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No Animals Were Harmed...: Protecting Chimpanzees from Cruelty behind the Curtain

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"No Animals Were Harmed . . .": Protecting Chimpanzees From Cruelty Behind the Curtain

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated."1

I. Introduction

It is easy to think of at least one television show, commercial, or movie that has used a chimpanzee as an "actor" to imitate humans, to perform stunts, or to otherwise amuse an audience. Suppose the audience knew the truth—that before the chimpanzee appeared on the screen, she was stolen as an infant from her murdered mother and family; that if she survived the tortuous journey to America, she was then routinely beaten with heavy objects in the name of training, mentally abused, and confined to a cage? If they knew about that history, would the use of chimpanzees in various forms of entertainment still seem amusing or charming to the audience? Although chimpanzees exploited in entertainment are not regularly obtained from the wild as they once were, their exploitation in entertainment continues to be unacceptable because they (and other great apes) are not only sentient beings, but beings capable of suffering, forming relationships, expressing emotion, mourning death, communicating thoughts, and expressing love.2 If this were not enough, chimpanzees are a severely endangered species and their use

1. Mahatama Gandhi (1869-1948). According to Gandhi, the more helpless a creature, the more entitled it is to protection by man from the cruelty of man.
2. In the past, to obtain an infant chimpanzee from the wild: hunters with shotguns or flintlocks loaded with pebbles or metal shrapnel attack mothers and other protective group members. Many infants die when this crude ammunition scatters to hit both mothers and their clinging offspring. Pit traps, poisoned food, wire snares, nets and even dog packs are also used to kill adults defending the youngsters. Infants are often tied hand and foot with wire, causing circulation loss and septic wounds, and are trucked to urban centres in tiny cages or tightly bound sacks, often under heavy suffocating loads to avoid detection at checkpoints. Few receive care en route, so starvation and dehydration are commonplace. While awaiting shipment overseas, more die of neglect in filthy holding pens and at airports where flight delays lead to exposure. Cramped in tiny crates, even carried in personal luggage, the victims often must endure days of travel through several transit points. Some infants manage, against all odds, to survive this ordeal only to die at the final destinations from cumulative physical and psychological trauma. In addition, it is estimated that at least ten chimpanzees die for every infant that survive[d] more than a year at the final overseas destination.

3. See generally the books of Jane Goodall; See also infra notes 26 to 30 and accompanying text.
as animal actors contradicts and offends the strong public policy of conservation and preservation that should be afforded to this precious species.

In this note I hope to effect a change in the way chimpanzees and other exotic animals are perceived when seen in filmed media, and ultimately, to effect a change in the way chimpanzees and other great apes may be lawfully employed in entertainment. With an emphasis on chimpanzees, I will illustrate why any use of great apes in entertainment (including television, commercials, movies, and live shows) is cruel, appalling, and shocking to the conscience of any reasonable person—and ultimately unacceptable in our society. I will begin by briefly looking at the legal status of animals and by noting the striking similarity between the status of animals and the historical status of slaves and women. Next, a detailed look at the sophisticated mental and behavioral characteristics of chimpanzees and the numerous similarities existing between their characteristics and those of humans will demonstrate why these creatures deserve to be treated as more than a form of property to be owned and exploited by man. Afterwards, a look at the use of chimpanzees in entertainment and a glimpse at the training practices documented by an undercover volunteer at a major animal training facility will demonstrate why chimpanzees must have legal protection from exploitation in filmed media. Lastly, an analysis of various federal regulations, including the Animal Welfare Act and the Endangered Species Act, as well as a look at a variety of state anti-cruelty laws, will illustrate how the law fails to protect chimpanzees from the cruelty inflicted on them for use in entertainment.

II. Animals as Property

The primary obstacle preventing chimpanzees from obtaining the right to be free from commercial exploitation in entertainment is the classification of nonhuman animals as property,\(^4\) a classification justified by a “speciesist” perspective. “Speciesism” is defined in the Oxford English Dictionary as discrimination against or exploitation of animal species by human beings based on an assumption of mankind’s superiority.\(^5\) Speciesism is “a bias, as arbitrary and hateful as any

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4. “The property status of nonhumans presents the highest hurdle for animal advocates . . . Some might say that to change this status is an insurmountable barrier, unprecedented and impossible.” SONIA S. WAISMAN, ET AL., ANIMAL LAW: CASES AND MATERIALS 73 (Carolina Academic Press 2d ed. 2002).

other” because it justifies a level of cruelty in proportion to an animal’s degree of dissimilarity to humans instead of using a more practical approach that contemplates an animal’s ability to suffer, or, his inherent value. Speciesism should be considered in tandem with the proposition that “all classifications are artificial,” and that “[s]pecies, as we describe them, are matters of convenience rather than biological reality.” Classifications are of course not artificial to the extent that a species is a group of animals embodying the same or similar features. However, classifications do function artificially when used to disadvantage one category below another—as is the case with chimpanzees and humans. Chimpanzees are legally treated like forms of property because they are not classified as homo sapiens, yet they share characteristics which support their treatment as humans in many ways.

Some authors suggest that chimpanzees and other great apes are regarded as property under the law because “[t]hey challenge the possibility of drawing a neat boundary line between humans and animals. They are neither completely human, nor completely animal, but both at once, or somewhere in between.” Perhaps some people find it too uncomfortable to abandon a speciesist perspective and thereby acknowledge chimpanzees and other animals as something more than property, because a speciesist perspective is necessary to justify the way animals are treated for our entertainment, clothing, and food. However, an increasing membership consider it “sheer

7. Speciesism also justifies arguments that measure “tolerable” cruelty according to an animal’s social popularity, agricultural uses, or commercial value.
8. This sentiment began with the famous words of Jeremy Bentham: “The question is not, can they reason? nor, Can they talk? but can they suffer. Why should the law refuse its protection to any sensitive being? The time will come when humanity will extend its mantle over everything which breathes.” AnimalRightsMalta.com, Quotes, at http://www.animalrightsmalta.com/quotes.html (last visited Feb. 19, 2004).
10. Id.
11. See infra notes 26 to 29 and accompanying text.
13. “The apes’ ambiguous similarity to ourselves, including a whole repertoire of emotions, gestures and other behaviours we immediately recognise, makes them a potential threat to our own identity, and results in our complex reactions to this close relative of ours. This threat makes it necessary for humans to reaffirm vigorously the ape’s
arrogance to perpetuate the anthropocentric views established by [our] ancestors simply because that was the collective human impulse." It may have been normal to regard animals as "dumb creatures" when their sophisticated mental abilities were unknown, but today such an argument cannot be made. It only seems appropriate that the status of animals evolve just as our understanding of them has. As succinctly put by Justice Holmes, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. [And i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." 

The premise underlying speciesism—that animals are inferior simply because they are not human—parallels the justifications once used to classify African-Americans as slaves and women as an unintelligent and inferior species of humans. Slaves were abducted from their native land, withdrawn from their families, their resistant relatives killed, then bought, sold, and traded as goods of commerce in much the same way infant chimpanzees have been obtained and traded. In many ways the chimpanzee trade is the African slave trade brought back to life. First, slavery was justified because African-Americans were not Caucasian and as such, were considered inferior and therefore objects of property—this is similar to the reasoning used to justify exploitation of chimpanzees. Second, African-Americans were slaves because they were an exotic and unfamiliar group of people that perhaps threatened Caucasians in much the same way that apes challenge the boundaries of personhood. Third, nonhuman animals, like slaves, are often regarded as less than human, but more than property. This paradox, and the brutish animality and low status, in order to protect the clearcut boundary between humans and animals. For this boundary is one that we need desperately, in order to be able to go on killing and eating millions of animals every year, while we refrain from killing or eating humans. Id. at 130-31.

14. TELEKI, supra note 2, at 302.
16. Although it is no longer the common practice to obtain chimpanzees for entertainment in this way, chimpanzees continue to be abducted from the wild for other uses, such as bush meat. And, of course, the tragic history of today's entertainment chimpanzees—now bred in small cages—is that described in the Introduction.
17. Id. at 301.
18. "A pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property." Corso v. Crawford Dog and Cat Hosp., Inc., 415 N.Y.S.2d 182, 182 (1979). In addition, Fable v. Brown, 2 Hill Eq. 378, 382 (S.C. 1835) acknowledged the quasi-property status of slaves by recognizing that they are chattel under law "yet in many cases, they are treated by laws as persons, and reasonable persons accountable for their actions. They are punished for crimes, which chattels could not be."
inability of both slaves and animals to neatly fit into a category as either property or person, is a reflection of the unsuitability of the property classification for either humans or great apes. If something does not properly fit within a property mold, then why treat it as such? Lastly, the fact that slavery was eventually recognized as intolerable lends support to the idea that the boundaries of personhood and property are not static, and at the very least, are not as rigid as they once were, thereby suggesting it is possible to “transform” (for some purposes) from property to person.

