

OUT TO SAVE THE WORLD: THE INTERSECTION OF ANIMAL WELFARE LAW, ENVIRONMENTAL LAW, AND RESPECT FOR FRAGILE ECOSYSTEMS

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“Nature and its vital contributions to people, which together embody biodiversity and ecosystem functions and services, are deteriorating worldwide Nature is essential for human existence and good quality of life. Most of nature’s contributions to people are not fully replaceable, and some are irreplaceable.”¹

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1. Sandra Diaz et al., *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers*, IPBES 10 (May 6, 2019), https://ipbes.net/system/tdf/ipbes_global_assessment_report_summary_for_policymakers.pdf?file=1&type=node&id=35329 [<https://perma.cc/YH3H-W8B3>].

INTRODUCTION

Of all the living things on earth, humans have the unique ability to destroy all life. Paradoxically, even though our lives will ultimately be destroyed too, we also seem to have the inability to stop the destruction, or at least a lack of will to stop it. As the daily litany of new destructions² piles up and both the pace and the quantity increase, each loss is buried in the pile beneath humanity's other problems. When humans start prioritizing, the living environment—both flora and fauna—is often neglected, and sometimes purposely harmed.³ Even nonliving elements of nature are harmed. In short, humans destroy the ecosystems necessary for human survival in order to effectuate some other human interest, a lack of balancing that is incomprehensible.

This article turns on its head the idea that if we are better human beings, we will behave better toward each other and other living things. This article starts instead with the premise that if we learn to value (and treat accordingly) all living things, we will be better human beings. Although there are undoubtedly several social lenses through which to discuss this idea, the intersection of animal law and environmental law provides a place, not just for discussion, but also for action.

Specifically, there are three legal constructs at the intersection of animal law and environmental law that could significantly reduce human harm to nature: one should be dismantled, one should be strengthened, and one should be reconstructed. This article starts in Part I by looking at the dichotomy of the animal welfare and environmental movements. Although they developed separately and have interests that often compete, the two

2. *E.g., Morning Edition: In Brazil, Tens of Thousands of Fires Ravage Amazon Rainforest*, NPR (Aug. 23, 2019, 5:04 AM), <https://www.npr.org/2019/08/23/753642821/in-brazil-tens-of-thousands-of-fires-ravage-amazon-rainforest> [<https://perma.cc/A9C2-5PVA>]; Seth Borenstein, *UN Report: Humans Accelerating Extinction of Other Species*, AP (May 6, 2019), <https://www.apnews.com/aaf1091c5a4e40b0a110daaf04950672> [<https://perma.cc/A9C2-5PVA>]. The Amazon fires are having a devastating impact on an entire ecosystem, including the indigenous peoples and animals that live in the forests. *See* Nick Paton Walsh et al., *As the Amazon Fires Rage, Members of this Indigenous Community Brace for their World to Change*, CNN (Aug. 29, 2019, 5:24 AM), <https://www.cnn.com/2019/08/29/americas/amazon-rainforest-fires-indigenous-community/index.html> [<https://perma.cc/ZN5M-BBK2>]; Shreya Dasgupta, *At Least 500 Jaguars Lost Their Lives or Habitat in Amazon Fires*, ECOWATCH (Sept. 26, 2019, 10:25 AM), <https://www.ecowatch.com/jaguars-amazon-wildfires-2640630816.html?rebelltitem=1#rebelltitem1> [<https://perma.cc/RCB5-BLUL>].

3. *See, e.g., Morning Edition: Amazon Rainforest Fires Put a Spotlight on Illegal Land Grabbers*, NPR (Aug. 26, 2019, 5:06 AM), <https://www.npr.org/2019/08/26/754266197/amazon-rainforest-fires-put-a-spotlight-on-illegal-land-grabbers> [<https://perma.cc/YLR3-9Q3G>]. The primary cause of the most recent fires in the Amazon was people clearing the land for cattle ranches. *Id.* Brazilian President Bolsonaro supports the ranchers, farmers, loggers, and even illegal miners, who are responsible for most of the deforestation and destruction of the rainforest. *Id.*

movements do intersect. Part II argues that state “ag-gag” laws⁴—which provide legal cover for the animal cruelty, environmental harms, and social injustices caused by concentrated animal feeding operations (CAFOs)⁵—should be dismantled and repealed. Part III analyzes the issue of who has and who should have constitutional standing under statutes like the Endangered Species Act (ESA).⁶ These statutes that are meant to protect the environment and animals could be more effective at doing so with both judicial and legislative fixes to allow courts to more often consider their injuries. Finally, Part IV tackles the role of environmental law in shifting paradigms of how we view the human/nonhuman dichotomy in nature. Legal systems are human constructs that can be reconstructed on a framework that redefines the legal status of nonhuman animals and elements of nature in order to provide ecocentric justice. In the face of some quite dire destructions and losses in the ecosystems humans inhabit and depend on for survival, human legal systems must safeguard nonhuman interests.

I. ANIMAL, VEGETABLE, OR MINERAL: CHARACTERIZING THE DISTINCTION BETWEEN ANIMAL LAW AND ENVIRONMENTAL LAW

Modern human civilization reflects a struggle between human and nature, with humans prevailing most of the time (except, perhaps, when confronting natural disasters), and in this context, there may be very little difference between animal law and environmental law. Both focus on the relationship between the human and nonhuman, be it animal, vegetable, or mineral. These concerns are manifest in the animal welfare movement and environmentalism, both of which use the law and other tactics to advocate for protection of nonhuman interests. But these movements differ in what they seek to protect.⁷

The animal welfare movement is narrowly focused, not just on animals, but on individual animals. Animal law brings in aspects of almost every other area of law: criminal law, family law, tort law, constitutional law, consumer law, disability law, environmental law, contract law, agriculture law, and food law. It would be easy to extend this list. Moving from legal issues to the social movement, Tischler and Myers define the concerns of the animal welfare movement this way:

4. *E.g.*, Farm Animal and Research Facilities Protection Act, MONT. CODE ANN. §§ 81-30-101 to 81-30-105 (2019); *see also* Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 *Envtl. L. Rep. News & Analysis* (Env't. Law Inst.) 10,960 (Oct. 2012).

5. *See* Misha Mitchell, *Cries from the CAFOs: A Case for Environmental Ethics*, 39 *J. LEGAL PROF.* 67 (2014).

6. 16 U.S.C. §§ 1531–1544 (2018).

7. There are historical and structural differences as well as those of perspective. *See* David S. Favre, *Foreword to WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* xxiii, xxiii–xxviii (Randall S. Abate ed., 2015).

The animal protection movement is comprised of people who believe that the lives and interests of animals matter, if not always to human beings, then to the animals themselves. Animal advocates support the reduction or elimination of pain, suffering, abuse, and neglect, as well as eliminating the exploitation and unnecessary death of animals. This focus on animals includes farmed animals, animals used in research and testing, wildlife and captive wildlife, animals used in entertainment, and companion animals.⁸

More broadly, environmentalists concern themselves with issues of air pollution, water quality, land conservation, ecosystem protection, climate change, and wildlife management. Tischler and Myers also define environmentalism and its impacts:

Environmentalism pulls in diverse subjects, from environmental justice for low-income communities and communities of color, to ecotourism and improved livelihoods as vehicles for conservation, to the protection of biodiversity. Environmentalism reaches land, air, climate, and water—from the ocean to surface water and groundwater—and the full scope of human activities that impact our land, water, and climate.⁹

As suggested by these definitions, in the context of protecting animals, the distinction between the animal welfare movement and environmentalism is often framed as one of scope of interest: individual animals versus animal species and their ecosystems. This may be framed as concern about domestic animals (including farmed animals) versus concern about wildlife. Indeed, sometimes the interests of the two movements clash. Consider feral cats, which are devastating to populations of wild songbirds.¹⁰ Animal welfare advocates may advocate for trap-neuter-return programs that over time reduce the size of (or eliminate entirely) feral colonies. Environmentalists might decry the continued loss of songbirds during that time and advocate instead for eradication of the colony. David Favre perhaps sounds harsh in saying that animal welfare advocates “don’t give much priority to protection of endangered species when it conflicts with other life,” and environmentalists rarely “see farm land ecosystems, and there is no room

8. Joyce Tischler & Bruce Myers, *Animal Protection and Environmentalism: The Time Has Come To Be More than Just Friends*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?, *supra* note 7, at 387, 389.

