

TWO MAJOR FLAWS OF THE ANIMAL RIGHTS MOVEMENT

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In its current guise, animal rights advocacy imposes few intellectual demands on its proponents, usually requiring little more than a colorful website and a college dictionary – the former in order to construct an audience, and the latter in order to provide the emotion-laden phrases needed to inflame that audience into supporting stringent penalties for animal-related crimes. Hard thought is not really essential for animal rights advocates to be able to proclaim an end to animal abuse, or an allegiance to easing animal suffering, and the standard advocate toolkit simply need not include “rational legal analysis” among the apparatus utilized to rail against mistreatment, to weigh in with personal anecdote on topical news stories, or to call for increasing fines and jail terms under local criminal statutes.

Trouble brews, on the other hand, for those advocates who aim further afield, who demand that animals be granted formal legal rights. Graphics and adjectives alone are vastly insufficient to validate just how that project would operate under the law, or how science and logic would support a formal position on animals as “rights-holders”. Unhappily, the animal rights movement, as it takes such aim, has shown that it is weaker, not stronger, for the effort. Separate from its vulnerability to criticism by those politically opposed, a call for legal rights for animals is without justification on the very two pillars on which such a claim presumes to found itself, the precepts of law and of science. The claim’s inherent weaknesses are revealed in the use of terms that are inapplicable given both the way that legal rules work as a practical matter, and the current level of our scientific knowledge about animals themselves. In this article, I confront these two core defects of the animal rights paradigm, and I seek to shed the light of law, science, and reason on what seems to be an unreasonable, nonscientific, and yet ill-critiqued phenomenon.

I. INTRODUCTION

To the Roman jurist Gaius is attributed the phrase *hominum causa omne ius constitutum* (“all law was established for man’s sake”).¹ Today, some 1500 years later, Gaius’ statement still holds firm: humans alone possess legal rights, while animals – “nonhumans” – are denied legal rights, including even rights of personal bodily integrity or personal liberty.

Ancient pronouncements may often be eroded over time, but Gaius’ proclamation has remained stable – proffering a succinct phrase that readily encapsulates a key distinction between humans and all other animals and on a core inquiry: to whom does “law” belong? Animal rights advocates certainly bemoan the very fact that the sentiment has persisted, irked that, after so many centuries, humans alone continue to enjoy legal rights in contrast to all other animals. Animal rights advocates squint down history’s long corridor, adamant that jurisprudential “advancements” should surely have resulted in *some* laws being established already “for animals’ sake.” What has delayed the progress, they lament, that should have occurred by now in obtaining a few of the same legal rights for animals that we have granted for ourselves?

Because their upset stems from a form of academic myopia, a shift in perspective might help – in particular, toward a viewpoint that instructs and broadens one’s awareness of the qualitative effect of time. Prehistory can and does illuminate and inform history, and in order for

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¹ Edward Poste, *Gai Institutiones or Institutes of Roman Law by Gaius* (Clarendon Press 1904).

the disdainful to eventually appreciate Gaius' statement, I believe that they must first come to an appreciation of the passage of time in two respects.

The first is the passage of large-scale *prehistoric* time, specifically the several million years of hominid evolution preceding Gaius' statement that it took for the beatifically rich and intricate process of genetic transmission of adaptations, fueled by a constantly changing natural environment, to select for humans to be fundamentally distinct from all other animals by reaping the benefits of "social exchanges".² It is a process that engineered all of Gaius' ancient and immediate ancestors (and of course Gaius himself as well as his later readers) with the astonishing ability to express what one is thinking in the form of "speech".³ The not-to-be overlooked fact that Gaius *wrote and spoke at all* is a central factor in support of law being "established" for anyone's sake; law has become established through the evolved mechanisms of writing, reading, and speaking, i.e., human language, and I and many others have written before that human language bases all law as a fundamental and founding principle.⁴

It is scientific studies that have primarily developed that idea, particularly in the fields of physical and cultural anthropology: From Charles Darwin to Richard Dawkins, evolutionary biology researchers interested in human evolution have enriched our understanding that non-directional evolutionary forces, coming to a critical point by the close of the Pleistocene era, constructed humans not as anything "better" or "worse" than any other animal, but simply as something vastly *different* than all other animals.⁵ It is from anthropological research in particular that we have come to recognize that speech and writing have played massive roles in accomplishing that change prehistorically,

However much we tend to be obsessed by them, our cognitive capacities, epitomized by our linguistic abilities, do indeed mark us off distinctly from all of the millions of other creatures on the planet... Well over three billion years after life established itself on earth, we, alone among the millions of descendants of our ancient common ancestor, somehow acquired not just a large brain – the Neanderthals had that – but a fully developed mind. This mind is a complex thing, not in the sense that an engineered machine is, with many separate parts working smoothly together in pursuit of a single goal, but in the sense that it is a product of ancient reflexive and emotional components, overlain by a veneer of reason. The human mind is thus not an entirely rational entity, but rather one that is still conditioned by the lone evolutionary history of the brain from which it emerges.⁶

The second helpful lesson for the animal rights activist might be a quick tutorial in appreciating, in all of its fine detail, the passage of (relatively smaller-scale) *historic* time,

² See e.g. Leda Cosmides and John Tooby, "Cognitive adaptations for social exchange" in Barkow, J. Cosmides, L. and J. Tooby (eds.) *The Adapted Mind: Evolutionary psychology and the generation of culture* (Oxford University Press 1992).

³ See e.g. Andrew, R.J. "Evolution of Intelligence and Vocal Mimicking", *Science*, August 24, 1962; MacDonald, C. "The Evolution of Man's Capacity For Language", in *Evolution After Darwin*, Vol. 2, Chicago; University of Chicago (1960); Hockett, C.F. and R. Ascher "The Human Revolution" *Current Anthropology*, June 1964.

