The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals

Derek W. St. Pierre
The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals

Derek W. St. Pierre*

By what measure is the comparative value of lives to be measured?

— Regina v. Dudley and Stevens

We are not just rather like animals; we are animals.

— Mary Midgley

The classification of a living being as property has long been an effective tool in perpetuating the subordination of that being. By defining a living organism as property, the law has already decided what limits to place on protecting the interests of that individual. To label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to the end determined by the property owner.

Not long ago, the concept of property included various classes of humans. In the Seventeenth century, Africans brought into the United States were bought and sold as chattel. During this same period, women, once

---

*The author is a 1998 graduate of the University of California, Hastings College of the Law. He would like to thank those involved in the process that became this Note, especially Lawrence Weiss, Jo Carillo, Bruce Wagman, Lisa Scanlon and Christine Troy.

1. 1881-85 All E.R. 61 (Q.B. 1884).
2. MARY MIDGLEY, BEAST AND MAN at xiii (1978).
4. Id. at 253.
married, became the property of their husbands. Possibly the biggest barrier to the exertion of rights by either group was their status as property. By definition, this categorization relegated both slaves and married women to a position without any legally cognizable rights.

Similarly, the subordination of non-human animals stems from a refusal to recognize that animals have interests of their own. In the eyes of the law, non-human animals are property. As such, they are imprisoned, tortured, mutilated, raped and even killed with the endorsement of our justice system.

This Note looks at the use of the legal classification of “property” as a tool to subordinate living beings and the means to overcome this subjugation. It begins by describing the concepts of property and rights. Next, this paper turns to setting forth the concept of animal rights and the current position of non-human animals in this country. Then two historic examples, American slavery and married women, are used to illustrate how the definition of living beings as “property” has been used as a tool of subordination. These examples are then employed to illustrate the current position of animals in society. In order to change that position, there must be a social reformulation of the concept of non-human animals as property into one that views them as beings with individual rights. This analysis concludes with some suggestions to move society towards that goal.

CLASSIFICATION AS PROPERTY AND THE SOCIAL DISTRIBUTION OF RIGHTS

The study of property is the study of social relations. Property rights are significant in their ability to create expectations of specific treatment in social dealings with others. This conception of property rights is central to our moral and legal structure.

The Anglo-American concept of property creates an artificial legal dualism with two primary types of entities: persons and property. De-

7. The term “non-human” is used to describe “animal” in order to accentuate the artificial nature of the human-animal dualism pervasive in our language. Humans are animals.
9. Examples include the food industry and factory farming; the fur industry and wire cages or steel leg-hold traps; the scientific communities’ psychological and biomedical testing; as well as the entertainment industries’ use of fear and pain to coerce performance.
12. See Francione, supra note 3, at 106.
spite the wealth of lofty debate over philosophical conceptions of property, this note looks instead at this abstract concept on its most basic, concrete level. "Property" has value solely as a means to an end, whereas "people" are ends in themselves. Property law is "a set of legal relations between persons governing the use of things." Legal theorists argue that there cannot be any legal relations between persons and things and that things cannot have rights. Being in the latter category, property is understood as that which does not have any interests of its own that must be respected.

However, the division between the concepts of "people" and "property" is not as logical as it appears. Inanimate objects sometimes fall into the category of people, and living beings can find themselves in the category of property. The consequence of this classification is that legally recognized people have rights and property does not.

A right is generally viewed as "a moral trump card that cannot be disputed." As such, a right serves as a protection that cannot be sacrificed, even if the outcome is illogical. In our legal system, "people" are the only holders of rights. By classifying an entity as property, the legal system denies that entity the ability to assert rights in its self-interest. Effectively, the only rights that exist in terms of property are the rights of the owner.

NON-HUMAN ANIMALS AND RIGHTS

A great deal of literature is devoted to the philosophical debate on whether or not animals deserve rights. This Note begins with the assumption that the life of an animal has inherent value which should be protected through the recognition of legal rights. The basis for this assumption lies at the intersection of science and philosophy. According to evolutionary theory, the difference between species is not one of distinct categories, but merely one of degree. There is nothing in this degree of difference that is so great as to justify the domination visited by our spe-

---

16. Corporations and ships are considered people for purposes of the law and can sue or be sued.
17. See FAVRE & LORING, supra note 8, at 21. See also FRANCIOSA, supra note 3, at 35.
19. This philosophical debate is wrapped up in two types of rights: moral and legal. For purposes of this Note, the discussion is limited to legal rights. A legal right is one that is recognized and enforced by the legal system. Although morals affect and strongly influence the legal system, moral rights lack formal remedies within this system. By definition, legal rights are the only rights our current society is bound to recognize.
cies upon other species of this planet.\textsuperscript{22} Humans do not possess any characteristics which are not shared by at least one other species.\textsuperscript{23} Non-human animals use tools, communicate with language, display emotions, have social relations, establish cultures, display rational thought and even exhibit altruism.\textsuperscript{24} The converse is also true. There are no shortcomings displayed by non-human animals that are not also reflected in human behavior.\textsuperscript{25} Our society values and protects the rights of every human—even the most severely mentally handicapped humans—some of whom lack both the capacity to use language and to think rationally, are given protection under the law. Currently, our society limits its circle of moral concern by imposing inherent value only on the lives of humans, without any rational basis for that limitation. In the spirit of social evolution, it is time to expand our circle of moral concern and respect the value of non-human life. Leaving the specific extent of rights for non-human animals to the philosophers, the general precepts to strive toward include freedom from imprisonment, as well as from the infliction of pain, suffering or death.\textsuperscript{26}