9. *Id.* at 390.

10. Scott R. Loss et al., *The Impact of Free-Ranging Domestic Cats on Wildlife of the United States*, NATURE COMM. (Jan. 29, 2013), <https://www.nature.com/articles/ncomms2380> [<https://perma.cc/MJ39-YP7L>].

in their world to focus energy on issues of pets.”¹¹ Nevertheless, as social movements with disparate origins,¹² they are differently focused and this is quite likely how they see each other, if not how they see themselves.

But distinguishing the two movements also in absolute terms suggests a false dichotomy. At least one prominent issue—farmed animals—is a critical common concern,¹³ albeit from different perspectives. The animal welfare movement is focused on the cruelty of raising animals in “factory farms,” or CAFOs. Animal welfare advocates are concerned about the welfare of individual animals—even hundreds of thousands of individual animals—but there is no concern for the survival of cattle or poultry as species. They reveal the horrors of CAFOs and slaughterhouses to demand better treatment for animals raised for food. To be sure, in this context environmentalists are no more concerned for the survival of cattle or poultry as species. They are, however, troubled by the significant environmental damage caused by CAFOs, from water pollution to the levels of methane released by cattle that contribute to climate change,¹⁴ which does contribute to extinction of species. But as Tischler and Myers point out, ultimately, both environmentalists and animal welfare advocates are concerned that these activities that endanger large numbers of individual animals do harm the environment and do endanger species.

[H]uman activity that degrades the environment is a major concern, not only for ecosystems, but for the many species of animals, and the millions of individual animals who depend on the environment for survival. Curbing these losses—and ultimately reversing extinction trends—is a priority for both the animal protection movement and the environmental movement.¹⁵

For both movements, law is perhaps the most effective tool to effectuate the ecological and ethical change they seek. Yet for both, a deeply ingrained legal tenet is also the most profound impediment to affecting change: legally, nonhuman animals—be they domestic or wild—are property.¹⁶ Neither nonhuman animals nor any other living environmental entity has any inherent value under the law. They are either private property or public property and are only as valuable as they are to their human owners. Laws that protect property are only as effective as the damages assigned for

11. Favre, *supra* note 7, at xxvii.

12. *See id.* at xxiii.

13. *See* Tischler & Myers, *supra* note 8, at 391–98.

14. Amy Quinton, *Cows and Climate Change: Making Cattle More Sustainable*, UC DAVIS (June 27, 2019), <https://www.ucdavis.edu/food/news/making-cattle-more-sustainable/> [<https://perma.cc/9GTC-9F2N>].

15. Tischler & Myers, *supra* note 8, at 395.

16. *Id.* at 401.

their breach.¹⁷ Nonhuman animals and nature, then, are only protected by the law to the degree they are valuable to humans, and that value does not always outweigh other human interests.

The interests of animal welfare advocates and environmentalists converge at changing the valuation and balancing of interests. “To effectively protect nature and animal interests under the law, the law must recognize and respect their value, not only their value to humans as resources or private property, but their intrinsic value in their own right.”¹⁸ But that valuation will not change until we transform the laws that dictate how we see nonhuman animals. And ultimately, the hypothesis underlying this article is that it does not matter if the focus is on individual animals or animal species or other elements of nature so long as humans construct a legal system that allows both humans and nonhumans to value the individual and wholistic interests of nature.

II. SEE NO EVIL, HEAR NO EVIL: MASKING THE ANIMAL AND ENVIRONMENTAL ABUSES OF FACTORY FARMING

The feature-length Australian documentary *Dominion*¹⁹ presents an uncompromising, unrelenting, and damning view of animal agriculture. “Focusing on the legal, industry-standard practices that occur all over the world,” the documentary is two hours of film taken from hidden cameras and drones in factory farms and slaughterhouses, showing both “the terrifying scale of an empire built on secrecy—and the individual stories of its victims,” ultimately questioning “the morality and validity of humankind’s dominion over the animal kingdom, [and] advocating not for minor improvements to their welfare but for a deeper conversation about our right to exploit those we deem inferior to ourselves.”²⁰

Dominion was filmed in Australia, but other than the scale of the industry and its abuses (many more animals are bred and slaughtered in U.S. animal agriculture), there are few differences between the horrors shown in the film and the same horrors that are largely hidden in the U.S.²¹ In fact, much of the footage in the film would have been illegal to obtain in the U.S. Indeed, even though the film’s director was the first person in Australia charged under that country’s ag-gag law (for an earlier film),²² his perception after making *Dominion* is that “it is clear as an Australian that our animal

17. Joan E. Schaffner, *Valuing Nature in Environmental Law: Lessons for Animal Law and the Valuation of Animals*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?, *supra* note 7, at 243.

18. *Id.*

19. *DOMINION* (Aussie Farms 2018).

20. *Dominion: About the Film*, AUSSIE FARMS REPOSITORY, <https://www.dominionmovement.com/> [<https://perma.cc/RP9W-2YRJ>].

21. *Q&A with Chris Delforce, Writer & Director of Dominion*, AUSSIE FARMS REPOSITORY, <https://www.dominionmovement.com/about> [<https://perma.cc/Z5CT-2ESG>].

22. *Id.*

agriculture sector strongly envies the ag-gag laws and Animal Enterprise Terrorism Act successfully introduced [in the U.S.].”²³ But the fact that *Dominion* has been screened around the world, receiving both widespread acclaim and push-back²⁴ for its powerful truth-telling, demonstrates that humans may not be willing to tolerate the animal cruelty and environmental degradation caused by modern animal agriculture once they know about it.

The terminology describing how animals are raised for food—intensive animal farming, industrial livestock production, factory farms, concentrated animal feeding operations—most decidedly does not conjure visions of happy cows, lush, green fields, or clear, cool streams. Instead, the images evoked—and indeed, the realities—are ugly and dystopian. An “animal feeding operation” is a “lot or facility” where animals are “confined and fed” for a period of time, but crops and other vegetation are not grown.²⁵ CAFOs are animal feeding operations that are defined by large numbers of animals.²⁶

More than ninety-nine percent of the estimated ten billion animals raised and slaughtered annually in the U.S. are raised and slaughtered in CAFOs.²⁷ This method of raising animals for food is harmful certainly to the animals, but also to the environment and ultimately to humans. “In addition to causing unquantifiable animal suffering, CAFOs put independent family farmers out of business, and they create deplorable working conditions for employees. CAFOs also create massive externalities in the form of environmental destruction while they ravage their vulnerable host communities and trample civil rights.”²⁸ At the end of 2018, the Environmental Protection Agency reported 20,382 CAFOs in the U.S.²⁹

The horrific animal abuses common in CAFOs are well-documented, mostly by animal welfare activists working undercover. Abuses in the industry have been described in case law, ironically not because the treatment of animals is illegal, but because documenting that treatment or attempting to regulate it are often challenged in court.³⁰ The confinement of laying hens

23. *Id.*

24. Joely Mitchell, *Industry Braces for Documentary Backlash*, QUEENSLAND COUNTRY LIFE (Apr. 4, 2018, 6:50 PM), <https://www.queenslandcountrylife.com.au/story/5320974/industry-braces-for-documentary-backlash/?cs=4710> [<https://perma.cc/HS2A-628R>].