⁴ Geordie Duckler, *Animal Wrongs: On Holding Animals To (And Excusing Them From) Legal Responsibility For Their Intentional Acts*, 2 University of Pennsylvania Journal of Animal Law and Ethics 91-121 (2007).

⁵ See e.g. Daniel Dennett, *Kinds of Minds* 147 (Basic Books 1996): "There is no step more uplifting, more explosive, more momentous, in the history of mind design than the invention of language. When *Homo sapiens* became the beneficiary of this invention, the species stepped into a slingshot that that has launched it far beyond all other earthly species in the power to look ahead and reflect."

⁶ Ian Tattersall, *Becoming Human: Evolution and Human Uniqueness* 233-234 (Harcourt Brace and Co. 1998).

specifically the 1500 years or so of complicated social rules development that has accumulated *subsequent* to when Gaius made his famous statement.⁷ This time span primarily comprises the comparatively rich and intricate sociological process of our development of the common law.⁸ That process currently enables us moderns to now appreciate the social significance of the particular *words* that Gaius ultimately selected to utter and the *mindset* he had with which he crafted the words that he selected.

It is historical studies that have primarily developed that idea, particularly in the fields of jurisprudence and cognitive psychology.⁹ From Thucydides to Carlyle to Dennett, legal historians and linguistic psychologists have enriched our understanding that sociological forces accumulated over historic time have constructed humans – not as any more communicative or more organized than other species – but as something intricately social at several orders of magnitude above such “social” groups as bees, termites, seagulls, beavers, or chimps.¹⁰ Our historical, i.e., recorded, past, has enmeshed us as a species in a communication and idea-driven sociality web that expresses itself most formally and most thoroughly through the rule and operation of law.¹¹

Multiple lessons abound then from both human history and human prehistory, and a suite of scientific studies can more than adequately explain why we should not treat animals like humans, or apply legal rules to them as if they were no different than humans. It may well be true that we can always do better to continue to tweak and restructure some of the more antiquated rules that we have used in the past about animals, that we can always legislate and litigate further to accommodate and to reflect more enlightened schema by which we value or convey animals, especially in the roles they play as our domestic companions or educational tools.¹² Nevertheless, the most valuable and legitimate interactions we can have with animals are those founded at heart on clear scientific principles, interactions and understandings which employ scientific reasoning and which take into account lessons from biology, anatomy, anthropology, and paleontology as to just what animals are to us and what we are to them.¹³

It really should not be so surprising, then, that a better informed point of view reveals Gaius’ remark as an insight to be appreciated rather than as an insufficiency to be remedied. Curiously, however (and considering that their topic demands a strong grasp on the gritty mechanics of how organisms in the natural world operate), animal rights advocates tend to be mired in naiveté as to what humans and animals actually are and what they do, and certainly seem to be plainly befuddled as to how both sets of entities actually came to separate out of a mutual past. At core, animal rights advocates’ concept of animal life and development is both internally and externally inconsistent with modern scientific knowledge.

⁷ See Alexander Marshack, *The Roots of Civilization* (McGraw-Hill 1972).

⁸ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co. 1963).

⁹ Barkow, J.L., Cosmides and J. Tooby, fn. 2 *supra*.

¹⁰ See Elaine Morgan, *The Descent of the Child: Human evolution from a new perspective* 247 (Oxford University Press 1992): “Once the child has learned the meaning of the words “why” and “because” he has become a fully paid-up member of the human race.”

¹¹ See generally Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press 1961).

¹² See e.g. Serpell, J., R. Coppinger and A.H. Fine, “The welfare of assistance and training animals” at 524-529 in *The Animal Ethics Reader* (Armstrong, S.J. and R. G. Botzler, eds.) (London Routledge Press 2003).

¹³ See e.g. Trivers, R.L. “The Evolution of Reciprocal Altruism” *Quarterly Review of Biology*, March 1971.

It is a position of this paper that nonscientific detritus – in particular, political or religious agendas – should not, but do, infect explanations as to what animals are, how animals are treated, or the logic of what laws and rules should apply to them. It is of immense concern that the animal rights movement is willing to and seeks to transmit exactly that manner of stain into what would otherwise be a wise and workable analysis of rules centering around animal ownership as a function of personal property rules, animal owners as responsible under tort law, and animal conveyances as mediated by the principles of contract.

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

At heart, the animal rights movement may be exposed to have to account for two basic failures. Its first is a failure to be scientific in the standard and valuable sense of “systematically analyzing the true manner in which the natural world works” and then “applying rules about the occurrence of natural phenomena in explaining certain events and mechanisms”.¹⁴

Certainly, for engaging in a topic that demands a clear understanding of a large and complicated component of the natural world, the animal rights movement has persistently displayed an embarrassing lack of adherence to the rigors of the scientific method or to the constraints of scientific analysis about what *animals* are in general. Anthropomorphism is regularly substituted in place of taxonomy, such that the parameters within which animal rights movement adherents talk about and address animals are essentially undisciplined about – and often inconsistent with – what we actually know about animals from classic and current scientific studies about them.¹⁵

For one, an ignorance of the taxonomic classification of the members of the kingdom *Animalia* results in advocacy and writings by animal rights activists almost exclusively about mammals alone, and a small percentage of mammals at that. An ignorance of the internal (i.e., anatomical and physiological) composition of animals results in a basic lack of appreciation for the intimate relations between animal function and form, and how organismal organization tracks phyletic organization. An ignorance of the evolutionary development of the various taxa within *Animalia*, that is, a disregard for all of the complex branching of the *Animalia* lineage into its variously organized classes, orders, and genera, results in soapy tubfuls of non-scientific nonsense spoken and written about “animals as our relatives”, “bloodlines”, “our cousins”, “animals sharing a common heritage”, “animal-human closeness”, “animal family members”, and “animal kin”¹⁶ – ironically, many of which terms that, in a different historical context, themselves derived from misconceptions about ancestor-descendant links used by racists to justify acts of segregation and discrimination.¹⁷

¹⁴ See e.g. Ronald Giere, *Understanding Scientific Reasoning* (Harcourt Brace Pub. 1991); Carl G. Hempel, *Aspects of Scientific Explanation* (The Free Press 1965).