In addition to slavery, the treatment of non-human animals also has some parallels to the historical treatment of women. “[I]t was once regularly asserted with the utmost confidence that women were failed men.” Women held positions as fictitious persons. Upon marriage the existence of a woman merged with that of her husband. A woman could not own or manage property, form a binding contract of a personal nature, and could not bring suit in her own name. A married woman lost all the legal incidents attaching to a person acting in her own name. Women were human, yet their existence and their rights were defined by their relationship to a man. Like nonhuman animals and slaves, women too inhabited the realm in between person and property. For instance, In re Ricker, 29 A. 559 (N.H. 1890) held that women were not citizens for purposes of a statute setting forth the requirements of becoming an attorney, but nonetheless admitted that the word “citizen” in the common and comprehensive sense undoubtedly included women.

Despite the similarities that exist between the historical treatment of slaves and women as compared to the current status of great apes, slaves and women possessed something that great apes do not.
not—inclusion in the human species. The essential factor demanding a change in the way African-Americans and women were perceived in the legal system was the fact that they were human despite being different from Caucasian males. "The reason that an exceedingly small number of decisions actually have sought to justify the status of nonhuman animals as human property is that judges normally fail to perceive that it requires justification. As human slavery once was, the legal thinghood of nonhuman animals is accepted as first principle."

Since African-Americans and women were human, their treatment as less than human had to be justified, and eventually such treatment could not. However, chimpanzees and other nonhuman animals lack this "human" component, and as such, their right to be free from cruel exploitation in the entertainment industry must be justified in some other way.25

III. Chimpanzees

Chimpanzees are similar to humans in many striking ways.26 It is important to recognize that chimpanzees are not only closely related to humans genetically,27 but also behaviorally,28 emotionally,29 and

24. Id. at 92.
25. In Equitable Self Ownership of Animals, Professor David Favre suggests an intermediate status in which the interests of animals are recognized by the legal system but the framework of property law is still used for limited purposes. Id. at 94.
26. "Scientific evidence confirming the close kinship [between humans and chimpanzees] can be seen in a wide range of shared traits. Example: chimpanzees exhibit many technical skills, from using stone implements to making assorted plant tools for specific purposes, which are acquired by learning and feature cultural variation. Example: chimpanzees share with us many cognitive abilities, such as long-term memory, self-recognition, sense of humor, even some elements of linguistic talent. Example: chimpanzees are so close to humans in body structure and chemistry that blood transfusions and organ transplants are feasible. Example: many emotional states are so alike for both chimpanzees and humans that each intuitively understands how to interact with the other." TELEKI, supra note 2, at 298.
27. "In DNA structure [chimpanzees] differ from us by only a little over 1 percent." MICHAEL NICHOLS & JANE GOODALL, BRUTAL KINSHIP 58 (Aperture 1999).
28. "When friendly [chimpanzees] meet after separation they may fling their arms around each other, hold hands, pat one another on the back, kiss. If they are suddenly frightened or excited they may reach out to touch or embrace. If they want a share of another's food, they beg, palm up. When they play, they laugh and tickle one another; when angry, they swagger and shake their fists." Id.
29. "In the summer of 1982 Kat [a longtime research volunteer working with Roger Fouts and Washoe, the first chimpanzee to learn ASL] was newly pregnant, and Washoe dotted over her belly, asking about her BABY. Unfortunately, Kat had a miscarriage, and she didn't come to the lab for several days. ... Knowing that Washoe had lost two of her own children, Kat [signed] MY BABY DIED to her. Washoe looked down to the ground. Then she looked into Kat's eyes and signed CRY, touching her cheek just below her eye. ... When Kat had to leave that day, Washoe wouldn't let her go. PLEASE PERSON
mentally. "Chimpanzees, along with bonobos, are the apes that have the closest biological relationship with our own species. . . . The anatomy of their brain and central nervous system is more like ours than is that of any other living creature." In contrast to how they may be perceived by abusive animal trainers, chimpanzees are not dumb savage animals unfeeling and unaware of the world around them. Chimpanzees "use insight, not just trial and error to solve problems. They have complex mental representations, understand cause and effect, imitate, and cooperate. They compare objects and relationships between objects. Given appropriate opportunity and motivation, they may teach, deceive, self-medicate, and empathize. They [even] transmit culture between generations." In sum, chimpanzees share with us . . . the faculty for (non-verbal) language, a hatred of boredom, an intelligent curiosity towards their environment, love for their children, intense fear of attack, deep friendships, a horror of dismemberment, a repertoire of emotions and even the same capacity for exploitative violence that we ourselves so often show towards them. Above all, of course, they show basically the same neural, behavioural and biochemical indicators of pain and distress.

However, it is not this multitude of similarities to humans in and of itself that makes chimpanzees and other great apes deserving of the right to be free from exploitation in the entertainment industry. The right stems from the fact that the treatment and training of chimpanzees in the entertainment industry parallels the evils of slavery and inflicts on chimpanzees the same kind of cruelty that slavery inflicted on African-Americans. Exploitation in the entertainment industry mirrors slavery because these animals


30. Captive chimpanzees "have been taught 300 or more of the signs of ASL, the American Sign Language used by deaf people. . . . Chimpanzees can identify themselves and companions in pictures and mirrors. They have a concept of self." NICHOLS & GOODALL, supra note 27, at 58.

31. Id.

32. WISE, supra note 6, at 4.


34. Generally speaking, chimpanzees have been abducted from their natural habitat, torn from their family group, exported in commerce, and beat into subjection ("training") in order to generate income for their owner as an "actor." Captive chimpanzees are deprived of virtually every facet of a normal, healthy life, and are instead restricted to a life of cages and beatings. The parallels to slavery are undeniable, especially when coupled with the psychological, behavioral, and emotional similarity to humans.
experience life in much the same way that humans do, so much so that if something would be cruel or detrimental if done to a human then it would also be cruel if done to a chimpanzee.

IV. Problematic "Actors"

Chimpanzees are problematic "actors" because they cannot be domesticated. Several factors contribute to the cruelty that falls upon chimpanzees in their life as animal "actors." First, chimpanzees are curious, mischievous, and intelligent. "Chimpanzees are first and foremost social creatures. That means that loneliness and boredom are the two biggest enemies of chimpanzees in captivity... It is hard to think of a worse candidate than the chimpanzee for confinement... and adherence to a monotonous, institutional routine."35 Second, chimpanzees in their natural environment occupy a large geographical range while living in a highly interactive social group. "Chimpanzees, like humans, need rich environments, social stimulation, and physical freedom in order to thrive. With few exceptions, neither the testing, zoological, or entertainment industries have managed to consistently provide those things for them."36 In addition to a chimpanzee's disposition and requisite living arrangement, chimpanzees usually do not have long careers as "actors" because as adults they become too strong and too difficult to control.37

The need to control a chimpanzee "actor" is of utmost importance because hostile attacks create legal liability and because the job of an actor is to perform on cue within the first few takes.

35. FOUTS, supra note 29, at 30.
36. NICHOLS & GOODALL, supra note 27, at 108.
37. "Chimpanzees are relatively controllable only for the first few years of life. For this reason, many young chimps who start their lives as pets or entertainers are given to laboratories when they grow too big to handle... In the entertainment business, some [chimpanzees] live into adulthood in horrific conditions—controlled by shock-collars or beaten by their trainers, living in small cages, forced to perform absurd acts, or even drugged to keep their natural energy at bay." Id. In addition, "performing chimpanzees are usually children stolen from their mothers," and many are "sent to research labs when they were no longer 'cute,' easy to handle or profitable." New England Anti-Vivisection Society, From Stage to Lab Cage: Chimpanzees in Research and Entertainment, at http://www.neavs.org/downloads/chimbrochure.pdf (last visited Jan. 24, 2004). Further still, “[o]nly infant and toddler chimpanzees are used in the entertainment industry because they are so small and not nearly as strong as an adult chimpanzee. If for some reason an adult is used then they are usually clothed with some type of shocking apparatus under their clothing. Most chimpanzees used in entertainment have their front teeth pulled or bashed out to prevent biting." Fauna Foundation, Chimpanzees in the Entertainment Industry, at http://www.faunafoundation.org/sanct/chimps/chimpsentertain .html (last visited Jan. 24, 2004) [hereinafter Fauna].
Some exotic animal proprietors claim their chimpanzees are trained with love and affection, but this is simply not true.