25. 40 C.F.R. § 122.23 (2018).

26. *Id.*

27. Christine Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL’Y 4, 4 (2017).

28. *Id.*

29. *NPDES CAFO Permitting Status Report*, EPA (Dec. 31, 2018), https://www.epa.gov/sites/production/files/2019-09/documents/cafo_tracksum_endyear_2018.pdf [<https://perma.cc/Q8X9-2AFR>].

30. *E.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (describing “disturbing” abuses at an Idaho dairy farm and partially overturning Idaho’s ag-gag law); *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, 870 F.3d 1140, 1143 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 862 (2019) (describing the process of force-feeding geese to produce foie gras); *Nat’l Meat Ass’n v. Brown*, 599 F.3d 1093 (9th Cir. 2010), *rev’d sub nom.*

and breeding sows is perhaps the most well-known issue, and the coverage has pressured the food industry to demand changes³¹ and states to enact laws limiting or banning the practice.³² Other largely unknown to the public standard industry practices are just as harmful to animals but are legal precisely because they are standard industry practices.³³ Even people who are aware of the facilities in their area rarely see inside the barns, slaughterhouses, and processing plants.

The environmental impacts of farming have been recognized for hundreds of years. In 1610, William Aldred successfully sued his neighbor for nuisance for “erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted.”³⁴ The court determined that “if the stopping of the wholesome air, etc. gives cause of action, *a fortiori* an action lies in the case at Bar for infecting and corrupting the air.”³⁵ CAFOs are the source of

Nat'l Meat Ass'n v. Harris, 565 U.S. 452 (2012) (describing cruelty to non-ambulatory cattle at a California slaughterhouse recorded in an undercover film). Not all of the abuse in these cases was legal, but none of the cases were criminal cases based on the underlying abuse.

31. See Maggie Fitzgerald, *Beyond Meat's Stock Pops on Report that Meatless Companies Are Struggling to Meet Demand*, CNBC (June 4, 2019, 10:07 AM), <https://www.cnbc.com/2019/06/04/beyond-meats-stock-pops-on-report-that-meatless-companies-are-struggling-to-meet-demand.html> [<https://perma.cc/XF8T-3JUF>].

32. See Lydia Mulvany & Leslie Patton, *Entire West Coast Goes Cage-Free on Eggs as Oregon Signs On*, BLOOMBERG (Aug. 15, 2019, 1:01 PM), <https://www.bloomberg.com/news/articles/2019-08-15/entire-west-coast-goes-cage-free-on-eggs-as-oregon-signs-on> [<https://perma.cc/NU8N-5M77>].

33. *Dominion* sheds light on many. The Aussie Farms Repository has a collection of photos, videos, documents, and other resources documenting “beyond doubt that animal abuse [is] not only commonplace, but in fact inherent to industries that exploit or use animals for profit. Aussie Farms operates under the belief that these industries rely on secrecy and deception, using marketing ploys such as ‘humanely slaughtered’ and ‘free range’, and imagery depicting happy animals living out their days on rolling green hills in the sunshine; and that by breaking down this secrecy and making it easier for consumers to see the truth about what their purchases support, the commercialised abuse and exploitation of animals will slowly but surely come to an end.” *About Aussie Farms*, AUSSIE FARMS REPOSITORY, <https://www.aussiefarms.org.au/about> [<https://perma.cc/VRX4-FBG9>]. Although both *Dominion* and the Aussie Farms Repository focus on Australian factory farming, the documented practices are pervasive industry standards worldwide.

34. William Aldred's Case, (1610) 77 Eng. Rep. 816, 816 cited in Jonathan Morris, Comment, “*One Ought Not Have So Delicate a Nose*”: CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm, 47 ENV'T'L L. 261, 263–64 (2017).

35. *Aldred's Case*, 77 Eng. Rep. at 821. In the U.S. too, the odorous air pollution from animal agriculture drew successful nuisance suits. *E.g.*, Commonwealth v. Van Sickle, 7 Pa. L.J. 82 (Pa. 1845), cited in Morris, *supra* note 34, at 270–71 (facility housing 1,000 hogs that created a stench “so intolerable as to make it almost impossible to pass through the street . . . without nausea” determined to be a nuisance). With the rise and growth of industrialized agriculture and CAFOs, states began to prohibit nuisance claims against agricultural operations via “right to farm” statutes intended to protect investment in agricultural operations. *Id.* at 276. In most states, animal agriculture is protected by these statutes. *Id.* at 278. A more recent trend in agricultural protections is adoption of constitutional right to farm and ranch provisions in state constitutions, protecting agricultural operations from state regulation. *Id.* at 283. Ag-gag laws—the intermediate step between statutory right to farm laws and the more recent constitutional protections—are another layer of protection for animal agriculture that is

tremendous air and water pollution. Groundwater pollution in the form of harmful nitrates and pathogens comes from waste lagoons, storm run-off, and flooding in areas near CAFOs.³⁶ In North Carolina alone, the pork industry produces over ten billion gallons of waste water annually.³⁷ CAFOs also emit very high levels of ammonia, hydrogen sulfide, methane, particulate matter, and 400 other volatile compounds into the air.³⁸ Methane, which is produced both by the animals themselves and the decay of manure in waste lagoons, is a significant contributor to climate change.³⁹ One estimate posits that CAFOs produce seventy-five percent of the ammonia pollutants in the U.S.⁴⁰ The noxious gases produced by waste lagoons have sickened and even killed farm workers.⁴¹ Nevertheless, in 2008, the EPA partially exempted CAFOs from reporting release of hazardous substances into the air because, “in most cases, a federal response is impractical and unlikely.”⁴² The D.C. Circuit vacated that final rule, saying, “In light of the record, we find those reports aren’t nearly as useless as the EPA makes them out to be.”⁴³

The response of states to the suffering and damage caused by CAFOs has not been to regulate CAFOs to improve factory farming, but instead to enact laws that keep the harms secret. In 2008, an undercover video released by the Humane Society of the United States showed unspeakable torture of downed cows inside the Westland/Hallmark Meat Packing Company in Chino, California, which supplied the National School Lunch Program. The backlash from the video led to the country’s largest beef recall, criminal charges against two workers, a massive settlement, the demise of the

clearly a response to animal welfare advocates trying to document the conditions inside animal agriculture operations. Ariel Overstreet-Adkins, Essay, *Extraordinary Protections for the Industry That Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana*, 77 MONT. L. REV. 85, 87 (2016).

36. Ball-Blakely, *supra* note 27, at 5.

37. *Id.*

38. *Id.* at 6; CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR EFFECT ON COMMUNITIES 5–6 (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/NJ6F-6R5G>].

39. HRIBAR, *supra* note 38, at 7.

40. Ball-Blakely, *supra* note 27, at 6.

41. *Id.*

42. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 FED. REG. 76,948, 76,956 (Dec. 18, 2008) (to be codified at 40 C.F.R. pts. 302, 355).