¹⁵ Bernard E. Rollin, “Scientific Ideology, Anthropomorphism, Anecdote, and Ethics” at 67-74 in *The Animal Ethics Reader*, *supra*.

¹⁶ See e.g. Jeffrey M. Masson, *The Emperor’s Embrace: Reflections on Animal Families and Fatherhood* (Pocket Books 1999); Alison Hills, *Do Animals Have Rights?* (Icon Books 2005).

¹⁷ Jonathan Marks, *What it means to be 98% chimpanzee: Apes, people, and their genes* 61-69 (University of California Press 2002).

The consequences of such ignorance are stark. The sciences of anatomy, taxonomy, organismal evolution, and cladistics are fluid and rich fields of inquiry, and – self-constrained by the intellectual rigor of actual laboratory research and peer-reviewed publication – reflect whatever the current state of knowledge is about complex phylogenies, about genetic and developmental links, and about the specific passage of physical and physiological traits between and among interbreeding animal individuals over time.¹⁸ Animal rights rhetoric about animals is, to the contrary, static and intellectually impoverished, and – not constrained at all by the need to rely on laboratory, fieldwork, or museum research or studies – reflects a disconnected set of random filtrations through sieves of each author’s individual prejudice, private guilt, moral imperative, religious preference, personal anecdote, use of selective statistics, or childhood fantasy.¹⁹

Within this particular area, the movement’s inconsistency about what animals truly encompass has two polar aspects. One aspect comprises a refusal to address all members of the entire *Animalia* kingdom, to account for *every* animal – an unwillingness, in other words, to lump the earthworm in with the elephant in bold talk about how “all” animals have or deserve to have rights. The other aspect comprises a counterpart failure to account for the fundamental distinction between humans and all other animals – an unwillingness, in other words, to remove from the group the one animal species, *Homo sapiens*, that is evolutionarily different.

In the first aspect, animal rights advocates such as Peter Singer tend to almost arbitrarily pick and choose among animals to separate, subjectively, those animals they feel deserving of rights, from those animals which are either too unfamiliar, too unattractive, or just too poorly held in the mind of the rights advocate to merit the application. Singer, for instance, identified those most worthy as “nonhuman animals that appear to be rational and self-conscious beings, conceiving themselves as distinct beings with a past and future.”²⁰ To the extent that such resoundingly non-scientific criteria are used to identify useful distinctions in a supposedly scientific grouping, the winners of his unusual lottery turn out to all be mid-to-large sized mammals, either the larger primates or the more familiar of the cetaceans.²¹

Writers such as Singer do not engage so much the term “animal”, as much as they toy with the term “person” in contrast, shoehorning the more aesthetically appealing of the apes and marine mammals at focus into a “personhood” term, manipulated rhetorically so as to eventually eviscerate the word’s root of any real meaning.²² For Singer, possessors of rationality and self-consciousness (or at least of their sporadic appearance) are rewarded with legal rights because *we humans* are rational and self-conscious – the pedestrian part of the idea being that anything pretty much like us should also get rights pretty much like ours. This is neither law *nor* science in any sense, but an appeal to a casual belief system called “anthropomorphism”, and advocates

¹⁸ See e.g., Alfred Sherwood Romer, *Vertebrate Paleontology* (Chicago University Press 1966).

¹⁹ Gary L. Francione, *Introduction to Animal Rights: Your Child or Your Dog?* (Temple University Press 2000).

²⁰ Peter Singer, *Practical Ethics* (Cambridge University Press 1979).

²¹ Bekoff, M. “Deep Ethology, Animal Rights, and the Great Ape/Animal Project: Resisting Speciesism and Expanding the Community of Equals” at pp. 119-124 in *The Animal Ethics Reader, supra* [primates]; Midgley, M. “Is A Dolphin A Person” at pp. 166-174 in *The Animal Ethics Reader, supra* [cetaceans]. It would therefore be even disingenuous to rejigger the movement to constitute a “mammal rights” movement since the other 85% of the mammalian taxa are left out of consideration anyway.

²² For a critique of this point see Michael P.T. Leahy, *Against Liberation* 24-26 (Routledge Press 1991).

regularly substitute that unhappy prejudice in place of real applications of anatomy, taxonomy, or biology to animal acts and relationships.²³ The overall result is that earthworms are ignored and apes are celebrated. Yet, other than the subjective appeal that complicated central nervous systems and their emergent sensory epiphenomenon seem to have to some lay people, an answer is still needed as to what is either the *logical* or *scientific* reason that all those poor earthworms – dumb, senseless, and irrational though they may be, yet animals as they most certainly are – sit left out in the legal cold?