With kindness, patience, and reward, a chimpanzee can be taught to do almost anything. But to get instant obedience, which is required if a chimp actor is to deliver the same performance day after day, the trainer usually tries to establish him- or her-self as an all powerful, utterly dominant figure. This is done in “pretraining” sessions, when no one is around. Typically the young chimp is bullied into abject submission, usually by being beaten over the head with an iron bar. A number of circus performers have testified about this, thereby forfeiting their jobs.39

Affection training describes a method purportedly used to train animals by rewarding desired behaviors. However, affection training is not a scientific principle and is actually a misnomer for the psychological principle of positive reinforcement. Animal trainers use the phrase “affection trained” to characterize the ideal way in which an animal could be trained, although it is not a reality, especially for exotic animals forced to live in an unnatural way and perform unnatural acts—among humans. Furthermore, positive reinforcement is only effective if the reward is sufficient to induce repeated displays of the desired action, and meager food rewards are not a sufficient lure to train chimpanzees.40 Further still, several chimpanzee trainers disregard a major component of positive reinforcement—that undesirable activity is ignored and not punished. In contrast to the principals of positive reinforcement, “[i]f a chimpanzee is not performing properly or [is] misbehaving then disciplinary measures are usually taken by . . . trainers, some of these measures in the past have involved baseball bats, lead pipes, cattle shockers, chains, hitting, and kicking.”41

38. “All our animals are Affection Trained with love, respect and positive reinforcement. This produces animals that enjoy learning and working.” Amazing Animal Actors, at http://www.amazinganimalactors.com/animals/animals.asp (last visited Jan. 24, 2004); “We have raised all of our animals from when they were babies and have nurtured them with affection and respect.” Brian J. McMillan, Hollywood Animals: Exotic & Domestic Animals for Film & TV, at http://www.hollywoodanimals.com (last visited Jan. 24, 2004)

39. Nichols & Goodall, supra note 27, at 71.

40. “[I]t is naive to assume that chimpanzees can be compelled to perform complex tricks with simple positive reinforcement such as a jellybean or other treat. The tricks are just too complex, and the rewards are just too small to hold their interest. The plain truth is this: the only thing that will make them stop behaving like curious, rambunctious chimpanzees and, instead, routinely perform mundane tasks over and over again on cue is abject fear of physical pain.” The Chimpanzee Collaboratory, Campaign to End the Use of Chimpanzees in Entertainment, at http://www.chimpcollaboratory.org/news/testimony.asp) (last visited Feb. 19, 2004) [hereinafter Collaboratory].

41. Fauna, supra note 37.
Abusive tactics like these were commonplace at Amazing Animal Actors in Malibu, California. Sarah Baeckler worked undercover as a volunteer at Amazing Animal Actors to determine the treatment of chimpanzee "actors." Baeckler is a primatologist, holding undergraduate degrees in Primate Behavior and Anthropology, and a Masters degree in Primatology, making her quite familiar with the behaviors and dispositions of chimpanzees. She worked approximately 1000 hours at this training facility from June 2002 to July 2003 and witnessed "sickening acts of emotional, psychological, and physical abuse every single day on the job." At the animal facility, trainers physically abuse the chimpanzees for various reasons, but often for no reason at all. If the chimpanzees try to run away from a trainer, they are beaten. If they bite someone, they are beaten. If they don't pay attention, they are beaten. Sometimes they are beaten without any provocation or for things that are completely out of their control.

Although these eyewitness accounts are limited to the actions recorded at one facility, this abuse is not isolated and cannot be explained away as acts occurring at one bad facility. The abuse does not stop at the training facility, but continues at the set as chimpanzees are forced by fear to perform stunts as "actors." In fact, Baeckler found an electric cattle prod inside a bag that had accompanied an older male chimpanzee on a television commercial.

42. Collaboratory, supra note 40. Baeckler never personally abused any of the chimpanzees but "was specifically instructed to hit or kick them at the first sign of any aggression or misbehavior." "Since [Baeckler] wanted to learn how severe the abuse could get, [she] asked for advice on how hard the chimpanzees should be hit or kicked, and got [these verbatim] answers: One trainer told me, quote, 'Hard enough that they know you mean business but not so hard that you do permanent damage.' Another said, 'Aim for her head because it's really sturdy.' And I heard the director of the compound say, 'Kick her in the face as hard as you can. You can't hurt her.' When I expressed nervousness one day about being bitten, a trainer handed me a hammer and said, 'If you need to hit her, use this,' and he pointed to the handle end of the hammer." Id.

43. Id.

44. "[A] confidential source described her experiences at another chimpanzee training facility in California [to Baeckler]. She said that the trainers there commonly "thumped" the chimpanzees to keep them in line. Interestingly, at Moorpark College (a California community college with a teaching zoo), a professor once told [Baeckler] that they would never consider having chimpanzees in the college's zoo because they were 'not willing to inflict the kind and amount of punishment required to train them.' This professor, who had worked for yet another chimpanzee trainer in the industry, said that 'people beat them with baseball bats to control them.' He also said 'some trainers will whack a chimp if it doesn't do a small behavior, like a smile, because later the chimp might think it can get away with more.' In short, abuse and physical violence are commonplace in this industry, and it's not even a secret. In fact, it's taught in a training school that is currently producing many future animal trainers and zoo workers." Id.
Interestingly enough, only a handful of cities in the U.S. have bans prohibiting the use of chemical, manual, and electrical means to make an animal perform.\footnote{Id.}

\section*{A. Cruelty on Stage and Screen}

As will be discussed later, one of the problems facing enforcement of animal cruelty laws with respect to chimpanzee "actors" is the fact that most of the abuse occurs behind closed doors or on private sets. Thus, most instances of abuse go unnoticed by the public. However, \textit{Project X}, ironically a film about the misuse of chimpanzees in medical research, was not one of those projects. The film was submerged in controversy concerning the abuse of chimpanzees on the set as well as the death of a chimpanzee, allegedly due to "training" injuries sustained during filming.\footnote{New England Anti-Vivisection Society, \textit{From Stage to Lab Cage: Chimpanzees in Research and Entertainment}, at \url{http://www.neavs.org/downloads/chimpbrochure.pdf} (last visited Jan. 24, 2004).} Sadly, chimpanzees used in the film were returned to medical research when the film was finished.\footnote{Id.} Another film, \textit{Any Which Way You Can}, starring Clint Eastwood, led to the death of Clyde, the orangutan who was Eastwood’s sidekick; Clyde was essentially beaten to death by his trainer for not paying attention.\footnote{"The assistant to Gentle Jungle’s head trainer told the media that the trainer beat Clyde to make him docile during the filming. He told reporters that one day before filming, the trainer ordered him and another trainer to help him take Clyde to an isolated spot because he wanted to ‘have a little talk with him.’ When Clyde became inattentive the trainer repeatedly beat him with a cane and an axe handle. Clyde tried protecting himself with his arms and rolling in a circle, trying to avoid the blows which were ultimately fatal. He died of cardiac arrest a month after the beating.” Performing Animal Welfare Society, \textit{Earth and Animal Resources: Animals in Movies and Television}, at \url{http://www.pawsweb.org/site/resources/factsheet_movies_tv.htm} (last visited Jan. 24, 2004).} One of the more notorious incidents of abuse that became public was officially reported in a defamation case against the Performing Animal Welfare Society (PAWS) and the People for the Ethical Treatment of Animals (PETA). The case was initiated by Bobby Berosini,\footnote{PETA v. Berosini, 895 P.2d 1269 (1995).} a well known animal trainer who was caught on videotape backstage before his show at the Stardust Hotel in Las Vegas beating his orangutans.\footnote{Id. at 1272-73.} Particularly outraging about this case was the fact that “Berosini, himself, testified that in his opinion it is often necessary to hit an orangutan to keep him under...
control." PETA broadcast the tape and Berosini sued for defamation. After years of litigation, the Nevada Supreme Court held:

the videotape is not "false" because it is an accurate portrayal of the manner in which Berosini disciplined his animals backstage before performances. The videotape is not defamatory because Berosini and his witnesses take the position that the shaking, punching, and beating that appear on the tape are necessary, appropriate and "justified" for the training, discipline, and control of show animals.

If it is "necessary" to physically and psychologically abuse an animal (up to and including death) in order to obtain its obedience for a performance, then a reasonable person would conclude that such animal is not appropriate for performing. The point is made clear in the case of domestic animals such as dogs. A dog, for instance, may be taught to perform a variety of stunts with the lure of minor rewards like food and praise. Dogs also live with humans, which makes interacting with them either on a set or in a household significantly less traumatic because dogs are not only domesticated, but also are at ease in these types of locations. In contrast, chimpanzees and other great apes are not domesticated, are not motivated by the same things that would be of interest to domesticated animals, and have more complex needs, which make these beings simply unfit for a lifestyle with humans performing unnatural stunts in unnatural environments. Despite behind-the-scenes oversight by the American Humane Association, training abuses like those found in the aforementioned projects continue to plague animal "actors."

B. Illusory Oversight by the American Humane Association

The American Humane Association (AHA) is an organization formed to protect the interests of animals used in filmed media. However, the AHA now plays an important role in perpetuating the notion that animals are properly treated and not harmed in the entertainment industry.