43. *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017).

company,⁴⁴ and a special hearing before a U.S. Senate Subcommittee.⁴⁵ This was not an isolated case, and other undercover video footage showed widespread cruelty and violation of food safety laws in the U.S. animal agriculture industry.⁴⁶ Although individual perpetrators and the facilities may have been held accountable, instead of tightening laws and enforcement to ensure the integrity of the U.S. food supply, several states reacted to the undercover videos not with alarm at the treatment of the animals but with alarm that undercover videos like these could endanger the industry. These states introduced bills, known as ag-gag laws, to prevent not the mistreatment of the animals, but the filming or photographing of the mistreatment.⁴⁷

Early ag-gag laws were purportedly enacted to combat agroterrorism (linked to ecoterrorism) and were intended to protect against property damage in animal industries including CAFOs and animal research facilities.⁴⁸ Even so, they contained provisions prohibiting undercover filming and photographing,⁴⁹ suggesting that the objective of combatting “terrorism” was not the whole story. In any case, these provisions foreshadowed the post-Westland/Hallmark laws, which were clearly focused on preventing not property damage, but the economic damage⁵⁰ that would result if consumers had a view behind the scenes of the animal agriculture industry. The ag-gag laws that were introduced in twenty-five states after Westland/Hallmark are generally characterized as either agricultural interference laws that ban recording in agricultural facilities without consent or distributing such a recording; agricultural fraud laws that prohibit gaining entrance to agricultural facilities under false pretenses, including misrepresenting oneself on an employment application; or rapid reporting

44. Helena Bottemiller, *Landmark Settlement Reached in Westland-Hallmark Meat Case*, FOOD SAFETY NEWS (Nov. 18, 2012), <https://www.foodsafetynews.com/2012/11/landmark-settlement-reached-in-westlandhallmark-meat-case/> [https://perma.cc/98ZR-CT92]; Jane Zhang, *Meatpacker Admits Ailing Cattle Used at Slaughterhouse*, WALL STREET J. (Mar. 13, 2008, 12:01 AM), <https://www.wsj.com/articles/SB120533310279730335> [https://perma.cc/LR2Z-BCAF]; *Meatpacker to Shut Down Permanently After Recall: Report*, REUTERS (Feb. 24, 2008, 12:15 PM), <https://www.reuters.com/article/us-hallmark-westland-meat/meatpacker-to-shut-down-permanently-after-recall-report-idUSN24205620080224> [https://perma.cc/7ZTZ-9B3L].

45. See *Hallmark/Westland Meat Recall: Hearing Before the Subcomm. on Agric., Rural Devel., Food and Drug Admin. & Related Agencies of the S. Comm. on Appropriations*, 110th Cong. (Feb. 28, 2008), <https://www.govinfo.gov/content/pkg/CHRG-110shrg44333/html/CHRG-110shrg44333.htm> [https://perma.cc/7P8A-X2CX].

46. Alicia Prygoski, *Detailed Discussion of Ag-gag Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> [https://perma.cc/ZEZ8-UTHB].

47. *Id.*; Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> [https://perma.cc/XJC7-D5WZ]. Bittman is credited with coining the term “ag-gag.”

48. Prygoski, *supra* note 46. Montana, Kansas, and North Dakota passed this type of ag-gag law in the 1990s. *Id.*

49. *Id.*

50. *Id.*

laws that require reporting of animal cruelty within twenty-four to twenty-eight hours.⁵¹ Rapid reporting laws are especially problematic because they seem like they are meant to combat animal cruelty, but really prevent whistleblowers from acquiring evidence of a pattern of abuse over time.⁵²

These laws have not gone unchallenged. Indeed, although they were introduced in twenty-five states between 2011 and 2015, they passed in only six.⁵³ Utah's law (a combined agricultural interference/agricultural fraud law),⁵⁴ Idaho's (also a combined agricultural interference/agricultural fraud law),⁵⁵ and Iowa's (an agricultural fraud law) have been challenged on First Amendment free speech and Fourteenth Amendment equal protection grounds.⁵⁶ All three were initially held unconstitutional.⁵⁷ The Ninth Circuit reversed the District of Idaho regarding the agricultural fraud portions of Idaho's law, but the agricultural interference portions remain enjoined.⁵⁸ The validity of the Iowa statute is on appeal, but just after the appeal was filed, the Iowa legislature passed another version of an agricultural fraud statute,⁵⁹ which is also now being challenged on First and Fourteenth Amendment grounds.⁶⁰

Perhaps to avoid the Fourteenth Amendment challenges, the most recent incarnation of ag-gag laws prohibit undercover investigation of abuses not just at agricultural and research facilities but at all businesses.⁶¹ Lawsuits have been filed seeking to enjoin enforcement of the new statutes in Arkansas and North Carolina.⁶² But expanding the scope of ag-gag laws to include all corporate misconduct is going in the wrong direction. The better course of action would be repeal.

This new expansion of ag-gag laws is alarming. In order to protect the cruel and environmentally damaging practices of industrial animal

51. *Id.*

52. *Id.*

53. *Id.*

54. UTAH CODE ANN. § 76-6-112 (West 2019), *held unconstitutional* by Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).

55. IDAHO CODE § 18-7042 (2019), *held unconstitutional* by Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1211–12 (D. Idaho 2015), *aff'd in part, rev'd in part* by Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018); IOWA CODE § 717A.3A (2019), *held unconstitutional* by Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 826–27 (S.D. Iowa 2019), *appeal filed*, No. 19-1364 (8th Cir. Feb. 22, 2019).

56. Prygoski, *supra* note 46.

57. *Herbert*, 263 F. Supp. 3d at 1213; *Otter*, 118 F. Supp. 3d at 1211–12; *Reynolds*, 353 F. Supp. 3d at 826–27.

58. *Wasden*, 878 F.3d at 1205.

59. IOWA CODE § 717A.3B (2019).

60. Complaint, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa Apr. 22, 2019).

61. ARK. CODE ANN. § 16-118-113 (2019); N.C. GEN. STAT. § 99A-2 (2018). The two statutes are virtually identical.

62. Animal Leg. Def. Fund v. Vaught, No. 4:19-cv-00442 (E.D. Ark. June 25, 2019); PETA v. Stein, 737 F. App'x. 122, 125 (4th Cir. June 5, 2018) (reversing the lower court's determination that the plaintiffs had no standing and allowing the lawsuit to go forward).

agriculture, legislators are willing to protect corporate misconduct across the board. This underscores the fact that these laws really protect social injustices. The director of *Dominion* says that the film is “about levelling the playing field by showing consumers of animal products what they’re actually paying for—giving them the chance to make informed decisions and hopefully, encouraging a more compassionate and critically-thinking society where misleading advertising is no longer taken at face value.”⁶³ But abuses inherent in industrial animal agriculture have a much deeper impact than the behavior of American consumers. Industrial animal agriculture notoriously preys on immigrants—especially undocumented immigrants—who may have no choice but to work in inhumane conditions.⁶⁴

[One company] has built its business by recruiting some of the world’s most vulnerable immigrants, who endure harsh and at times illegal conditions that few Americans would put up with. When these workers have fought for higher pay and better conditions, the company has used their immigration status to get rid of vocal workers, avoid paying for injuries, and quash dissent.⁶⁵

CAFOs are often located in economically disadvantaged areas, often near communities of color, where vulnerable residents do not have the opportunities or resources to move or ameliorate the deleterious impacts of the CAFOs.⁶⁶

Ag-gag laws allow the animal agriculture industry to hide practices that prey on vulnerable people, animals, and ecosystems, and they mask the social and ethical issues created by the industry. Allowing corporations to hide the evils inherent in the food system that is crucial to our survival does not make humans better, healthier, or safer.

63. *Dominion: About the Film*, *supra* note 20.

64. It is likely not a coincidence that U.S. immigration officials selected the chicken processing industry for massive simultaneous raids that resulted in almost 700 arrests for immigration violations. See Rogelio V. Solis & Jeff Amy, *Largest US Immigration Raids in a Decade Net 680 Arrests*, AP (Aug. 7, 2019), <https://www.apnews.com/bbcef8ddae4e4303983c91880559cf23> [<https://perma.cc/BY9G-YLMW>].