The “earthworm omission problem” necessarily forms part of the intellectual landscape on which the animal rights argument rests, and the exclusion of animals with simple nervous systems from rights-type arguments has the effect of eroding the terrain precariously downward into pure silliness as one approaches the rights advocates’ refusal to address all members of the animal group, to account for *every* animal. Only the smallest semantic shift may cause the argument to careen forward into absurdity, such as with this advocate’s ill-thought out plea for universal inclusion,

In order to make a case for ‘animal rights’, some philosophers, lawyers, ethologists, and others are eager to demonstrate that other nonhuman species have some degree of humanlike self-awareness. Such an approach in the final analysis is humanocentric and ‘species-bound’ since it assumes that only humanlike (or suprahuman) beings are worthy of being accorded rights. Surely all living creatures of creation, by virtue of their existence and being an integral part of the interdependent whole which constitutes the biosphere, have the basic right to exist, live, reproduce and fully actualize their natural potentials (within the natural constraints of ecological harmony rather than under the constraining forces of human dominion).²⁴

If rights are to be accorded to “all living creatures of creation, by virtue of their existence and being...part of the biosphere” then the scientific word “animal” is instantly drained of its academic and linguistic meaning, and merely becomes a convenient, but content-empty, term on which to drape the implementation of a moral, not legal or scientific, policy. Worse, as moral positions go, that position presents what must surely be the most irrational and unworkable moral policy ever conceived. “All living creatures,” its religious phraseology aside, delineates a massive group to which a billion squared members belong, with barely a single valuable distinction to divulge between this blue whale over here or that dust mite over there – and it presents a practical application problem that would make the determination of war crime reparations seem like county fair pie judging in comparison.²⁵

Again: within the particular area of the animal rights movement’s ignorance of the taxonomic classification of *Animalia* inconsistencies about what animals encompass has two polar aspects. As to the second inconsistency, animal rights advocates refuse to acknowledge that distinctions affecting what “rights” are, *do* exist between humans and all other animals, distinctions that ground the significance of a legal right as something that can apply *only* to humans. Advocates are unwilling to accept that, while nonhuman animals can certainly accomplish extraordinary tasks without recourse to the conscious thought that arises from

²³ Richard Morris and Michael Fox (eds.) *On The Fifth Day: Animal Rights and Human Ethics* 137-204 (Humane Society of the United States 1976).

²⁴ Michael W. Fox, *Species Identity and Self-awareness* at 347-353 in *Species Identity and Attachment* (M. Aaron Roy, ed.) (Garland STPM Press 1980).

²⁵ See Claus Nielsen, *Animal Evolution: Interrelationships of the living phyla* (Oxford University Press 1995).

language, *the manner of thought that produces language appears only in us.*²⁶ Advocates cannot bear to admit in turn that language forms a critical dividing line between rights-holders and non-rights-holders. They do not like it that rights are embodied in some form of linguistic expression. In another sense, they do not like it that to have a right means to be responsible for one's actions. They do not like it that an entity incapable of accepting responsibility, as with a child, can be accorded only protections, not rights.²⁷ They do not like it that the difference between a right and a protection is significant in that the former requires an entity to make its own decisions, while the latter requires us to make decisions for another. Surely, the whole aspect of *empirically* proving the existence of truly independent decision-making among animals is a living nightmare from which animal rights advocates desperately wish to be awoken.

Animal rights advocates especially do not like it that humans make the decisions on which law is founded because we can distinguish between right and wrong in a *moral* sense, and that we can do that solely because language enables us to do so.²⁸ The base ability to “communicate” – an activity that even unremarkable non-rights holders such as car alarms and toaster ovens frequently engage in – is far, far below the rich and complex activity of true human language.²⁹ To get past this slight bump, rights advocates also toy artistically with the terms “language” and “communication”, but ultimately cannot surmount the extensive observational-based scientific evidence about the massive evolutionary difference between the two terms.³⁰

It remains nonetheless and undeniably true that the requisite manner of thought required for “language” in animals is simply absent in nonhuman animals. That absence, in turn, draws a critical dividing line that while it cannot logically be denied, yet *is* denied,

All non-human animals are constrained by the tools that nature has bequeathed them through natural selection. They are incapable of striving towards truth; they simply absorb information, and behave in ways useful for their survival. Both their knowledge of the world, and their behavior towards it, has been largely preselected by evolution.

...
Language, in other words, helps turn humans into conscious agents: individuals with distinct personalities and abilities who only ‘realise’ themselves through their interactions with each other, and with the social and natural world. Humans are individual personalities, but they are equally social beings. Animals are neither truly individual, nor truly social. They are not truly individual because, while they may have distinct personalities, they lack the capacity to take individual responsibility. They are not truly social because while they may live within groups, those groups cannot take collective decisions (whether conscious or unconscious) to transform themselves.³¹

Symbolic thought – as a biologically evolved process that has occurred in us alone – takes us out of our past as simply another genera of mid-sized Neolithic primate, and has pushed us into a new life as uniquely social creatures.³² We have moved from wilderness to metropolis in a breathlessly short span of time, and language, not simply communication, has enabled us to

²⁶ Mary Midgley, “Is A Dolphin A Person” at 166-174 in *The Animal Ethics Reader*, *supra*.

²⁷ Tom Regan, “The Case For Animal Rights” at 17-24 in *The Animal Ethics Reader*, *supra*.

²⁸ See Frey, R.G. *Rights, Interests, Desires and Beliefs* at 50-53 in *The Animal Ethics Reader*, *supra*.

²⁹ See Stephen Anderson, *Doctor Dolittle's Delusion* (Yale University Press 2004); see also, Michael Bright, *Animal Language* (Cornell University Press 1984).

³⁰ See generally, Steven Pinker, *The Language Instinct* 368-9 (Harper Collins 1995).

³¹ Kenan Malik, *Man, Beast, and Zombie* 349-350 (Orion Books 2000).