The AHA's familiar film end credit disclaimer, "no animal was harmed during the making of this production," is intended to, and

52. Id. at 1275 n.6.
53. Id. at 1272.
54. The AHA has established guidelines describing a standard of care that should be provided for animals when used in filmed media. Projects complying with the standards established by the American Humane Association are then able to use the AHA's trademarked end disclaimer: "No animal was harmed during the making of this
largely does, convince the public that films with the disclaimer are "cruelty free." The appearance of the disclaimer misleads the public because the AHA's rating is reasonably interpreted to literally mean that an animal appearing in a film was not injured as a result of that appearance when in fact the AHA only monitors certain very limited aspects of a production, and even then films have displayed the disclaimer without the AHA's knowledge or consent. In addition to this misleading disclaimer, retired AHA Director of the Film and Television Unit Gini Barrett has stated that "[m]ost of the time, animals in motion pictures enjoy one of the best lifestyles for animals in the world." However, the disposition of chimpanzees documented by Jane Goodall and Roger Fouts, in addition to the incidents witnessed by Sarah Baeckler at Amazing Animal Actors, suggest otherwise.

The AHA was formed in 1877 as a national charity and has "been working with producers to facilitate safe, effective, and efficient performances by animal actors since the 1940s." Since 1980, a clause in the Screen Actors Guild producer contract has granted sole authority for monitoring the treatment of animals in movies, television shows, commercials and music videos to the AHA's Film and TV Unit. The AHA's stamp of approval misleads the public into thinking that the use of chimpanzees in entertainment is not cruel or abusive. However, as discussed in the proceeding sections, a chimpanzee cannot perform without being beaten, mistreated, and "trained" to act opposite of her innate character, and a chimpanzee cannot be "trained" without suffering countless instances of cruelty in order to be afraid of behaving naturally. Although the AHA specifies that its role is to prevent "legally defined cruelty to production." American Humane Association, Guidelines, at http://www.ahafilm.org/guidelines.html (last visited Feb. 19, 2004).

55. See infra notes 73 and 74.


58. Id. at 4.

59. "[H]ealthy, young chimpanzees are playful, curious, energetic, and mischievous, but these traits don't serve them well when training begins, so one of the things that chimpanzees in the entertainment industry have to endure is an initial 'breaking of the spirit.' In other words, they have to learn how NOT to act like normal chimpanzees." Collaboratory, supra note 40.
animals," the AHA sends a false message to filmed media audiences by suggesting that animals appearing on the screen were not harmed in any way when in actuality the life of a chimpanzee "actor" is consistently cruel. Although the chimpanzee may not have been injured on the set, the chimpanzee was undoubtedly abused and cruelly treated at some point.

So while the image conveyed by the AHA is that it protects animals from abuse and injury, the organization merely assumes a coaching role suggesting to studios and production crews what should be done without setting forth actual requirements. The idea behind such an organization (to monitor and in fact to protect the interests of animals in filmed media) is commendable, but the current practices of the AHA leave much to be desired. Specifically, the AHA promotes guidelines instead of demanding compliance with rules, it uses an ambiguous rating system, it has not strictly monitored the use of its disclaimer, and it suffers from poor funding and improper staffing.

The AHA promulgates pseudo-regulations that merely suggest to studio and production crews actions to take regarding the use of animals; but the desires of the producer or director are implicitly prioritized over the animals' interests. For instance, the "basic principles" section of the AHA guide states, "if an animal must be treated inhumanely to perform, then that animal should not be used." In addition, the "AHA will enforce all applicable anti-cruelty laws as necessary." The brief definitions section of the guidelines fails to define "humane" or "inhumane." The guidelines are permissive rather than mandatory, so that the ultimate decisions are left to the filmmakers. The only terms the AHA guidelines define are "animal," "animal handler," and "motion picture or filmed media." Without a more comprehensive list of definitions the guidelines do not provide much guidance. What constitutes rest, safety, humane, appropriate condition, or non-injurious material? Even more shocking is provision 207 of the AHA guidelines, which substitutes

60. AHA Guidelines, supra note 57, at 4. For instance, in California, cruelty includes killing, maiming, torturing, or wounding a live animal with malice or intent. In addition, anyone who overdrives, torments, or deprives of necessary sustenance or shelter, or anyone who causes any of these actions to happen similarly commits cruelty. CAL. PENAL CODE § 597 (West 2004).

61. "The AHA aggressively advocates that each production meet [the standards established by the AHA], and provides ongoing guidance on how to do so." Id. at 4. (emphasis added). The AHA's "aggressive advocacy" is hardly a requirement to ensure the safety of animals exploited in filmed media.

62. Id. at 5 (emphasis added).

63. Id. (emphasis added).
the judgment of a veterinarian for that of the AHA animal handler in the event that an animal becomes sick or injured. Compounding these inadequacies is the fact that AHA "[m]onitors were granted law enforcement powers in California in 1997, but no arrest has ever been made or ticket issued by a monitor." A nonexistent enforcement rate hardly suggests that the AHA is "enforcing all applicable anti-cruelty laws as necessary."

The AHA's rating system of "Acceptable," "Believed Acceptable," "Unknown," "Questionable," "Unacceptable," "Acceptable/Questionable," or "Acceptable/Unknown" is nearly as useless as its guidelines. The AHA specifies that, under the "Acceptable" rating, the film has been evaluated solely on the treatment of the animals during production and animal action during filming has been supervised to insure humane treatment. A "Believed Acceptable" rating designates films with animal action that the AHA did not directly supervise, but has nonetheless concluded that no animals were abused or endangered. The "Questionable" rating is assigned to films in which no animals were intentionally harmed yet questionable practices were used. An "Unknown" designation is given to films in which the AHA was not present on set and was unable to substantiate information regarding the use of animals. Lastly, a rating of "Unacceptable" informs the public that deliberate cruelty occurred in the production of the project. The two final combination ratings suggest that both types of animal treatment occurred. Are seven different degrees of acceptability really necessary? It would appear that a film either follows humane practices, engages in inhumane practices, or the practices are unknown. However, an ambiguous rating system is to be expected from a set of guidelines that merely encourage humane treatment without defining acceptable treatment and without requiring it of media groups. Even with one of the seven ratings assigned to a

64. "If an animal is injured, sick or becomes incapacitated it shall be treated immediately. Such animal shall not resume work until it has been determined by the animal trainer or the veterinarian that the condition has been corrected." Id. at 10.


66. AHA Guidelines, supra note 57, at 10.

67. Id.

68. Id.

69. Id.

70. Id.
certain film, how can the public trust a rating issued by an organization that is largely funded by major film studios? A closer look at the little-known unit reveals that the group has been slow to criticize cases of animal mistreatment, yet quick to defend the big-budget studios it is supposed to police.

Misuse of the AHA’s end credit disclaimer presents another problem since films have haphazardly used the disclaimer without the AHA’s authorization. “The ‘no animals were harmed’ seal appeared on New Line Cinema’s “Simpatico,” despite the death of [a] horse that ruptured a ligament and staggered to the ground during filming at the Los Alamitos racetrack. The AHA said it was unaware that the film carried its approval.” The message conveyed by the AHA’s seal of approval is even more deceiving if the organization cannot ultimately control the use of their end credit disclaimer. In addition, “[s]hock collars and BB guns were used to train horses for ‘Running Free,’ a Sony Pictures release about wild horses filmed in Namibia. The AHA gave the movie high marks on its Web site without disclosing the controversial training techniques, which the association discourages.”

Lastly, the AHA’s Film and Television Unit Director “has been accused by her own staff of interfering with animal welfare probes that could prove embarrassing to filmmakers and studios.” In addition, the director has acknowledged that the AHA film unit lacks the staffing and resources to keep tabs on the nearly $8 billion film industry. The spirit of the AHA is not carried out in the practices of the Film and Television Unit. The AHA would be a more admirable organization if, instead of suggesting how animals should be treated in filmed media, it required studios to conform to a set of humane standards that did not succumb to the preferences of producers or directors. Furthermore, the AHA’s “No Animals Were Harmed…” disclaimer would carry more weight if its use was strictly regulated and limited to films that do not injure animals before, during, or after filming.

72. Id.
73. Id. (emphasis added).
74. Id. (emphasis added).
75. Id.
76. Id.
The body of law relating to animals often begs the question: Is it better that the law be certain, predictable, or stable, or is it better that the law be right by expressing a community's present sense of justice? Generally speaking, the law fails animals when, irrespective of current societal views, it prefers to be certain, predictable, and stable. More specifically, the law has failed to provide animals with adequate protection from cruelty for three primary reasons. First, a substantial line of precedent supports the archaic notion that animals are a form of property. Second, certain animals are expected to fulfill a specific purpose in society and as a result the law permits treatment of these animals in a way that is consistent with this purpose. Lastly, animal laws often prioritize and promote an important human interest over that of a given animal.

Historically the law only protected animals, and particularly livestock, because the loss of such animals represented a financial loss to the owner. The first laws to address the interests of animals without regard to their value as property were in the form of anti-cruelty statutes. However, the purpose behind these laws was not to promote the interests of animals directly, but instead to prevent undesirable behaviors in people. "[M]ost courts agree these statutes are intended to prevent humans from acting in cruel ways toward each other and regard cruel treatment toward animals as leading to cruel treatment toward humans." Id. at 753.