65. Michael Grabell, *Cut to the Bone: How a Poultry Company Exploits Immigration Laws*, NEW YORKER, May 8, 2017, at 46.

66. See generally Ball-Blakely, *supra* note 27.

III. STANDING ON THEIR OWN FOUR FEET: LEGAL STANDING FOR ANIMALS AND THE ENVIRONMENT⁶⁷

In May 2019, the United Nations released a report that revealed the shocking reality that one million plant and animal species are in danger of extinction due to human activity.⁶⁸ The report alarmingly states:

Human actions threaten more species with global extinction now than ever before. An average of around 25 per cent of species in assessed animal and plant groups are threatened . . . suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss. Without such action there will be a further acceleration in the global rate of species extinction, which is already at least tens to hundreds of times higher than it has averaged over the past 10 million years.⁶⁹

Although this may be the direst warning yet, it is not the first recognition that humans have an interest in preserving biodiversity. In 1972, President Nixon, in announcing his environmental agenda, recognized “that even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species.”⁷⁰ Nixon proposed a law that “would make the taking of endangered species a Federal offense for the first time, and would permit protective measures to be undertaken before a species is so depleted that regeneration is difficult or impossible.”⁷¹

Hearings on endangered species legislation confirmed that:

[s]ome sort of protective measures must be taken to prevent the further extinction of many of the world’s animal species. The number of animals on the Secretary of the Interior’s list of domestic species that are currently threatened with extinction is now 109. On the foreign list, there are over 300 species. Further, the rate of extinction has increased to where on the average, one species disappears per year . . . [M]any

67. This section is based on work published previously and updated recently in Stacey L. Gordon, *The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement’s Quest for Legal Standing for Non-Human Animals*, in *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?*, *supra* note 7, at 211–41 (2d ed. scheduled for publication May 2020).

68. Diaz et al., *supra* note 1.

69. *Id.* at 3.

70. The President’s 1972 Environment Program, 8 WEEKLY COMP. PRES. DOC. 227 (Feb. 8, 1972).

71. *Id.*

of these animals perform vital biological services to maintain a “balance of nature” within their environments.⁷²

Because of these findings, Congress enacted the Endangered Species Act (ESA),⁷³ “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁷⁴ The underlying concerns were important, impassioned, and broad.⁷⁵ The codified preamble to the law states:

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.⁷⁶

“While each of [the] asserted interests ultimately benefits humanity, the ESA provides a comprehensive scheme to preserve and protect endangered species themselves in order to provide those benefits.”⁷⁷

And yet, at this moment, the ESA itself is in danger. At the same time the United Nations report of May 2019 was published, the U.S. Fish & Wildlife Service and National Marine Fisheries Services were rewriting ESA regulations as ordered by the President.⁷⁸ When he issued the accompanying Executive Order, surrounded by industry executives, the President made clear the purpose of regulatory reform was to benefit industry and spur economic growth.⁷⁹ The agencies set about to reinterpret the statutory

72. S. REP. NO. 93-307, at 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2989–90, *cited in* Katherine A. Burke, Comment, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 655 (2004).

73. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

74. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978), *quoted in* Burke, *supra* note 72, at 638.

75. *See* Burke, *supra* note 72, at 639.

76. 16 U.S.C. § 1531(a)(1)–(3) (2018).

77. Burke, *supra* note 72, at 639.

78. Enforcing the Regulatory Reform Agenda, Exec. Order No. 13,777, 3 C.F.R. 293 (2018).

79. Remarks on Signing the Executive Order on Enforcing the Regulatory Reform Agenda, DAILY COMP. PRES. DOCS. (Feb. 24, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700138/pdf/DCPD-201700138.pdf> [<https://perma.cc/R6UT-5Q3Z>].

language underlying the ESA regulations,⁸⁰ and amended specific rules regarding determination of species as threatened, consideration of unoccupied areas in designation of critical habitat, and presentation of economic impacts with regard to listing decisions.⁸¹ While the Administration and some in Congress praised the amendments, environmentalists warn these changes weaken the Act and will make it difficult to protect vulnerable plant and animal species, while others in Congress believe the amendments do not go far enough and suggest amendments to the ESA itself.⁸² As of this writing, courts are considering challenges to the new regulations⁸³ at the same time Congress is considering bills to amend the ESA and weaken it even further.⁸⁴

While the most immediate task may be to prevent further weakening of the ESA, the most important task may actually be to reinterpret and amend it, though probably not in the way most of the bills contemplate. Specifically, the ESA should be reinterpreted to broaden the definition of injury in citizen suits and amended to allow for animal suits. The last half of the previous

80. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193, 35,194 (proposed July 25, 2018) (amending 50 C.F.R. pt. 424).

81. The final rule still does not allow consideration of economic impacts in listing decisions, but it does allow gathering and publishing of that information prior to decision. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,024–25 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424).

82. Adam Aton, *Endangered Species: Trump Admin Rolls out Rule Changes to Limit Law's Reach*, GREENWIRE (Aug. 12, 2019), <https://www.eenews.net/stories/1060931003> [<https://perma.cc/4E9W-NMYA>].

83. *Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019) (lawsuit filed by seven environmental and animal welfare groups and the State of California); *California v. Bernhardt*, No. 3:19-cv-06013 (N.D. Cal. Sept. 25, 2019) (lawsuit filed by seventeen states and the District of Columbia).

84. In fact, there are competing bills in Congress. H.R. 4348, 116th Cong. (2019) and S. 2491, 116th Cong. (2019), both with the stated purpose “[t]o terminate certain rules issued by the Secretary of the Interior and the Secretary of Commerce relating to endangered and threatened species” were introduced on September 17, 2019. The House version would void the 2019 amendments to the regulation, but the Senate version would also strengthen the ESA by requiring analysis of climate change impacts in listing decisions. S. 2491 § 3(c). Meanwhile, the Congressional Western Caucus is working on 19 bills to “modernize” the ESA. *Endangered Species Act and Wildlife*, CONGRESSIONAL W. CAUCUS, <https://westerncaucus.house.gov/issues/issue/?IssueID=14890> [<https://perma.cc/3WQ6-9XMT>].

Rep. Gianforte, who introduced a bill earlier in 2019 mandating that Fish & Wildlife Services delist the Yellowstone Grizzly without following ESA delisting procedures, H.R. 1445, 116th Cong. (2019), said that the ESA has “become a bludgeoning tool for frivolous lawsuits from special interest groups,” and that “[a]buse of the ESA is also shutting down our forest management in Montana. It’s been weaponized, and now we’re at a point where we, instead of managing our forests, we breathe them every summer.” *Gianforte Bill Outlines Further ESA Rollbacks*, MONT. PUBLIC RADIO (Sept. 25, 2019), <https://www.mtpr.org/post/gianforte-bill-outlines-further-esa-rollbacks?fbclid=IwAR3YGtXkXIA3nXAluqzJ5EaihnBZW6DBR8mqLAVw942fcbYkbBL9G-jypVo> [<https://perma.cc/NK2E-VU7L>].

sentence isn't as radical an idea as it may seem. Justice William O. Douglas recognized the possibility in 1972:

The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.⁸⁵

Standing is the legal doctrine that protects the constitutional requirement that courts consider only "actual cases and controversies."⁸⁶ Adding an animal suit provision to the ESA wouldn't automatically grant every animal standing to seek redress for every injury, but it would expand enforcement of the ESA by allowing lawsuits by those who can most easily establish injury. Article III standing requires that the plaintiff be able to show three elements: injury, causation, and redressability.⁸⁷ If the plaintiff meets that test, the court must determine whether Congress has specifically conferred standing. The ESA's citizen suit provision does that, allowing any *person* to bring a civil suit for the enforcement of the ESA *on their own behalf*,⁸⁸ but neither the Constitution nor Congress allows a person to bring a civil suit to enforce the ESA purely out of interest in animal welfare.⁸⁹ The plaintiff must have a personal stake in the lawsuit, which has been defined as an injury that is "concrete and particularized" and "actual or imminent and not 'conjectural' or 'hypothetical.'"⁹⁰

The U.S. Supreme Court recognized in *Sierra Club v. Morton* that environmental degradation can constitute injury: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."⁹¹ The standing doctrine does not preclude a plaintiff from bringing a citizen suit to enforce violations of environmental laws that are causing widespread

85. *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (citing Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

86. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992).