³² Janet Astington, *The Child's Discovery of the Mind* (Harvard University Press 1993).

make that journey. In assessing language, rights advocates' ignorance of the rigorous application of linguistic and behavioral studies transforms what could be a healthy recognition of the limits of objective observations about the conduct of animals in nature and in captivity, and rejects it in favor of subjective bouts of pure story-telling. Compare the following two passages, the first a snippet of impersonal scientific restraint, the second – an imaginary conversational exchange projected by the author onto his dog – a classic of intensely personal animal rights speculation,

It is not always easy to decide what counts as communication in animals. As one researcher notes, “Students of animal behavior have often noted the extreme difficulty of restricting the notion of communication to anything less than every potential interaction between an organism and its environment.” (Marshall, 1970:231). So that, at the very least, sticklebacks mating, cats spitting, and rabbits thumping their back legs must be taken into consideration – and it isn't at all clear where to stop... There is no way yet in which we can be sure about making the right decision when it comes to interpreting such phenomenon.³³

I love dogs; it has always been clear to me that they lead extremely intense emotional lives. ‘No, Misha, no walk just now’. *What?* The ears would cock. *Can I have heard right?* ‘Sorry, Misha, but no.’ Unmistakable. The ears flop. Misha would throw himself onto the floor. There was no mistaking the pure disappointment he was feeling. Just as unmistakable was his intense joy when I would say, ‘Okay, get your leash, we’re going for a walk,’ and the sheer pleasure Misha felt on his walks, his delight at racing ahead, chasing leaves, doubling back, tearing off into the forest and returning behind and ahead of me.³⁴

The second passage has no application beyond that of sharing in an author's wish-fulfillment fantasy; the first simply posits a healthy caution about research goals on, and legitimate knowledge of, the meaning of an animal's conduct. In their conjunction, the two passages carve out a forceful reminder that behavioral and ecological interactions between and among animals can be massively sophisticated affairs and that disentangling their myriad influences has occupied field scientists for the better part of three centuries with no end in sight.³⁵ In their contrast, the two passages reflect the unhappy fact that most animal behavior explanations simply stump animal rights advocates, who find it preferable to blind themselves to, and substitute fantasy in the stead of, the real world complexities.

Animal rights activists glance askew at research and translate the science actually being done into a hodgepodge of moral concerns instead about the *treatment* of certain animals by scientists: at chimps in captivity, for instance, or at impacts on “biodiversity” by industry, at modern farming technologies creating inroads in “natural” environments, or at the subjugation or reintroduction of captive wildlife by field biologists.³⁶ Yet they fail to “do science” themselves, or to look further than the last decade of nature writing and personal opinion on what it all means.³⁷ Proposals that “rights” might remedy the problems tend to arise from authors who go out of their way to avoid scientific journal studies on what animals actually do.

³³ Jean Aitchison, *The Articulate Mammal: An Introduction to Psycholinguistics* 35 (Universe Books 1976).

³⁴ Jeffrey M. Masson, *When Elephants Weep: The Emotional Lives of Animals* xvi-xvii (Dell Publishing 1995).

³⁵ For a comprehensive, but somewhat dated, review of scientific studies, see Sara J. Shettleworth, *Constraints on Learning*, in *4 Advances in the Study of Behavior* 1, 1-61 (Daniel S. Lehrman et al. eds., 1972).

³⁶ See Michael Fox “To Farm Without Harm and Choosing A Humane Diet: The Bioethics of Humane Sustainable Agriculture” in Robert Garner (ed.) *Animal Rights: The Changing Debate* 92-103 (New York University Press 1996).

³⁷ For a wonderful example involving two very different writers both examining insect “intelligence”, contrast an animal rights advocate's speculative and ill-supported single sentence conclusion that honeybees must be given legal

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

Again: the animal rights movement may be exposed to have to account for two basic failures. Its second is a failure to adhere to the parameters within which law allows us to define what rights are and to make rights useful.

The fundamental legal rights that we have granted to ourselves are considered such “not simply because they implicate deeply personal and private considerations, but because they have been identified as ‘deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed’”.³⁸ Fundamental legal rights are, therefore, at one and the same time both *historically*-derived intellectual concepts as well as *prehistorically*-derived cognitive artifacts.³⁹ Even ignoring personal privacy and personal autonomy (areas which seem like they should be fundamental but are not), a basic right to liberty that we have preserved for ourselves is only denominated a “right” as a result of actions we have taken all throughout our past in slowly establishing a value to liberty that was not always apparent to us, but which only became apparent over time and on account of historical events. Lacking that history, lacking that tradition, lacking that dawning realization and development of perceived value based on significant social incidents of importance to large groups of people, animals have no legal rights.⁴⁰

Yet a call to “respect the rights of individual animals in the same way as we respect the rights of humans” has nevertheless rung through the voices and actions of animal rights authors and activists ever since Singer put those words down over 30 years ago.⁴¹ Singer and adherents to his philosophy have consistently discounted the law’s acknowledgment that rights concern matters that are basic to our conception of justice and that define the community sense of fair

rights since they are “sentient”, citing as his sole authority a “personal communication” with a psychologist (Steven Wise *Drawing the Line* 81 (Perseus Books 2002): “Do their tiny brains produce sentience? Apparently so”), with an evolutionary biologist’s well-supported explanation of how the rigors of the scientific method might generate real answers about certain insect interactions using, as his example, co-evolutionary behaviors of wasps and figs (Richard Dawkins *Climbing Mount Improbable* 308 (W.W. Norton and Co. 1996):

Much of the deciphering of the wasp-pollination story would simply have involved slicing figs open and looking inside. But “looking” gives too laid-back an impression. It wasn’t a passive gawping but a carefully planned recording session yielding numbers to be fed into calculations. Don’t just pluck figs and slice them. Systematically sample figs from a large number of trees, from particular heights, and at particular seasons of the year. Don’t just stare at the wasps wriggling inside: identify them, photograph them, accurately draw them, count them and measure them. Classify them by species, sex, age and location in the fig. Send specimens to museums for identification by detailed comparison with internationally recognized standards. But don’t make measurements and counts indiscriminately just for the sake of it. Make them in the service of testing stated hypotheses. And when you look to see if your counts and measurements fit the expectations of your hypothesis, be aware, in calculated detail, how likely it is that your results could have been obtained by chance and mean nothing.