The "rationale for the anticycruelty statutes is, for the most part, that cruelty to animals has a detrimental impact on the moral development of human beings. . . . [T]he animal is viewed as instrumental to some goal of humans and the duty is indirect as far as the animal is concerned." Id. at 757.
“acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s].” Modern law has since progressed in the way it perceives animals. Currently, there are a variety of laws that attempt to promote the interests of animals; they include federal enactments like the Animal Welfare Act, the Endangered Species Act, the Marine Mammal Protection Act, and state laws in the form of anti-cruelty statutes.

A. The Animal Welfare Act

The Animal Welfare Act (AWA) authorizes the Secretary of Agriculture to promulgate standards governing the humane handling, care, treatment, and transportation of animals. At first blush, the AWA appears to provide substantial protections to animals, but difficulty enforcing the alleged protections, and the enactment of various exemptions, paralyzes the purpose of the Act.

In addition, a prominent problem “enforcing the AWA, and making the spirit and intent of the Act as set forth in the House Reports a reality, [is] the difficulty establishing standing to sue.” To establish standing in federal court, a plaintiff must satisfy both constitutional and prudential requirements.

To satisfy the constitutional requirements, a plaintiff must suffer, or be in imminent danger of suffering “an injury in fact”; the plaintiff’s injury must be fairly traceable to the defendant’s conduct; and a favorable ruling on the plaintiff’s claim(s) must be able to remedy the problem of which the plaintiff complains.

An injury in fact is an invasion of a legally protected interest, and can be found, for instance, in the form of an esthetic or

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84. Id. at § 2143(a)(1). The standards established by the Secretary set the minimum requirements for “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, [and] adequate veterinary care.”
85. “[T]he USDA has consistently promulgated regulations that, taken as a whole, have actually served to undermine the spirit of the AWA and render the statute nearly ineffective.” Deawn Hersini, Can’t Get There From Here... Without Substantive Revision: The Case For Amending the Animal Welfare Act, 70 UMKC L. REV. 145, 147 (Fall 2001).
86. WAISMAN ET AL., supra note 4, at 520-21.
87. Id. at 227-28.
89. “The Supreme Court has repeatedly made clear that injury to an esthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing.” Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998). See Defenders of Wildlife, 504 U.S. 555 ("the desire to use or observe an animal species, even
informational injury.\textsuperscript{90} For instance, the court in \textit{Animal Legal Defense Fund v. Glickman}, 154 F.3d 426 (D.C. Cir. 1998), found that a plaintiff had been harmed by observing animals living under allegedly inhumane conditions and had established a constitutionally cognizable injury in fact. However, the plaintiff’s frequent visits to zoos and parks were undoubtedly an important factor in establishing a sufficient esthetic interest and imminent injury. The imminence prong ensures that the injury is not too speculative and that the injury is either ongoing or impending.\textsuperscript{91} Imminence is important because the court does not want to issue advisory opinions in which no injury occurs.\textsuperscript{92} However, pleading an injury in fact that is satisfactorily imminent is more difficult than it sounds. For instance, in \textit{ALDF v. Espy}, plaintiff Patricia Knowles was a psychobiologist who had worked extensively in research labs that experimented with mice. She brought suit alleging a violation of the AWA for excluding birds, rats, and mice from the definition of “animal.” The Court found Dr. Knowles’ alleged injury insufficient to establish standing because it was too remote.\textsuperscript{93} Specifically, the court found fault in the fact that plaintiff was not currently employed and that she chose to engage in this particular line of work.\textsuperscript{94}

To satisfy the second prong of constitutional standing, a plaintiff must not only trace the injury to the defendant’s conduct, but Supreme Court precedent also requires a plaintiff to demonstrate that the challenged agency action authorizes the conduct causing the plaintiff’s injuries.\textsuperscript{95} To determine if causation is present, a comparison must be made between what the defendants did and what the plaintiff alleges the defendant should have done under the statute

\textsuperscript{90} An informational injury is justiciable where the information sought is essential to the injured organization’s activities and a lack of the information will render these activities infeasible. Competitive Enterprise Institute v. NHTSA, 901 F.2d 107, 122 (D.C. Cir. 1990).

\textsuperscript{91} \textit{Animal Legal Defense Fund, Inc. v. Espy}, 23 F.3d 496, 500 (D.C. Cir. 1994).

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.}, at 501.

\textsuperscript{94} Plaintiff “merely states that at some undefined future time she ‘will be required to engage in further research,’ and even that is in part not literally true. She will not be \textit{required} to do so. Whether she will do so is wholly within her control. Six years ago [plaintiff] decided that her energies could most profitably be spent on activities other than research. That choice has determined the present state of affairs, in which she suffers no injury and will not do so unless she makes a further choice to subject herself to it. We cannot say that the injury she seeks to litigate is ‘certainly impending.’” \textit{Id.} at 500-01

\textsuperscript{95} \textit{Glickman}, 154 F.3d at 440.
providing the cause of action. In *Glickman*, the plaintiff was able to satisfy the causation requirement by alleging the USDA failed to adopt the specific minimum standards required by the AWA for the care and housing of primates. In addition, the plaintiff was able to describe how the conditions at the facility in which he observed animals complied with the USDA regulations, how the regulations failed to comply with the standards set forth by the AWA, and how the USDA's regulations failed to protect him from incurring an esthetic injury.

The third prong of constitutional standing is redressability, which requires a finding that a favorable decision by the court will likely remedy the injury complained of by the plaintiff. The lucky plaintiff in *Glickman*, who was able to demonstrate an injury in fact, was also able to satisfy the redressability prong of constitutional standing. The court found his regular and routine visits to Game Farm, his plans to return to the farm in the next several weeks, as well as his intention to continue visiting the animals there important to ensuring that a favorable decision would likely redress his injury. “Tougher regulations would either allow Mr. Jurnove to visit a more humane Game Farm or, if the Game Farm’s owners decide to close rather than comply with higher legal standards, to possibly visit the animals he has come to know in their new homes within exhibitions that comply with the more exacting regulations.”

In addition to the constitutional requirements of injury in fact, causation, and redressability, there are three prudential requirements that must also be satisfied before bringing a claim under the AWA. First, a plaintiff may not raise a third party complaint without showing an independent and individual injury; second, a plaintiff may not bring suit on the basis that all citizens experience the same harm; and third a plaintiff’s statutory claim must be within the zone of interests intended to be protected by the statute. The zone of interests test has been characterized as “generous and relatively undemanding.” A plaintiff falls within the zone of interests if the interest sought to be protected by the complaint is arguably within

96. Id. at 441.
97. Id. at 443.
98. Id.
99. Id. at 444.
100. Id.
101. WAISMAN ET AL., supra note 4, at 228.
102. *Glickman*, 154 F.3d at 444.
the protections offered by the statute. The test focuses both on those who Congress intended to benefit, and on those who in practice can be expected to police the interests that the statute protects. In addition, the “test requires some indicia—however slight—that the litigant before the court was intended to be protected, benefitted [sic] or regulated by the statute under which suit is brought.”

Additional standing requirements are implicated when an organization files a suit.

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The germaneness prong for establishing organizational standing is not meant to unduly restrict the occasions on which an association may bring a suit on its members’ behalf, but rather, is meant to require only that an organization’s litigation goals be pertinent to its special expertise and the grounds that bring its membership together.

Satisfying standing requirements is an arduous task in bringing a suit under the AWA. The standing doctrine is further complicated by inconsistent and unpredictable case law, and by frequent and sometimes heavy-handed exercise of judicial discretion.

Courts and commentators agree the case law on standing presents one of the most confused areas of federal jurisprudence. The federal courts have been erratic at best in describing and defining the contours of the doctrine and the Supreme Court has openly acknowledged the problem: “the concept of ‘Art. III standing’

103. Id.
104. Id.
105. Id.
107. Id. at 56.
109. “Standing is a threshold question, and a court’s determination of the issue should not include any consideration of the merits of a lawsuit. Nevertheless, commentators generally agree the Supreme Court’s standing precedent has changed based on the Court’s perception of the merits and value of bringing a particular action or type of action.” WAISMAN ET AL., supra note 4, at 227.
110. Id.
has not been defined with complete consistency in all of the various cases decided by [the Supreme] Court which have discussed it.”

It becomes increasingly difficult for people to protect the interests of animals through enforcement of the AWA when establishing standing to sue is so difficult. However, private suits are an important element in enforcement of the AWA, since enforcement by the USDA has proven inadequate. In addition to criticism by animal welfare organizations, the USDA Office of the Inspector General has criticized the agency’s enforcement, noting failures to promptly inspect facilities, renewals of licenses following documented violations without re-inspections, and failures to collect penalties, in addition to other deficiencies. To remedy the enforcement problems of the AWA, one author suggests amending the Act to include a limited qui tam provision. She sees “[a]llowing a certain class of plaintiffs to step into the shoes of the state in order to enforce the act against a violator [as] one of the best ways to fill the wide gaps the USDA has created through non-enforcement [because] the qui tam plaintiff [would be] relieved of the burden of showing an individualized, personal injury in fact.”

Another solution involves adding a citizen-suit provision to the AWA, similar to the one found in the Endangered Species Act (ESA), which grants standing to


After today’s decision the lower courts will understandably continue to lament the intellectual confusion created by this Court under the rubric of the law of standing. . . . The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a “complicated specialty of federal jurisdiction.”