87. *Id.* at 560–61.

88. 16 U.S.C. § 1540(g) (2018) (emphasis added).

89. *Sierra Club*, 405 U.S. at 734–35.

90. *Lujan*, 504 U.S. at 560.

91. 405 U.S. at 734.

damage, but only if that plaintiff also has a particularized personal injury.⁹² For example, in *Massachusetts v. EPA*, the Court held that the Commonwealth of Massachusetts had standing to challenge the denial of rulemaking to regulate automobile emissions—which contribute to worldwide climate change—because, as a coastal property owner, Massachusetts will suffer a specific and imminent injury as sea levels rise.⁹³ The Court said, “That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’s interest in the outcome of this litigation.”⁹⁴ However, virtually all human injury resulting from harm to animals is subjective.⁹⁵

Cass Sunstein contends that only three categories of persons will have personal injuries to sue to protect the interests of animals: those who suffer informational injuries, those who suffer aesthetic injuries, and those who suffer competitive injuries.⁹⁶ The recognition that aesthetic injury is cognizable for standing purposes is crucial for environmental cases, but in the face of widespread extinction, it is not enough. In environmental cases—including ESA cases—aesthetic injuries are based on a desire to observe nature.⁹⁷ But, to meet the concrete, particularized, and imminent requirements for standing, an aesthetic injury must be supported by more than an expressed desire to observe nature or wildlife. Plaintiffs must have actual plans to travel to specific places in the foreseeable future in order to view nature or wildlife or previous activity that suggests similar future enjoyment of nature or wildlife but for the statutory violation at issue.⁹⁸ This threshold showing will be difficult to make when the interest at issue is not the desire to observe a specific species, but to stop the imminent extinction of a million species, virtually all of which a specific plaintiff—even an organizational plaintiff—has never seen and has no plans to ever see. The interest at issue with these species is not necessarily an aesthetic interest in observing them, but a common survival interest in not allowing the destruction of ecosystems that support the biodiversity that is also necessary for human survival.

Recognizing an ethical injury need not contravene standing jurisprudence. While it is true that this interest may be common to every

92. *Id.* at 740.

93. 549 U.S. 497, 521 (2007).

94. *Id.* at 522.

95. Burke, *supra* note 72, at 651.

96. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1334–35 (2000).

97. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (plaintiff desired to travel to national forests potentially affected by timber sale regulations); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (plaintiffs desired to view species endangered by international projects); *Sierra Club*, 405 U.S. 727 (plaintiffs wanted to protect wilderness-like quality of area that would be affected by road construction); *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (plaintiff had an aesthetic interest in viewing primates living in humane conditions).

98. *See* Gordon, *supra* note 67, at 214–19.

person, thus allowing virtually anybody to claim standing for redress of the injury, existing precedent provides limiting guidance. In *Animal Legal Defense Fund v. Glickman*, standing was not only found by virtue of the plaintiff's past record of visiting the primates daily and being disturbed by their living conditions, but also on his background, education, and knowledge.⁹⁹ This suggests not just aesthetic, but an objective, knowledge-based ethical component to the individual plaintiff's injury. The requirement of specific knowledge protects the jurisprudential standing requirement that the injury must be personal and particularized. This would allow scientists and animal welfare and environmental organizations to have standing based not on their aesthetic interests but on scientifically based ethics.¹⁰⁰

But if the interest is preserving biodiversity, addressing any plaintiff's ethical injury would barely touch the problem; at most, any one plaintiff's injury would reach the several species in one ecosystem, hardly the million that are in danger of extinction. This problem raises another element of standing—redressability. Redressability requires that “it must be ‘likely,’ as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’”¹⁰¹ Unless a species population is very small, or the animal species' critical habitat covers a small area, it seems unlikely that one case will save even one species, let alone preserve biodiversity on anything but a local level. The complexity of environmental harms requires courts to adopt an interpretation of redressability that allows for incremental solutions, which the Supreme Court did in *Massachusetts v. EPA*.¹⁰² Other courts have followed:

The redressability requirement does not require a plaintiff “to solve all roadblocks simultaneously;” rather, a party may seek “to tackle one roadblock at a time. . . .” That is especially true when the harm complained of is environmental. Given the complexity of the natural world and the innumerable ways in which human activities affect the environment, it is rarely possible to say with certainty that a particular verdict will resolve a particular environmental harm. Often, environmental harm will result indirectly from human activity, occurring later in time or some distance away from the activity that caused it, or after some intermediate natural process Environmental harm may also result from “cumulative impacts,” i.e., impacts “which result[] from the incremental impact of the action when added to other past, present, and reasonably

99. *Glickman*, 154 F.3d at 429.

100. See Sunstein, *supra* note 96, at 1354. Sunstein also suggests scientific injuries as an alternative to aesthetic ones but separates them from ethical injuries.

101. *Lujan*, 504 U.S. at 561 (internal citations omitted).

102. 549 U.S. 497, 524 (2007).

foreseeable future actions” Rather than shut the courthouse doors to real environmental harms, courts have adopted a practical construction of Article III’s case-or-controversy-requirement that allows a plaintiff to maintain an action if it is likely that a favorable verdict will constitute a meaningful step towards remedying the alleged harm.¹⁰³

In addition to this judicial fix to the problem of standing to enforce the ESA, there is a congressional one that, as suggested above, is neither radical nor impossible: Congress could grant standing to animals. The Ninth Circuit has already suggested as much:

We see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.¹⁰⁴

As promising as this sounds, the court has so far been adamant that animals do not have standing, even though it once appeared that it had granted standing to an animal,¹⁰⁵ and that other courts had followed.¹⁰⁶ In *Palila v. Hawaii Department of Land & Natural Resources*, the court said that “[a]s an endangered species . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right.”¹⁰⁷ However, faced with a question of animal standing again in *Cetacean Community v. Bush*, the court determined that its earlier statement was dicta, “little more than rhetorical flourishes.”¹⁰⁸ Having dismissed its own potential precedent for animal standing, the court went on to analyze the ESA, National Environmental Protection Act (NEPA), Marine Mammal Protection Act, and Administrative Procedures Act (APA), and found that none grant standing to animals.¹⁰⁹ More recently, the court doubled-down on this analysis and held that Congress similarly did not grant animals standing under the Copyright Act.¹¹⁰

103. *Cal. Sea Urchin Comm’n. v. Bean*, 239 F. Supp. 3d 1200, 1205–06 (C.D. Cal. 2017) (internal citations omitted).

104. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004).

105. *Palila v. Haw. Dep’t of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988).

106. *Marbled Murrelet (Brachyramphus Marmoratus) v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995); *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).

107. *Palila*, 852 F.2d at 1107.

108. *Cetacean Cmty.*, 386 F.3d at 1174.

109. *Id.* at 1176–79.

110. *Naruto v. Slater*, 888 F.3d 418, 425–26 (9th Cir. 2018) (the “monkey-selfie” case).

Absent an express Congressional mandate, the Ninth Circuit will not find standing for animals:

The court in *Cetacean* did not rely on the fact that the statutes at issue in that case referred to ‘persons’ or ‘individuals.’ Instead, the court crafted a simple rule of statutory interpretation: if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.¹¹¹

Furthermore, in *Naruto v. Slater*, the Ninth Circuit found an additional hurdle for animal standing that would require congressional action: animals literally cannot speak for themselves, but absent next-friend status that Congress must grant, neither can anybody else.¹¹² Professor Sunstein believes that Congress will grant standing to animals.¹¹³ About nonhuman standing, he concludes that:

It would be acceptable for Congress to conclude that a work of art, a river, or a building should be allowed to count as a plaintiff or a defendant, and authorize human beings to represent them to protect their interests. So long as the named plaintiff would suffer injury-in-fact, the action should be constitutionally acceptable.¹¹⁴

Regardless of whether the ESA is intended to protect animal and plant species (the legislative history suggests that it was) or people (the legislative history suggests that too), the reality is that biodiversity is essential to the survival of the planet, and humans are rapidly destroying that biodiversity.¹¹⁵ Both human and nonhuman animals have interests in preserving the multitude of species, both are injured by actions that harm species, and both should have access to the courts to seek redress for that harm.