³⁸ *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004).

³⁹ See e.g. James B. Reichmann *Evolution, Animal ‘Rights’, and the Environment* 256-263 (Catholic University of America Press 2000).

⁴⁰ See e.g. *Kihlstadius v. Nodaway Veterinary Clinic*, 697 F. Supp. 1087 (W.D. Mo. 1988) (holding that dogs do not have civil rights).

⁴¹ Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (New York Review/Random House 1975).

play.⁴² It seems to matter little to animal rights advocates that animals do not have a concept of “justice” or of “fair play” at all, much less a communal one. The requisite “collective conscience” is – embarrassingly enough – missing.⁴³ In omitting the need to first show a sense of justice, fair play, or social conscience, Singer and adherents to his philosophy then also discount the corollary that to have a right means also to be responsible for one’s actions.⁴⁴ It is for that very reason that an entity *incapable* of accepting responsibility, as with a child for instance, can be accorded “protections”, but never rights. A right requires the entity to make its own conscientious decisions, while common law and statutory protections require us as rights-holders to make conscientious decisions for another. And once again, the effect of language is absolutely key here: Humans – as rights-holders – make conscientious decisions because we can distinguish between right and wrong in a moral sense, and we can do that because language allows it. The generic ability to simply “communicate”, to the contrary, does not rise to the requisite level. *That* difference – between language specifically and communication generally – is immense,

Animals use communication in a fashion that appears to seek influence over the behavior of others, but not the thoughts or knowledge of others. Humans, by contrast, from infancy show an understanding that other humans have minds that work roughly the same way their own do, and whose knowledge can be altered by words and actions.⁴⁵

The animal rights movement earnestly but mistakenly believes that rights are disconnected from duties – but only for animals other than humans. Somehow, humans are required to fulfill duties to respect the rights of animals to life, freedom, from human-induced pain, and confinement, but animals are not required to have similar duties reciprocally. That inequity casts a strong reflection on the movement’s misconstruction of “rights”. If the animal rights movement wishes rights to be accorded to “all living creatures of creation, by virtue of their existence and being...part of the biosphere” then not just animals, but “rights” as well become illusory objects. Rights become as amorphous and ethereal as do “creatures”, objects determined to exist by the sheer force of the beholder’s will to want them to exist.

In subverting any rational employment of those terms, the animal rights movement must account for fostering such philosophical monstrosities as Illinois’ recent *Humane Care For Animals Act*, which defines “animal” as “*every living creature, domestic or wild, but does not include man*”.⁴⁶ Subsequent to challenge, an Illinois review court, in *People v. Shanklin*, applied the definition to a criminal defendant’s acts of cruelty to an animal “regardless of the type of animal”.⁴⁷ *Shanklin* thereby set a path for applying unscientific terminology (using the unfortunately non-scientific phrase “type of animal”) that brooks no logical obstacle to protecting each and every ant and worm within the geographical boundaries of the entire state of Illinois. In a world in which trial courts are now unblinkingly upholding cruelty convictions for killing a goldfish⁴⁸, the time seems overripe for holding the animal rights movement hard to task for jettisoning good science in favor of bad politics. A renewed theme of restraint in effectuating

⁴² *State v. Amini*, 175 Or. App. 370, 28 P.3d 1204 (Or. App. 2001).

⁴³ *Cf. Smith v. State*, 6 S.W.3d 512 (Tenn. Crim. App. 1999); *King v. South Jersey Nat. Bank*, 66 N.J. 161, 330 A.2d 1 (N.J. 1974).

⁴⁴ See fn. 38, *supra*.

⁴⁵ Stephen Budiansky, *If A Lion Could Talk: How Animals Think* 161 (Weidenfeld and Nicholson 1998).

⁴⁶ 510 ILCS 70, Section 16(c)(1).

⁴⁷ *People v. Shanklin*, 769 N.E. 2d 547 (Ill. App. 2002).

⁴⁸ *People v. Garcia*, 29 A.D. 3d 255, 812 N.Y.S. 2d 66 (2006 N.Y. slip op.).

workable animal welfare may be made meaningful by starting with a bracing dose of biological reality.

First, it should be noted that a law that criminalizes the intentional destruction of “every living creature” would paralyze the most basic human social activities just as surely as a law that prohibits eating, or walking around, or sleeping indoors. It isn’t just that applying the law of *Shanklin* to the real world would have everybody in jail in an instant for the horrific murders of innumerable ants, mosquitoes, and spiders. It is the liberty and ownership rights of the entire unlucky populace that would be impaired, and it is the very industries of agriculture, hunting, farming, recreation, and construction on which humans rely that would be eviscerated were litigators to try to strain the microcosm of all social and biological relations that real life represents through the ludicrous sieve that *Shanklin* extends.

Even worse, true animal welfare (in the sense of the welfare of *all* animals) would easily be as retarded as it would be advanced by rigorous application of a rule such as that in *Shanklin*: for each insect “saved”, some bird or fish’s next meal must be placed in jeopardy, and for each mid-level feeder deprived by human intervention, some higher level member of the trophic pyramid must go hungry as well. Yes, in that sense the rule in *Shanklin* merely substitutes one animal’s problem for another’s. Yes, as well, the rule in *Shanklin* turns a dangerously blind eye away from the relativistic nature of law, the fact that every law in some way impacts another, such that until we begin to select which animal should be more protected, the protection of all starts to sound as nonsensical as the protection of none.