112. Hersini, supra note 85, at 148.

113. Id. at 165.

114. Under the citizen suit provisions of the ESA:

any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of [the ESA] . . . or

(B) to compel the Secretary to apply . . . the prohibitions [in the act] . . . with respect to the taking of any resident endangered or threatened species within any State; or

(C) [require] . . . the Secretary to perform any act or duty under section 1533 . . . which is not discretionary . . .


In addition, district courts have jurisdiction, “without regard to the amount in controversy or the citizenship of the parties, to enforce any provision, or to order the Secretary to perform such act or duty.” Id.
citizens who sue to enforce the Act. However, the Supreme Court has severely limited the effectiveness of enforcing the ESA via the citizen-suit provision by limiting the ability of plaintiffs to rely on the automatic conferral of standing. More specifically, the Court requires plaintiffs who are the beneficiaries of a statutory scheme to meet a stringent injury-in-fact test to establish constitutional standing to sue to enforce or enjoin a violation of the Act, regardless of the citizen-suit provision. Another author makes a convincing argument for amending the ESA to include an animal-suit provision to remedy the deficiencies of the citizen-suit provision. An animal-suit provision would create a cause of action in animals that qualify for protection under the Act to sue through human proxies to enforce the Act or to enjoin violations of it. The arguments supporting the addition of an animal-suit provision to the ESA are also compelling with respect to the AWA. It is clear that an animal-suit provision would improve enforcement not only of the ESA, but also of the AWA.

B. The Endangered Species Act

The Endangered Species Act (ESA) has been described by the Supreme Court as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” The Court has also noted that the ESA protects animal life, in particular those nearing extinction, at “whatever the cost.” The ESA directs the Secretary of the Interior to determine if any species is endangered or threatened due to habitat destruction, overutilization (for commercial, recreational or education purposes), disease, predation, or other natural or manmade factors. Therefore, the purpose of the ESA is twofold: to provide a means by which the ecosystems upon which endangered and threatened species depend

116. Id. at 635.
117. Id.
120. Tenn. Valley Auth., 437 U.S. at 184.
may be conserved, and to provide a program for the conservation of those species. 122

In order to implement the ESA, the Secretaries of Commerce and Interior delegate responsibilities to the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The ESA’s protection of a species and its habitat is triggered only when the appropriate Secretary lists a species as either “endangered” or “threatened.” 123 A species is “endangered” when it is in “danger of extinction throughout all or a significant portion of its range.” 124 A species is “threatened” when it is likely to become an endangered species within the foreseeable future. 125 “[T]he decision whether to list a species as endangered or threatened [is supposed to be] based solely on an evaluation of the biological risks faced by the species, to the exclusion of all other factors.” 126

As already noted, the purpose of the ESA is conservation of endangered and threatened species. 127 “Conservation” includes “the use of all methods . . . necessary” to eliminate the need for further conservation measures. 128 Thus, the recovery of endangered species is “the first priority” under the ESA. 129 “[T]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” 130 Accordingly, if a species is listed, the government has an affirmative duty to take all necessary steps to protect and increase endangered populations. 131 For example, in Andrus, plaintiff claimed regulations governing “twilight hours” for sport hunting of migratory game birds were arbitrary and capricious. The government claimed the ESA only prohibited regulations that jeopardize the continued existence of protected species. Thus, because the most important factor affecting the bird population was the quality of its habitat, the agency argued a minor alteration in

126. Hodel, 716 F. Supp. at 480.
129. See Tenn. Valley Auth., 437 U.S. at 181.
130. Id. at 184 (emphasis added).
131. Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.C.C. 1977) [hereinafter Andrus]; Loggerhead Turtle v. County Council of Volusia County, Florida, 92 F. Supp. 2d 1296, 1302 (M.D. Fla. 2000); Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998) ("each federal agency is required to take whatever . . . actions are necessary to ensure the survival of each endangered and threatened species").
shooting hours was unlikely to jeopardize the birds.\textsuperscript{132} The court disagreed:

It is clear from the face of the statute that the Fish and Wildlife Service, as part of the Interior, must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so. The Service cannot limit its focus to what it considers the most important management tool available to it, i.e., habitat control, to accomplish this end. . . .

The agency has an affirmative duty to increase the population of protected species. . . . [I]t is apparent that the rulemaking process was not adequately focused upon the obligation of the Fish and Wildlife Service to conserve and increase the population of these species. In this sense, then, the regulations must be said to be arbitrary.\textsuperscript{133}

An important—and here, especially relevant—power is retained by the government with respect to threatened species. Specifically, the appropriate Secretary has the authority to make special rules for threatened species under Section 4(d) of the ESA, 16 U.S.C. section 1533(d): “Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” These “special rules” severely undermine and offend the spirit of the Act—especially with respect to chimpanzees.\textsuperscript{134}

Special rules prevent chimpanzees from receiving full protection under the ESA because these rules have allowed chimpanzees to become split-listed. In the Federal Register of April 19, 1976, 41 Fed. Reg. 16466, the FWS proposed to classify both the chimpanzee and pygmy chimpanzee (bonobo) as “threatened” species.\textsuperscript{135} At this time, all chimpanzees (irrespective of wild or captive designations) were characterized as threatened species and entitled to the significant protections provided by the ESA. However, because threatened species are subject to the special rulemaking provisions of section

\textsuperscript{132} See Andrus, 428 F. Supp. at 169.

\textsuperscript{133} Id. at 170.

\textsuperscript{134} The ESA is also criticized for: the lack of sufficient funding needed to carry out species conservation, the sluggish listing process, the piecemeal and reactive structure of the statutory provisions, and the ESA’s general failure to adequately protect biodiversity. Nancy Kubasek, M. Neil Browne, & Robyn Mohn-Klee, The Endangered Species Act: Time For A New Approach?, 24 ENVTL. L. 329, 336 (1994).

\textsuperscript{135} The proposed listing was based on the following cited factors: destruction of chimpanzees’ natural habitat; capture and export of chimpanzees for research laboratories and zoos; the spread of disease from people to chimpanzees; and ineffectiveness of existing regulatory mechanisms. 41 Fed. Reg. 16468 (Apr. 19, 1976).
1533(d), this equal treatment almost immediately disappeared. The FWS proposed a special rule, 50 C.F.R. § 17.40(c) ("Section 17.40"), which acts as an exemption from the ESA protections. Section 17.40 provides that the protections for threatened species do not apply to captive animals in the United States on the effective date of the rule (October 19, 1976), or to the offspring of such animals, or to the offspring of threatened animals legally imported into the United States after the effective date of the rule. This represents the first, and most important, "split," since it resulted in different treatment of chimpanzees under the ESA, depending on whether they were captive or wild. Captive chimpanzees no longer were entitled to the protections provided by threatened status, while wild chimpanzees were. Notably for purposes of a potential challenge, the resulting final rule, incorporating the exemption, contains no discussion or analysis of the special exemption under section 17.40. This is in violation of the requirement that the Secretary have a conservation-minded reason for the rule.

On November 4, 1987, the Humane Society of the United States, the World Wildlife Fund, and the Jane Goodall Institute petitioned to have the classification of chimpanzees changed from "threatened" to "endangered." They were mostly unsuccessful. On March 12, 1990, the FWS published its final rule, reclassifying only wild populations of chimpanzees and all populations of pygmy chimpanzees from threatened to endangered. In the proposed rule, the FWS discussed the rationale for the section 17.40 exemption as "intend[ing] to facilitate legitimate activities of U.S. research institutions, zoos, and entertainment operations, without affecting wild chimpanzee populations." Thus, captive chimpanzees retained a threatened status, with the corresponding section 17.40 exemption still in effect.

The FWS considered several arguments put forth by numerous interested parties in support of reclassification of captive chimpanzees to endangered status—and rejected them all (including arguments

136. The petitioners argued the status of the chimpanzee had deteriorated substantially since the species was originally classified as "threatened" in 1976. They cited the reasons for the deterioration as massive habitat destruction; fragmentation of populations and associated vulnerability to disease; excessive hunting and capture; and lack of effective national and international controls. See Endangered and Threatened Wildlife and Plants; Finding on Petition and Initiation of Status Review, 53 Fed. Reg. 9460 (Mar. 23, 1988).


that the special rule/lower status could stimulate commerce in chimpanzees, that the split-listing was responsible for the population decline, and that both captive and foreign populations were not self-sustaining—to name a few. While this is the “true” split listing, it does not seem to have had any practical effect, except to protect wild chimpanzees from ever being subject to a special rule. (It may result in different treatment under some international laws or CITES, but as far as the ESA is concerned, the actual change was in classification only.)

The FWS’ perception of entertainment operations as “legitimate” activities is completely contradictory to the conservation purpose of the ESA, and to the affirmative duty to rehabilitate dwindling species populations. One of the goals of the ESA is to protect animal species from “overutilization for commercial purposes” and to protect animal life at “whatever the cost.” These goals are wholly ignored by split-listing chimpanzees under the ESA and by permitting their continuing use as “actors.”