IV. AND NOW FOR SOMETHING COMPLETELY DIFFERENT: CONSTRUCTING AN ECOCENTRIC LEGAL SYSTEM

Dominion challenges the idea that humans are superior to and have dominion over nonhuman animals.¹¹⁶ As we watch the destruction of nature,

111. *Id.*

112. *Id.* at 422.

113. Sunstein, *supra* note 96, at 1359–60.

114. *Id.* at 1361.

115. Diaz et al., *supra* note 1.

116. *Q&A with Chris Delforce*, *supra* note 21.

often in the name of human development, we see that the idea of dominion—and the need to challenge it—is broader than the human/nonhuman animal binary. Over twenty years ago, Professor Jonathan Wiener charted paradigms of environmental law that moved from a view in which nature is at a stable equilibrium, and humans are separate from and superior to nature, to a view in which nature is dynamic and changing, and humans are part of nature¹¹⁷ (see Table 1 below). In his characterization of the developing paradigms, the focus of the role of law shifted from exploitation to conservation to preservation.¹¹⁸ As the paradigms shift through four phases (or “faces” per Wiener’s nomenclature), the view of humanity shifts from one in which humans are morally superior to nature, to one in which humans are morally inferior, to one of moral uncertainty.¹¹⁹

Table 1: Wiener’s “Four Faces of Environmental Law”¹²⁰

View of Nature	View of Humanity	Role of Law
Stable, vast and resilient, raw, fearsome	Separate from nature; morally superior to nature	Exercise human dominion over nature; exploit
Stable, in balance (absent human disruption); fragile; wild	Separate from nature; morally superior to nature	Exercise benign stewardship over nature; conserve
Stable, in balance (absent human disruption); fragile, pristine	Separate from nature; morally inferior to nature	Protect balance of nature, untainted by humans; preserve
Dynamic, in disequilibrium, interconnected, chaotic	Part of nature; morally uncertain	?

Wiener’s contention is that the role of environmental law at any point in time was derived from society’s views of nature and the moral status of humans in relation to nature.¹²¹ At the time he wrote the article, nature was understood as dynamic, the “balance of nature” was a fallacy, and humans were a part of nature and therefore neither morally superior nor inferior;

117. Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POL’Y F. 1, 3 (1996).

118. *Id.*

119. *Id.*

120. *Id.* at 4.

121. *Id.* at 5.

however, absent the human/nonhuman dichotomy in earlier paradigms, it was unclear what the role of law was.¹²² Wiener could not fill in the final cell in the chart—the role of law in this new paradigm—suggesting that the new paradigm was just “beginning to construct a legal regime that escapes this dichotomy and is based instead on consequences and on incentives to promote ecological health.”¹²³

It is safe to assume the predominant paradigm still views nature in constant disequilibrium and chaos, which it must be if only because there is no longer any way to argue a nature free from human disruption. However, even at the time Wiener charted the development of environmental law paradigms, the idea of a view of humanity that is part of nature and morally neutral was not as clear, nor necessarily even desirable.¹²⁴ Given headlines about mining development, petroleum exploration, deforestation, climate change, and species extinction, it does seem that humans still view themselves as morally superior to nature or at least treat nature with moral ambiguity, because while we have laws that support preservation of nature, we often interpret them in ways that allow exploitation.¹²⁵

This may be the crux of the dilemma regarding the role of law in Wiener’s new paradigm. Because law is a human construct designed to order human society, decide human disputes, and redress human injury, a paradigm of the role of law in nature cannot assume a view that humanity is a morally neutral part of nature because the interest of humans will always dominate. Indeed, as was discussed in the last section, nonhuman natural elements do not even have access to the human legal system absent an injury to humans. The legal system, therefore, has no interest in addressing harms to nature absent co-occurring harms to humans.

While Wiener tried to define a legal system that would “escape the dichotomy,” the legal system in Walter Kuhlmann’s paradigm recognizes the dichotomy but not the moral superiority. Kuhlmann’s ecocentric legal framework starts with the view of nature as dynamic and interconnected; law, in his paradigm, “would require greater consideration in the law for species and habitats and would reduce presumptions in the law in favor of human desires, i.e. would result in a net change toward a more ecocentric legal framework.”¹²⁶ The role of environmental law is not to erase the human/nonhuman dichotomy in nature, but to create a legal system that values ecosystems, which humans are a part of but not superior to. The role of law, then, is to control for dominion and moral superiority. Using language

122. *Id.* at 2–3, 17.

123. *Id.* at 17.

124. Walter Kuhlmann, *Making the Law More Ecocentric: Responding to Leopold and Conservation Biology*, 7 DUKE ENVTL. L. & POL’Y F. 133, 155–57 (1996).

125. *See id.* at 149–59.

126. *Id.* at 135.

from Kuhlmann, the empty cell in Wiener's chart would read: "Recognize biotic values; 'diminish human dominion;'¹²⁷ cohabit."

The challenge for this view of environmental law is that legally, plant and animal species and non-living elements of nature are human property. Human dominion over nature is, then, embedded in the system. It is not, however, so intrinsic that it cannot be questioned. Steven Wise and the NonHuman Rights Project have now filed habeas corpus petitions on behalf of four chimpanzees and four elephants, seeking not only their release from captivity, but a determination that they are legal persons.¹²⁸

Granting legal personhood to nonhuman animals would confer rights on nonhuman animals, but would neither grant animals human status nor confer human rights, or even absolute rights that would trump human rights. If the goal is to create an environmental law paradigm that recognizes the human/nonhuman dichotomy in ecosystems but considers nonhuman value, humans and nonhuman should not have identical rights; they should have rights inherent to their species.¹²⁹ Constitutional law scholar Laurence Tribe considered the idea of animal rights and reasoned that they are not so radical an idea in constitutional jurisprudence.¹³⁰

The NonHuman Rights cases have moved through the New York court system, arguing for chimpanzees Tommy, Kiko, Hercules, and Leo, and are still pending in Connecticut and New York courts on behalf of elephants Beulah,¹³¹ Karen, Minnie, and Happy. None, so far, have been successful, but they also have not slammed shut the door. In denying Hercules and Leo's petition for habeas corpus, Judge Jaffe of the New York Supreme Court said:

Efforts to extend legal rights to chimpanzees are . . . understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law As Justice Kennedy observed in *Lawrence v. Texas*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." For now, however, given the precedent to which I am bound, it is

127. *Id.* at 160.

128. *Litigation: Confronting the Core Issue of Nonhuman Animals' Legal Thinghood*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/litigation/> [<https://perma.cc/N5PV-C9VY>].

129. See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 325-407 (2007).

130. 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, 1 (2001).

