commodities or property to be bought or sold, exploited or killed at an 'owner's' whim. I am proud to be the guardian of my animal companions."¹⁷⁰ Despite charity groups who call pets "companions," incorrectly refer to owners as "guardians," and claim that their living property is something

167. See DISCOURSES ON LIFE AND LAW, *supra* note 54, at 41 (citing estimates that rape and attempted rape affect 44% of women in the U.S. alone).

168. Men have also been castrated, disproportionately used as soldiers, and otherwise mutilated to uphold patriarchal social organizations, and surely all humans suffer psychological harms such regimes; yet the point is that these things are carried out all the while preserving the system that keeps the basic social order solidly in place.

169. See *supra* note 140 and surrounding text.

170. *The Guardian Campaign Famous Faces for Animal Guardianship*, at <http://www.guardiancampaign.com/friendsofcampaignFamousfriends.htm> (last visited Mar. 7, 2005) (on file with the UCLA WOMEN'S L.J.) [hereinafter *Guardian Campaign*].

more than “mere” property, Wyler (or some other human in Wyler’s home) in fact owns and makes every decision about the lives of the pets who live there, including when they will next be permitted to urinate.

Mary Tyler Moore’s advocacy is similar; it also does not challenge the system of ownership, but again merely advocates a different word for the master: “I like [the] term guardian as opposed to master or owner. It is an honor that is bestowed on some of us and we need to treat it that way.”¹⁷¹ Jim Mason, despite having challenged our hierarchical attitudes in a 1993 book inspired by feminist pioneer Elizabeth Fisher’s *Woman’s Creation*,¹⁷² is quoted on one current and regularly updated animal welfare site as having accepted a decidedly paternalistic view:

Animals have been regarded as property for way too long. It’s high time we took on a more loving and responsible relationship with our kindred beings in the web of life on this beautiful planet. I always think and act as a guardian towards my kindred beings, never as their owner.¹⁷³

If Mason believes other animals should not be regarded as property, a harsher critique of the protection concept is in order.¹⁷⁴ Such a critique does not negate our deep caring for the individual animals already brought into existence as property and currently living in our homes.¹⁷⁵ But taking other animals seriously would entail questioning the future acceptance of pets, rather than making the institution more palatable by the popular employment of euphemisms.¹⁷⁶ Platitudes aside, a being is either a piece of

171. The Pet Press (Sep. - Oct. 2002), cited in *Guardian Campaign*, *supra* note 170.

172. See JIM MASON, AN UNNATURAL ORDER: UNCOVERING THE ROOTS OF OUR DOMINATION OF NATURE AND EACH OTHER (1993). In the book’s Acknowledgements section, Mason writes: “My work was sparked by Elizabeth Fisher’s *Woman’s Creation*, published in 1979.”

173. *Guardian Campaign*, *supra* note 170.

174. “In law . . . injuries to animals and women — if seen as injuries at all as opposed to breaches of moral rules — are seen as injuries to their owners . . . In neither case has protection worked.” MacKinnon, *supra* note 2, at 265.

175. Moreover, nothing in this essay is meant to indicate that we would not get medical help for an animal who could not consent to treatment. But it is critical to avoid conflating the concept of providing needed care for an individual animal who is property on one hand, and guardianship, which is a legal term of art imposing an exacting fiduciary duty, on the other. It makes no more sense to refer to pet ownership as guardianship than it does to claim that slaveowners would have been guardians of human slaves simply by uttering the term.

176. Additionally, it would seem far more sensible to work for an end to the engineering of these animals than to insist on being called their guardians, given the corporate impulse to profit from sales of trend animals such as cloned cats, scien-

property or a person.¹⁷⁷ Once the controlling class acknowledges that slavery is odious, a reformed or humane version of slavery is not a morally acceptable option. We rationalize and perpetuate our dominion over other animals in part by making ourselves their benefactors; but is any ownership of animals ethically acceptable? Moral consistency puts the burden of persuasion on those who maintain the acceptability of slavery within the non-human context. If women, non-human animals, or any traditionally oppressed group is to be regarded with dignity, the debate must focus on respect rather than protection through “a more loving and responsible relationship.” Darwin wrote: “Animals, whom we have made our slaves, we do not like to consider our equals.”¹⁷⁸ If we have enslaved animals, the existence of a few relatively well-treated house slaves does not justify this enslavement any better than it did human enslavement. And the house slaves can exist only as long as slavery does.

VI. RISING UP OFF THE PAGE

*Just as our solution is ours, their solution has to be theirs. 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?*¹⁷⁹

Professor MacKinnon exits the stage of Sunstein’s and Nussbaum’s book with a poignant note about the choice of the essay’s title, “Of Mice and Men.” John Steinbeck’s play, explains MacKinnon, “is about unequal love. A morality play about loving to death: the relation between affection and aggression.”¹⁸⁰ And there is a message for non-human-rights advocates: “Unless you change the structure of the power system you exercise, that you

tists’ willingness to promote such concepts, and the interest of buyers, the media, and the cat fancier community in promoting the living results of such acts as public spectacles. See Maggie Shiels, *At Play with Firm’s Clone Kittens*, BBC NEWS ONLINE, Aug. 9, 2004, at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/sci/tech/3548210.stm> (last visited Aug. 9, 2004) (on file with the UCLA WOMEN’S L.J.).

177. See HIGGINBOTHAM, JR., *supra* note 135, at 156-59 (distinguishing the servant, who could own property, from the slave, who was property, and whose legal status was inherited and amounted to “perpetual bondage”). See also *id.*, at 11, strikingly observing that colonial courts and legislatures seemed to be no more “sensitive about commercial transactions involving slaves than they were about sales of corn, lumber, horses, or dogs.”