C. The Regulation of Migratory Birds as an Example for Change

Currently, there are laws that accomplish for eagles what the AWA and ESA fail to accomplish for chimpanzees. Strict federal regulations have been enacted to protect migratory birds, most notably with regard to eagles. These regulations have made it nearly impossible to use an eagle in entertainment. Such stringent regulations offer a useful example of the type of laws that should be enacted for the protection of chimpanzees. It is illegal to sell, purchase, barter, trade, import, export, or offer for sale, at any time or in any manner, any bald eagle or any golden eagle, or the parts, nests, or eggs of these birds, and the Department of the Interior will not issue a permit to authorize these acts. It is also illegal to transport into or out of the United States any live bald or golden eagle, or any live egg of those birds, and the Department of the Interior will not issue a permit to authorize these acts. In addition to these prohibitions, federal regulations further restrict the use and

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144. 50 C.F.R. § 22.12(b) (2003).
possession of eagles. For instance, a falconry permit may only be issued for golden eagles, and even then, possession and transportation is permissible only if compatible with the preservation of golden eagles and only if the applicant is qualified to possess and transport golden eagles for falconry purposes.\(^{145}\) In addition, a permit authorizing the taking, possession, or transportation of lawfully possessed bald or golden eagles, their parts, nests, or eggs may only be granted for scientific or exhibition purposes of public museums, for public scientific societies, or for public zoological parks.\(^{146}\)

The cumulative effect of these regulations is to essentially prohibit anyone, except a very small group of people from handling, let alone exploiting, an eagle. Chimpanzees could be spared the miserable life of “actors” if similarly strict regulations were enacted for their protection and conservation.

D. State Anti-Cruelty Laws

In addition to federal regulations, state anti-cruelty statutes, as well as local ordinances, are used to regulate the use or treatment of all animals, including chimpanzees. Although the language of most cruelty statutes is broad enough to prohibit the training practices of many exotic animal trainers, several factors prevent these statutes from having any significant effect. First, the difficulty of catching violators in the act presents severe problems because training occurs behind closed doors in private facilities or in secluded areas on media production sets. Second, “many anticruelty statutes contain broad exemptions for virtually all of the activities that traditionally involve animal suffering and death.”\(^{147}\) Third, most anti-cruelty statutes impose relatively minor penalties for a violation, which signal to society that such conduct while illegal is not viewed as particularly egregious.\(^{148}\) Fourth, animal cruelty offenses are not taken seriously by law enforcement officials, who are often reluctant to enforce the law even against obvious offenders.\(^{149}\) Lastly, few states allow a private right of action to remedy a situation in which a criminal statute is being violated, and this only increases the problem of non-

\(^{146}\) 50 C.F.R. § 22.21 (2003). Furthermore, under this section the Department of the Interior “will not issue a permit under this section that authorizes the transportation into or out of the United States of any live bald or golden eagles, or any live eggs of these birds.”

\(^{148}\) Id.
\(^{149}\) Id.
enforcement. The anti-cruelty laws of California, New York, and Florida provide a glimpse of the different ways some states have approached the issue of defining cruelty and providing a suitable punishment.

California has one of the toughest anti-cruelty laws in the country and enforcement of the law appears to be more rigorous than in many other states.\textsuperscript{150} Anyone who with malice or intent kills, maims, tortures, or wounds a living animal may be imprisoned and/or subject to a fine of not more than $20,000.\textsuperscript{151} Additionally, anyone who overdrives, torments, or deprives any animal of necessary sustenance or anyone who causes any of these actions to happen, may be guilty of a felony and subject to a fine not exceeding $20,000 and/or imprisonment.\textsuperscript{152} Given California’s broad statutory language, animal dealers exploiting chimpanzees as “actors” could easily be prosecuted under this statute because anyone who in “any manner abuses any animal” violates the law. However, a problem enforcing California’s law arises when the State must prove willfulness or malice,\textsuperscript{153} because a defendant may often prevail by showing the charged conduct was part of some institutionalized animal exploitation acceptable in the particular industry that per se involves inflicting suffering or death on animals. However, proving mere intent is usually a lower standard, and requires that the act be conscious and voluntary in contrast to intending cruel conduct.\textsuperscript{154}

New York’s definitions of “animal” and “torture or cruelty” are extremely straightforward and provide the framework for the statute to include any injurious act to animals. The law defines “animal” to include every living creature except a human being, and “torture or cruelty” as every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted.\textsuperscript{155} The fact that “unjustifiable” qualifies the type or degree of physical pain that is prohibited is an important distinction. When “unjustifiable physical pain” is the standard, a “defendant can easily raise a reasonable doubt that would preclude criminal liability by arguing that the cruelty was ‘necessary’ to achieve some ‘accepted’ end, so that the conduct is not within the scope of the anticruelty statute.”\textsuperscript{156} Although

\textsuperscript{150} FRANCIONE, supra note 147, at 119.
\textsuperscript{151} CAL. PENAL CODE § 597(a) (2003).
\textsuperscript{152} CAL. PENAL CODE § 597(b) (2003).
\textsuperscript{153} FRANCIONE, supra note 147, at 136.
\textsuperscript{154} Id.
\textsuperscript{155} N.Y. AGRIC. & MKTS. LAW § 350 (McKinney 2003).
\textsuperscript{156} FRANCIONE, supra note 147, at 134.
New York’s law is similar in language to California’s law, it additionally provides that the animal in question may be either wild or tame and that any person furthering, encouraging, or instigating the act of cruelty is equally liable. An important distinction between the California and New York laws is the severity of the punishment, with New York being more lenient by only charging a misdemeanor offense punishable by imprisonment of no longer than a year or by a fine of not more than $1,000 or both. However, New York’s law is important in that it provides for enforcement by a public servant other than a police officer. This provision allows someone who is specially authorized by law to issue and serve citations when there is reasonable cause to believe that a person has committed an offense.

Florida takes an interesting approach to defining “animal” and “torture” that are equally, if not more inclusive in scope than New York’s anti-cruelty law. Florida’s law specifies that not only within the anti-cruelty chapter, but also in every law of the state relating to or in any way affecting animals, the word “animal” includes every “living dumb creature.” In addition, the words “owner” and “person” include corporations, and impute the knowledge and acts of its agents and employees to the corporation itself. However, similar to New York’s law, the words “torture,” “torment,” and “cruelty” include every act, omission, or neglect only when unnecessary or unjustifiable pain or suffering is caused. Florida’s anti-cruelty law applies a penalty that increases with repeat offenses and/or with the severity of the act. In contrast to both the California and New York laws, Florida’s law acts not only to punish the offender, but also to correct the offender’s violent inclination. The first offense is punished as a misdemeanor with imprisonment and/or a $5,000 penalty. However, where the finder of fact determines that a violation of this subsection includes the knowing and intentional torture or torment of an animal that injures, mutilates, or kills the animal, the violator must pay a minimum mandatory fine of $2,500 and undergo psychological counseling or complete an anger management treatment program.
This requirement, while modern in its counseling requirement, actually reflects the traditional notion of furthering the interests of people by promoting the interests of animals since a person who abuses animals is more likely to abuse women or children.\(^6\)

Although these anti-cruelty statutes take a variety of approaches to combating violence towards animals, they do not provide protection to chimpanzees. California's tough punishment provisions, New York's public servant enforcement mechanism, and Florida's psychological counseling/anger management requirement, while innovative and forward-looking, mean nothing if the offenders cannot be caught abusing an animal or do not satisfy the mens rea requirement for cruelty. However, the solution may be found in the power of local ordinances.

At first blush it might seem local ordinances could not have much impact on a problem such as chimpanzee abuse, but they can. The appeal of local ordinances is that they are easier to pass into law than state regulations and can prohibit an animal act altogether, thereby eliminating the problem with enforcing anti-cruelty laws against private acts of cruelty. Several cities ban animal acts completely,\(^6\) others prohibit the use of chemical, manual, or electric means to make an animal perform,\(^6\) while others impose strict regulations on the use of animal acts.\(^6\) The local ordinance in Revere, MA provides that "no living non-domesticated animal may be displayed for public entertainment or amusement on property owned by the city of Revere, or on city-owned property under lease, or on private property, excluding competitive arena sports and exhibits deemed educational by the Massachusetts Society for the Prevention of Cruelty to Animals."\(^7\) In addition, "[n]o captive

\(^6\) WAISMAN ET AL., supra note 4, at 400. See also FRANCIONE, supra note 147, at 30 ("As a historical matter, the concern for child welfare and the concern for animal welfare were closely connected.").

\(^6\) These cities include: Pasadena, CA; Encinitas, CA; Stamford, CN; Hollywood, FL; Lauderdale Lakes, FL; Quincy, MA; Revere, MA; Provincetown, MA; Takoma Park, MD; Port Townsend, WA; Braintree, MA; Boulder, CO; Orange County, NC; Estes Park, CO; and Redmond, WA. Circuses.com, Local Bans on Animal Acts in the United States, at http://www.circuses.com/cban.html (last visited Feb. 28, 2004).