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

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

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

authentic meaning of personhood and of consciousness. If a living thing is a person simply because it possesses sensory consciousness, then there is little point in referring either to animals or to humans as ‘persons’ in the first place, since ‘person’ would add absolutely nothing not already contained in the term ‘animal’.⁴⁹

Semantic gamesmanship often reflects a secret need to promote a biased viewpoint, and nowhere is their bias or subjectivity more transparent than where animal rights advocates argue from the basis of what should be straightforward and objective analyses of the natural world. In that arena, the abuse of linguistic terms is minor in comparison to the abuse of field studies. For one thing, unless forcibly reminded of the cruelty inherent in nature, animal rights advocates tend to heavily romanticize both wildlife as well as life in the wild. They blind themselves to the fact that animals in the wild are not free at all, but are prisoners of space and time.⁵⁰

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

The natural world is, by the necessity of how evolutionary processes work, a world in which competition for resources makes life unrelentingly harsh, brooks no permanent relief from pain and decay, terminates early, and is a world in which the careless and intentional acts of other living things in trying to keep their own bodies alive are regularly the cause of each trouble encountered. An artificial enclosure such as a home, a zoo, a laboratory, or a kennel, may indeed reduce those impacts or, at worst, perhaps simply replace those impacts with ones with different names, but whatever the enclosure, it is certain that the act of opening its door and allowing the animal “to go free” does not send the animal into any more free or favorable environment in any respect worth describing.

The animal rights movement would rather bowdlerize evolution by natural selection or nature (often unrealistically defined as animal life outside of human influences) through what the science writer Matt Ridley has called “condescending sentimentalism” by “desperately play[ing] up the slimmest of clues to animal virtue... and clutch[ing] at straws suggesting that humankind somehow caused aberrant cruelty.”⁵¹ Rights advocates work hard to discount the *reduction* of the natural horrors which captivity, farming, and ranching has effected on animals, preferring to trumpet the benefits that freedom has brought to humans and then apply the false syllogism that those benefits are readily translatable to animals. In doing so, they mistake what life is like for an

⁴⁹ James B. Reichmann *Evolution, Animal ‘Rights’, and the Environment* 261 (Catholic University of America Press 2000).

⁵⁰ See David Hancocks, *A Different Nature: The Paradoxical World of Zoos and Their Uncertain Future* (University of California Press 2001).

⁵¹ Matt Ridley, *The Origins of Virtue* 215 (Penguin Books 1996).

animal who is “truly free”, and threaten to truthfully expose animals to higher levels of pain and suffering than they currently experience in captivity, on farms, on ranches, and in our homes.⁵²

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

Those of us at the heart of the animal law movement envision a world in which the lives and interests of all sentient beings are respected within the legal system, where companion animals have good, loving homes for a lifetime, where wild animals can live out their natural lives according to their instincts in an environment that supports their needs – a world in which animals are not exploited, terrorized, tortured or controlled to serve frivolous or greedy human purposes. This vision guides in working toward a far more just and truly humane society.⁵³

A workable definition of “sentience” notwithstanding, one would have to be utterly and deliberately ignorant of the last one hundred and fifty years of accumulated rigorous scientific study of how evolution by natural selection actually works in, and has shaped, the natural world to sincerely make such a plea. Not only is “a world in which animals are not exploited, terrorized, tortured or controlled to serve frivolous or greedy human purposes” an unobtainable, inherently biologically impossible world, but the world of nature to which Tischler fervently hopes to somehow return animals to already *is* a world in which animals *are* “exploited, terrorized, tortured or controlled” – only to serve the frivolous or greedy purposes of other animals, including conspecifics and kin.

Proponents of legal rights for animals also tend to create nearly insolvable ethical dilemmas in the real world. For example, a quite serious ethical dilemma is created by the double standard that activists apply to prohibitions against animal mistreatment under the weak rubric that “allows” animals to be cruel to each other but prohibits humans from being cruel to animals. If animals are rights-holders, then animal cruelty laws should apply to them – yet when animal rights activists are confronted with the possibility of truly adjudicating competing rights among all rights-holders as a intrinsically defined group, they falter: they know in their hearts that the lion is not planning on laying down with the lamb any time soon, yet neither can they imagine having to hold the lion legally accountable for what lions “naturally” do to lambs, acts invariably involving intentional violations of every animal cruelty law ever imaginable and then some. Choices that must be made the activist refuses to make, and in the scenario where the lion attacks the human infant and one must choose whom to save, an animal rights position creates an irrational impasse.⁵⁴

⁵² See e.g. John R. Campbell and John F. Lasley, *The Science of Animals that Serve Humanity* (McGraw-Hill Co. 1998).

⁵³ Joyce Tischler, “Toward Legal Rights For Other Animals” at 691-693 in *Animal Law* (3rd ed.) (Carolina Academic Press (Waisman, S. et. al. eds.) 2006).

⁵⁴ See Daniel A. Moros, *Taking duties seriously: Medical experimentation, animal rights, and moral incoherence in Birth To Death: Science and Bioethics* (eds. David C. Thomasma and Thomasina Kushner) (Cambridge University Press 1996) at 313-324.

Another example of ethical conflict created by the animal rights position is that the entire animal world must then be seen to be inherently immoral, as the new “rights” are never, and never will be, respected *between and among* animals other than humans.⁵⁵ God help the activist who tries valiantly to hold long onto the argument that it is *morality* that demands that we assign legal rights to animals: a basic biology text would stop them absolutely cold at the early chapter describing the major division of all animal life into prokaryotes and eukaryotes.⁵⁶ The activist, were they to glean their information from a college science lesson instead of from a religious tome, would find that prokaryotes engage in the most outrageously immoral acts that have ever been exhibited on the planet: throughout earth history, prokaryotes have created immense global crises of starvation, pollution, and extinction that make human parallels appear laughable and puny in comparison. Prokaryotes destroy other organisms by the great multitude, routinely transfer genetic material freely from individual to individual, have fooled around with genetic engineering and created “chimeras” at a level that our most ill-advised laboratory technicians could only dream about, and have fundamentally altered the biotic and abiotic world in doing so.⁵⁷

A movement undoubtedly implies at least three basic assumptions: that political power fuels its goals, that its goals serve a social good, and that its adherents use the political power to become beneficiaries of the power (or alternatively that the movement’s adherents work to help a group of beneficiaries who cannot use the political power themselves). Certainly, the animal rights movement uses political power to fuel its goals, which are claimed to serve a social good.⁵⁸ It is a movement blemished by an overly earnest use of vaudeville, a fairly childish concept of public relations⁵⁹, and a serious susceptibility to market forces affecting all small business operations.⁶⁰ A few courts have begrudged some merit to what the movement hopes to

⁵⁵ See generally Frans de Waal *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Harvard University Press 1996).