178. CHARLES DARWIN, *METAPHYSICS, MATERIALISM, AND THE EVOLUTION OF MIND: EARLY WRITINGS OF CHARLES DARWIN 187* (1974; transcribed and annotated by Paul H. Barrett; with a commentary by Howard E. Gruber).

179. See MacKinnon, *supra* note 2, at 270.

180. *Id.* at 272.

mean well may not save those you love. Animal rights advocates take note."¹⁸¹

Much more work remains to be done before our society acknowledges the importance of understanding the ways in which the domination of any group affects all. This requires confronting domination itself, rather than directing discrete anger to specific injustices based on identification of the victim within a specific class. Critically, animals are still property, rendering their position the most demeaned of any thinking, feeling beings in our midst. At the same time, the oppression of women stands as a paradigm for the maltreatment of all — foreigners, non-human beings — and it shows how that oppression is often hardened into law. In MacKinnon's words, women are the animals of the human kingdom, the mice of men's world. Domination based on species and domination based on sex are interwoven, and it is impossible to unravel one without pulling at the other. Those who view any specific manifestation of the dominator mentality as a discrete thread might well find themselves working at the frayed ends of injustice; their interventions might well turn out to be far less effective than grasping the interwoven thread.

It is possible to promote animal rights while being mindful of dominator paradigms within human relations; indeed, it is impossible to ignore those paradigms and chart an effective course for an animal rights movement. That is so, even though relatively few people work in animal rights at this time, so that the community engaged in this area is under great pressure to focus its energy on "the animal question" specifically. The fewer theorists and activists there are in this area, the more critical it is that they are informed by (and inform) people who work in interrelated areas of social justice.

Focusing on the issue of non-human rights itself, beginning with finding its best meaning, requires the political insight to identify, to the extent possible, the fundamental interests of animals. This means transcending the charity approach; it means staying out of the business of contriving palliative responses to conditions set up after animals are already made into objects of study and of commerce.

It also requires the willingness to accept challenges to the status quo. "People who study animals," remarks Professor MacKinnon, "often say more about themselves than about ani-

181. *Id.*

mals, leaving one wondering when the road kill will rise up off the page and say: Stop making me an object of your analysis."¹⁸² Indeed, a great portion of animal advocacy to date has consisted of rekindling popular interest in animals studies. These studies are often called non-invasive or benign; yet the objects of analysis are usually isolated, detained, and perpetually at risk of being shuttled off to all manner of studies or storage, depending upon what funding becomes available, what diploma needs to be awarded, or what book needs to be written. And scientific forays into the mental life of a confined individual are as invasive as any experiments can be. To address this new cycle of experimentation, many advocates will be challenged to regard anew the writings and projects of the past, and the plans for the future. Professor MacKinnon's questions for the movement should be welcomed; the movement richly needs the filter this feminist fragment provides. Accepting that the feminist critique applies, and that a certain project would have to be re-thought, does not mean the investigator, advocate, or teacher is a failure. On the contrary: A change in perspective, when such change is warranted, is a sign of personal growth, and it strengthens a movement.

And a change is warranted. "[P]eople tend to remain fixated on what we want from them," notes MacKinnon, "to project humans projects onto animals, to look for and find or not find ourselves in them."¹⁸³ The question for the animal rights theorist and activist is "what they want from us, if anything other than to be let alone, and what it will it take to learn the answer."¹⁸⁴

The idea of the right to be let alone first appeared in 1890, in a *Harvard Law Review* article by Samuel Warren and Louis Brandeis.¹⁸⁵ In the wake of lurid media accounts of the social

182. *Id.* at 270.

183. *Id.*

184. *Id.*

185. See Warren & Brandeis, *supra* note 120 (crediting Judge Cooley for the phrase "right to be let alone" in THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACTS 29 (2d ed. 1888)). Warren and Brandeis observed that in the famous case of *Prince Albert v. Strange*,

[T]he court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."

activities of a prominent Boston family, Warren and Brandeis proposed a new tort: the invasion of privacy. Distinguishing it from injury to reputation on grounds that invasion of the "the private life, habits, acts, and relations of an individual" damaged a person's sense of dignity and embittered one's life, the writers declared that the concern at issue was not confined to property rights, but rather focused on an individual's "inviolable personality."¹⁸⁶ Forty years later, as a Supreme Court justice, Louis Brandeis wrote, regarding the Constitution's framers:

They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁸⁷

Although women had no privacy when Brandeis and Warren first wrote of the right, privacy — "as a part of the more general right to the immunity of the person," they wrote, "the right to one's personality"¹⁸⁸ — was and is, for many of the reasons the authors noted, the right also most valued by women. And for the animal who is classified as neither civilized man nor woman, it seems that it would also be so. Surely, at the core of non-human rights is the right to life, to enjoy liberty of movement, and to an inviolable personality — "the right to be left alone." For other animals, the right's significance shines with particular intensity. For them, enjoying the most comprehensive of rights would mean regaining the freedom from being subjected to our notions of civilization entirely.

Id., citing Lord Cottenham in *Prince Albert v. Strange*, 1 McN. & G 25, 43 (1849), adding that "Lord Cottenham stated that a man 'is that which is exclusively his'."

186. *See id.* (describing the gravamen of the tort as the protection of the individual from "popular curiosity").

187. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting). Justice Brandeis also noted:

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping . . . Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

Id. at 474 (internal citation omitted).

188. *See Warren & Brandeis, supra* note 120, at n. 33-34 and surrounding text.