\(^6\) These cities include: Pompano Beach, FL; Tallahassee, FL; Collinsville, IL; Woodstock, IL; Jefferson County, KY; and Southampton, NY. Id.

\(^6\) These localities include: Cedarburg, WI (requires criminal background check for circus employees); Fairfax County and Spotsylvania County, VA (no public contact between animals and people is permitted); Wallkill, NY (no contact between people and tigers, lions, or bears is permitted); Oklahoma City, OK (prohibits nondomestic cats and canines, primates, and bears on display). Id.

\(^7\) Id.
animal shall be forced to live out of its natural environment, separated from its own species and displayed to the public in any exploitive manner."\textsuperscript{171} Local ordinances like the one in Revere, MA accomplish for cities what the federal government should provide nationwide.

The AWA, ESA, and state anti-cruelty laws only protect chimpanzees from training tactics in theory. Most cruelty to chimpanzees occurs behind closed doors and without detection from authorities. The problem of enforcement is compounded by the relatively low priority that animal cruelty cases receive in prosecutorial offices. Therefore, an express prohibition on the use of chimpanzees and other great apes in television, movies, and commercials would eliminate the cruelty and abuse inherent in training these animals to be actors without creating another law that would suffer from non-enforcement. The added appeal of a prohibition against the use of chimpanzees and other great apes in entertainment is that such a law would essentially enforce itself because a project could not use any of these animals if it intended to commercially profit from its distribution, since the appearance of a prohibited animal would disclose the violation and serve as evidence for the offense.

VI. Liberty & Equality Rights for Chimpanzees

One reason Americans acknowledge liberty and equality in each other is that each person's own liberty and equality depends on this mutual recognition. Although the law protects the liberty and equality of each individual, to some extent liberty and equality depend on reciprocal exchanges. In contrast, acknowledging certain liberties in chimpanzees and other great apes, like the right to be free from use in entertainment or exploitation in medical research, must be completely altruistic in that such recognition does not create financial gain or some other quantifiable benefit. However, the case for recognizing certain liberties in chimpanzees and other great apes can be made by taking a closer look at the definition of equality and liberty to exact what these principles actually mean.

The difference between equality and liberty is that equality requires likes be treated alike whereas liberty suggests that someone receives rights because of who she is without being compared to anything.\textsuperscript{172} In this sense, people should grant chimpanzees certain

\textsuperscript{171} Id.
\textsuperscript{172} WISE, \textit{supra} note 6, at 29.
liberty rights because they are chimpanzees. However, this choice requires people to value chimpanzees and other great apes over the monetary gain that may be realized by their exploitation—a daunting request in today's money-driven society. Alternatively, some argue that any animal might be entitled to equality rights even if the animal is not entitled to liberty rights, because the animal is like someone who possesses basic liberty rights. The significant and substantial similarities between chimpanzees and humans previously noted suggest, under this reasoning, that chimpanzees are entitled to rights because they are like humans. Although this argument is seemingly speciesist, it is not. To clarify, chimpanzees deserve rights not because they are similar to humans, but because humans recognize these rights in each other and therefore should recognize these rights in other like beings. "[T]here is no moral quality which separates [a chimpanzee] from other people who are rightly protected under the Constitution." In addition, most judges believe that practical autonomy is sufficient for basic liberty rights if the autonomy includes an awareness of self. Further still, some authors argue that under the common law, adult chimpanzees are entitled to basic legal rights because they possess certain advanced mental abilities.

Some believe chimpanzees should not be afforded basic liberties or rights because they are not human—that for example, the right to life or the right to be free from medical exploitation is one limited to humans. The flaw in this justification is that "even using a human yardstick, at least some nonhuman animals are entitled to recognition as legal persons."

The chimpanzees share with us a number of psychological characteristics that have not been found in other species. One of these is the ability to engage in pretend play; another is to be able to see the world from another individual's point of view. Some human beings (namely autistic individuals) lack both of these abilities, yet we are happy to treat them... as human. Furthermore, "[t]here is nothing that humans with the most serious intellectual disabilities can do or feel that chimpanzees or gorillas cannot; moreover, there is much that a chimpanzee or a gorilla can do

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173. *Id.* at 29.
175. Wise, *supra* note 6, at 32.
176. *Id.* at 6.
177. *Id.* at 240.
178. Dunbar, *supra* note 9, at 110.
that a profoundly mentally disabled human cannot do.” Advocating that chimpanzees are not entitled to rights because they are not human necessitates defining what it means to be human.

To be human arguably means more than having a given genetic composition, especially since ships and corporations are legal "persons." Corporations... are relative newcomers to personhood and they, of course, are persons for some purposes, but not for others. ... Corporations can be criminally liable but cannot be incarcerated; they must pay taxes, but cannot vote. The legal category of persons never has been fixed or static, and is not now limited to human beings.

Many philosophers have described what it means to be a person, and under these varying definitions a compelling case could be made to include chimpanzees and other great apes. For instance, “[t]heologist Joseph Fletcher provided a list of ‘indicators of humanhood’ that includes self-awareness, self-control, a sense of future, a sense of the past, the capacity to relate to others, concern for others, curiosity, and communication.” Chimpanzees have virtually all of these “indicators of humanhood.” One could also argue, given the numerous biological, psychological, and behavioral similarities, that whatever makes a person human, chimpanzees possess enough of those traits to deserve rights beyond those granted to forms of property, at the very least.

Once we accept or even suspect that humans are not the only beings with personalities, not the only beings capable of rational thought and problem-solving, not the only beings to experience joy and sadness and despair, and above all not the only beings to experience mental as well as physical suffering, we become less arrogant, a little less sure that we have the inalienable right to make use of other life forms in any way we please so long as there is a possible benefit for us.

While it “is true that apes cannot make a deliberate argument for their rights, ... neither can young children or oppressed people whose oppressors refuse to learn their language; yet morally we protect their

181. Hall & Waters, supra note 174, at 1.
182. Id. at 18.
183. NICHOLS & GOODALL, supra note 27, at 71.
rights, at least in principle.” 184 Chimpanzees are similar enough to “humans” to make the abuse inherent in “actor” training parallel to the criticized aspects of human slavery. Acknowledging rights in chimpanzees and other great apes to be free from exploitation does not require bestowing on them citizenship status and the right to vote. It does however require that these animals be afforded the dignity they deserve by at the very least prohibiting their exploitation as “actors.”

VII. Conclusion

Even though our legal system is structured so that virtually any animal exploitation can be regarded as necessary for entertainment purposes, 185 the use and abuse of chimpanzees as “actors” is truly unnecessary when one thinks about how little a role chimpanzees and great apes actually play in the entertainment industry. It seems as though such horrific cruelty and heart-breaking abuse to these sophisticated, intelligent, and sentient creatures cannot possibly exist in the year 2005, but it does.

Surely the empire that is the entertainment industry could thrive and continue to command large sums of money without the use of chimpanzees and other great apes. The advanced computer technology available to the entertainment industry, which makes it possible to simulate a chimpanzee or digitally recreate one, only increases the insignificance of using live chimpanzees in filmed media.

Chimpanzees deserve protection beyond the meager safeguards afforded to them by current federal regulations and anti-cruelty laws—they need explicit protection from exploitation in entertainment. Federal regulations suffer from non-enforcement; both by agencies empowered to enforce those laws, and by citizens who cannot establish standing to sue for enforcement. Anti-cruelty laws are impotent to protect chimpanzees; the laws may prohibit the actions implemented by trainers to subdue a chimpanzee’s natural behaviors, but enforcement is virtually impossible against violators. Furthermore, “anticruelty statutes are explicitly designed not to interfere with many activities that most people would regard as cruel.” 186 Chimpanzee “actors” must live in unnatural settings, in

185. Francione, supra note 79, at 739.
186. FRANCIONE, supra note 147, at 145.
inadequate social groups, and be routinely physically abused in order to be among humans. If that were not enough, this first phase of their lives replaces a childhood that would have otherwise been filled with play and which they would have spent in close proximity to their families. After that they are subjugated to lives of further boredom and torture, locked in cages without companions or adequate stimulation.

Chimpanzees and other great apes can be protected from use in entertainment without changing the law classifying great apes as property. Nor is it necessary to label them as persons. We need simply to recognize their undeniable traits, their acknowledged culture, personalities, and abilities to think and feel that corresponds with ours. With the curtain drawn aside and the reality of chimpanzee training exposed to the light, the popular desire for great apes in entertainment should logically subside. What reasonable person would condone the daily beating of a two-year-old child in order to force her to act on command? Chimpanzee actors possess the intellectual capacity of that two-year-old—and possibly a heightened awareness of pain and separation from their families.

It is this author's hope that with the inherent brutality behind the onstage and onscreen presentation of chimpanzee "actors" presented here, the next decade will free chimpanzees from props and human clothing, and allow them to live in closer resemblance to the life they would have known.