131. Sadly, Beulah collapsed and died at a state fair in Massachusetts in September 2019. She was 54 years old. Amanda Woods, *Beloved Elephant Beulah Dies of Heart Attack at State Fair*, N.Y. POST (Sept. 26, 2019), <https://nypost.com/2019/09/26/beloved-elephant-beulah-dies-of-heart-attack-at-state-fair/> [<https://perma.cc/6ZQN-ZBN8>].

hereby ordered that the petition for a writ of habeas corpus is denied.¹³²

In the appeal of Tommy's case in the New York Court of Appeals, Judge Fahey concurred with the Court's denial of the writ, but issued a stunning opinion:

The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing? . . . The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a "person" or relegated to the category of a "thing" amounts to a refusal to confront a manifest injustice.¹³³

Austrian courts similarly declined to grant personhood to a chimpanzee, *Matthew Hiasl Pan*.¹³⁴

However, other foreign jurisdictions have granted rights to nonhuman plant and animal species and even to non-living elements of nature. In 2008, the Spanish Parliament passed a resolution recognizing that great apes have the right to life and freedom.¹³⁵ The Supreme Court of India extended the constitutional right to life to animals in 2014, and in 2019, an Indian high court recognized all non-human animals as legal entities¹³⁶ in an

132. Decision & Order, *In re NonHuman Rights Project, Inc. v. Stanley*, No. 152736/15, slip. op. at 32 (N.Y. Sup. Ct. July 29, 2015), available at <https://www.nonhumanrights.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf> [<https://perma.cc/2P8H-8246>].

133. Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 100 N.E.3d 846, 848 (N.Y. 2018) (Fahey, J., concurring) (mem) (internal citations omitted).

134. Martin Balluch et al., *Hiasl: The Whole Story*, VGT (Jan. 18, 2008), <https://vgt.at/en/work-pan.php> [<https://perma.cc/G9AV-PMXC>]. The Austrian courts did not determine the issue of personhood, but instead denied the petition on technical grounds. *Id.*

135. Lee Glendinning, *Spanish Parliament Approves 'Human Rights' for Apes*, THE GUARDIAN (June 26, 2008), <https://www.theguardian.com/world/2008/jun/26/human-rights.animalwelfare> [<https://perma.cc/FB8G-9UJM>].

136. Sonia Shad, *Indian High Court Recognizes Nonhuman Animals as Legal Entities*, NONHUMAN RIGHTS BLOG (July 10, 2019), <https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/> [<https://perma.cc/NC2E-J6Q6>].

opinion that echoes Kuhlmann's ecocentric legal framework.¹³⁷ An Indian court has also granted the legal status of "living human entities" to two rivers, the Ganges and the Yamuna.¹³⁸ Like India, New Zealand has not generally granted the status of legal person to nature, but it has granted legal status to two natural features, the Te Urewera forest,¹³⁹ and the Whanganui River.¹⁴⁰ The people of Ecuador held a national referendum that resulted in a constitutional amendment that grants to nature the rights "to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution," though the constitutional amendment does not confer legal status.¹⁴¹

Building on all of this, in 2017, the Colorado River Ecosystem filed a lawsuit in the federal District of Colorado seeking recognition of the river's "right to exist, flourish, regenerate, be restored, and naturally evolve."¹⁴² While the court quickly dismissed this case,¹⁴³ another U.S. river has been granted personhood status: the Klamath River was declared a legal person by the Yurok Tribe.¹⁴⁴

All of these instances focus either on personhood or rights, but a few scholars have proposed another legal concept that vests animals only with a narrow set of rights—property rights—and the standing to enforce them.¹⁴⁵ Karen Bradshaw proposes vesting property rights in animals at the ecosystem level.¹⁴⁶ That property would be held in trust and managed for the benefit of the animals inhabiting that ecosystem, including humans who also would be one of the animal owners of the ecosystems they inhabit.¹⁴⁷ Bradshaw highlights several benefits to this system, including the practicality that it

137. *Singh v. State of Haryana*, CRR-533-2013 (Punjab & Haryana HC May 31, 2019), https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf [<https://perma.cc/X76M-9QV6>].

138. Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, THE GUARDIAN (Mar. 21, 2017), <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> [<https://perma.cc/EM9E-E3RW>].

139. Te Urewera Act 2014, § 11 (N.Z.).

140. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 14 (N.Z.).

141. Constitución Política de la Republica del Ecuador (Ecuador), art. 71, *quoted in* Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 54 (2018).

142. Amended Complaint at 3, *Colorado River Ecosystem v. Colorado*, No. 17-CV-02316-NYW (D. Colo. Dec. 3, 2017), *quoted in* Matthew Miller, Note, *Environmental Personhood and Standing for Nature: Examining the Colorado River Case*, 17 U. N.H. L. REV. 355, 356 (2019).

143. Order, *Colorado River Ecosystem v. Colorado*, No. 17-CV-02316-NYW (D. Colo. Dec. 4, 2017), *cited in* Miller, *supra* note 142, at 357.

144. Anna V. Smith, *The Klamath River Now Has the Legal Rights of a Person*, HIGH COUNTRY NEWS (Sept. 24, 2019), https://www.hcn.org/articles/tribal-affairs-the-klamath-river-now-has-the-legal-rights-of-a-person/print_view [<https://perma.cc/Z5FR-PXP5>].

145. Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. 809, 815 (2018). *See also* JOHN HADLEY, *ANIMAL PROPERTY RIGHTS: A THEORY OF HABITAT RIGHTS FOR WILD ANIMALS* (2015). Hadley establishes the philosophical framework for animal property rights, while Bradshaw builds the legal framework for affording animals those rights.

146. Bradshaw, *supra* note 145, at 833.

147. *Id.* at 833–34.

may be more palatable to courts than granting animals personhood, and the broader focus that would afford rights to more animals than the current systems which focus on primates and large mammals.¹⁴⁸ This system would not protect animals from cruelty nor would it protect the animals the personhood movement seeks to protect—certain wild animals in captivity.¹⁴⁹ It would, however, protect habitat and thereby indirectly protect other elements of nature in ecosystems.

While it seems that comprehensive rights and the status to enforce them for all of nature is likely a long way off, a legal system that bestows rights on individual species and elements of nature would necessarily develop a jurisprudence that values nature in a way that moves us toward that “ecocentric legal framework” that fractures the destructive idea of human dominion over the natural world. Humans would have to stop inflicting unnecessary harm on species and natural elements that could legally stand up for themselves.

CONCLUSION

Peter Singer defines “speciesism” as “an attitude of bias against a being because of the species to which it belongs. Typically, humans show speciesism when they give less weight to the interests of nonhuman animals than they give to the similar interests of human beings.”¹⁵⁰ The term is properly used to refer to human treatment of *animals*,¹⁵¹ and as such it can only provide a partial explanation for human dominion over all of nature, but it is not difficult to extend the attitude as an explanation for the destruction of plant species as well, or to the destruction of any other element of nature, especially as we are bombarded daily with headlines proclaiming the weakening of environmental protections because they limit human economic development.

In the context of a legal system that is a human construct, humans are inherently separate from the rest of nature. Yet humans inhabit and are part of nature’s ecosystems. A legal system that fosters and allows human dominion over nature to the extent ecosystems and the nonhuman elements that they are made of—animal, vegetable, and mineral—are destroyed makes little sense. Law, however, only values the interests of others to the extent its makers provide. But law is a human construct, and it can be reconstructed. Its foundational canons and rules change as society changes; if they did not, law would become irrelevant. Animal and environmental law, both of which

148. *Id.* at 848–49.

149. *Id.* at 849–50.

150. George Yancy & Peter Singer, *Peter Singer: On Racism, Animal Rights and Human Rights*, N.Y. TIMES OPINIONATOR (May 27, 2015, 7:00 AM), <https://opinionator.blogs.nytimes.com/2015/05/27/peter-singer-on-speciesism-and-racism/> [<https://perma.cc/7N8C-S7DE>].

151. *Speciesism*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/185996> [<https://perma.cc/KY48-UU8G>].

use the legal system to protect nonhuman elements of nature, have never been as crucial as they are now because what is endangering both human and nonhuman survival is human attitude and activity. Where animal law and environmental law intersect is a place to force change. Some changes can allow humans to advocate for nonhuman interests; other changes must allow the nonhuman elements of nature to champion their intrinsic value and rights for themselves.