⁵⁶ Prokaryotes are the most primitive and the most ubiquitous of organisms, single-celled entities with no nuclear membrane and classically exemplified by *E. coli*, the common bacteria of the gut. They were the dominant form of life on the planet for billions of years. Eukaryotes, entities with more complicated cell structure, arrived late in the life game, and include all the multicellular organisms one finds on the planet today, from slime molds to Republicans.

⁵⁷ Lynn Margulis and Dorion Sagan, *Microcosmos: Four Billion Years of Microbial Evolution* 29-31 (University of California Press 1997).

⁵⁸ Wesley V. Jamison, *Every Sparrow That Falls: Understanding Animal Rights Activism As Functional Religion* at 556-562 in *The Animal Ethics Reader*, *supra*.

⁵⁹ In 2006 alone, for instance, animal rights advocates sought public recognition for a) a pet fashion show in California proclaiming that “Animal Law is In Fashion” and awarding prizes to dogs in human costume, b) a court ruling in Philadelphia directing a farm to stop referring to its chickens as “happy and well-treated” but to call them “contented and well-treated” instead, and c) proposed legislation in Connecticut that would remove the definition of an invasive monk parrot species as “invasive”. For more historical shenanigans, see generally James Jasper “The American Animal Rights Movement” in Robert Garner (ed.) *Animal Rights: The Changing Debate* 129-142 (New York University Press 1996).

⁶⁰ See e.g. *American Soc. for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York*, 165 A.D.2d 561, 568 N.Y.S.2d 631 (N.Y.A.D. 2 Dept. 1991) (“Furthermore, while the humane treatment of animals may well constitute public business, it is firmly established that not every bit of public business constitutes a governmental function.”)

accomplish.⁶¹ In the courts, however, the movement's intellectual rigor has not withstood serious scrutiny.

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

IV. CONCLUSION

Immensely lengthy evolutionary processes, in slowly but inexorably crafting the natural objects now self-described as "people", have invested those objects with a remarkable adaptation: being able to construct and comprehend abstractions called "laws," intellectual concepts produced by language and forged in the fire of intricate social entanglements. The ability to use those abstractions have – in a remarkably short time geologically – uniquely benefited the objects to inhabit and exploit every imaginable niche on the planet.

Where human laws result from humans having developed the unique trick of language, where human rights result from humans having enfolded laws into detailed procedures that themselves require language to accomplish, who else other than humans might reasonably be invited in to warm their hands at that uniquely constructed fire? The cognitive scientist Daniel Dennett, in his book *Kinds of Minds*, envisioned, as a rhetorical device, a "charmed circle" within which we might magically be able to bring in all creatures finally recognized to be deserving of our moral and legal protection.⁶²

Animal rights activists who embrace definitions such as that found in *Shanklin*, rather than deal with the messier and stickier realities of animals proffered by evolutionary biology, do so because they want Dennett's charmed circle created and expanded – by being codified as law. Forget what science might have to say; what is the harm, they muse, in simply legislating out an enormous area that encompasses *all* entities, "every living creature" regardless of taxonomic type, or economic utility, or evolutionary history, or biological interaction?

Theodor Geisel, in a slightly different classic of cognitive reasoning, *The Sneetches*, has already answered one form of that question (in anapestic tetrameter, no less), and, a little less dreamily, explained a portion of the inherent logical absurdity in such an expansion: rules protecting "those with stars on their bellies" *as well as* "those with none upon thars" eventually

⁶¹ *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 894 P.2d 337 (Nev. 1995) ("Although we recognize a degree of merit in the animal rights movement, we feel working within the needs and sentiments of the community yield far greater participation and progress.")

⁶² Daniel Dennett, *Kinds of Minds* (Basic Books 1996).

reveals that the broadest type of protection is often no more than a trap for the logically inconsistent, a ruse in which none are protected and made free, but in which all are left exposed by being immobilized instead.⁶³

The animal rights movement's laudable goals include, patently enough, protecting the welfare of a few familiar animals. The movement's methods to reach those goals include the promulgation of legislation that penalizes the neglectful, the abusive, and the downright malicious. The movement contributes, unevenly, to the ongoing public debate over what to do with and about animals.⁶⁴ At the moment that the movement flounders into rights territory, misapprehends the police power of the state and the protection of the citizenry, and then exponentially compounds problems by offending the biological understanding of "what an animal is", its methods immediately outstrip and disserve the goals. It is not that the movement's analysis in this area is somehow faulty; it is that there is no analysis at all. Tort, property, contract, and ownership laws, respecting the objective value of a smallish amount of animal life at the expense and allowance of the destruction of many other animals, serve law, science, logic, and "animal welfare" far better, not least by embracing the realities and necessities of complex animal-environmental interactions and attending to the welfare of humans through the vehicle of law.

⁶³ Theodore Geisel, *The Sneetches and other stories* (Random House, Inc. 1961).

⁶⁴ *Ouderkirk v. People for Ethical Treatment of Animals, Inc.*, Slip Copy, 2007 WL 1035093 (E.D. Mich. 2007).