A meaningful discussion of rights requires a discussion of how rights are enforced or asserted. Yet, speaking of rights in terms of self-assertion creates a problem regarding the rights of animals. Since animals cannot speak for themselves, who is to assert their interests? Our legal system already confronts and resolves this problem when dealing with children, mentally incompetent individuals and others who are deemed unable to represent themselves. Guardians ad litem and next friends are appointed to advocate for the best interest of that individual and could serve the same purpose for non-human animals.\textsuperscript{27}

\textbf{MODERN SOCIETY AND NON-HUMAN ANIMALS}

The current prevailing attitude towards non-human animals in this country can be described as legal welfarism. This is the notion "represented by and in various legal doctrines, that animals, which are the property of people, may be treated solely as means to ends by humans as long as this exploitation does not result in the infliction of 'unnecessary'

\textsuperscript{22} See Gary Francione, Keynote Speech at the University of Oregon Land Air Water Conference (Mar. 14, 1997) (Video recording on file with the University of Oregon).
\textsuperscript{23} See id.
\textsuperscript{24} See id.
\textsuperscript{25} See id.
\textsuperscript{26} Any meaningful discussion of this would also include maintenance of livable habitat.
\textsuperscript{27} "... An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian . . . for the protection of the infant or incompetent person." Fed. R. Civ. P. 17(c). This represents a potential solution within our existing legal framework. The degree of social change argued for herein would require considerable legal restructuring as well; adequate representation of non-human animal interests would be at the center of that reorganization.
pain, suffering, or death."28 As property, non-human animals are meant to be used in a reasonable and efficient manner. Consequently, the value of non-human animals is measured only in terms of their usefulness to humans, not in terms of any interests they may have in their own right.

Legal welfarism embraces the reasonable and efficient, but "humane" use of non-human animals. Animal welfarists work to improve the conditions under which animals are kept and used. However, their theory of humane use can be seen as a rhetorical concept because it would be difficult to find an individual specifically espousing a pro-cruelty ethic. Even the largest exploiters of animals might claim that they treat their animals well and have every incentive to do so.29

The state regulates the use of animals through anti-cruelty statutes.30 Yet, cruelty statutes are designed to prevent "unnecessary" suffering, and do not create anything equivalent to "rights" for non-human animals.31 According to David Favre, the use of cruelty statutes to establish criminal sanctions seeks to fulfill three social goals: "first, to proscribe certain human actions as unacceptable in our society; second, to decide that a minimum level of care is due to any animal; and finally, to protect the economic interest that animals represent to their owners."32 Our legal system is structured, however, such that virtually any treatment of a non-human animal can be justified as some sort of "necessity."33 Arguably, the value

28. FRANCIONE, supra note 3, at 18.
29. Members of the industry trafficking in animals could claim that unless they properly feed and care for their animals, they could not produce a high quality product. Further, industry members could also claim that raising animals is their livelihood and any abuse of such animals cuts into their profit.
30. All 50 states have anti-cruelty statutes. For summaries of those statutes see Henry Cohen, State Statutes Prohibiting Cruelty to Animals, Congressional Research Service, The Library of Congress (1992). The language of California Penal Code § 597 is fairly representative, although the potential penalties are stiffer than most. It states:

```
Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars.
```

CAL. PENAL CODE § 597(b) (West 1998).
32. FAVRE & LORING, supra note 8, at 122.
33. See, for example, Section 59 of Article 27 of the 1957 Laws of Maryland, which states: "Customary and normal veterinary and agricultural husbandry practices including but
of the life of a non-human animal is caught up in a cost benefit analysis so heavily weighted in favor of even the most frivolous human "benefit," that the protections provided by cruelty statutes are practically nonexistent.

Non-human animals are currently categorized as personal property.\textsuperscript{34} In theory, all non-human animals within the boundaries of the United States are owned either by a private individual or by the government.\textsuperscript{35} David Favre summarizes the rights of non-human animal owners as follows: the right to convey, the right to consume, the right to use as collateral, the right to obtain the natural dividends of the animal and the right to exclude others.\textsuperscript{36} Owners of non-human animals can resort to all the normal property protections offered by the law, i.e. the owner can sue for: conversion, larceny, tortious injuries, punitive damages and even mental anguish.\textsuperscript{37} However, owners have the authority to disregard these protections. Since non-human animals themselves have no legal rights, if owners do not assert that there is a right, then no rights for humans or non-humans will be exercised.\textsuperscript{38}

\textbf{HISTORICAL FOUNDATIONS OF MODERN SOCIETY}

This current position of non-human animals in our society results from a long history of subjugation and domination by humans over humans.\textsuperscript{39} Science, theology and social myths have all played a part in establishing modern relationships between human and non-human animals.

The work of Charles Darwin and evolutionary theory mark the beginning of modern biology. As shown in Darwin's \textit{The Descent of Man}, the theory of evolution denies the existence of a privileged status for humans: "[t]here is no fundamental difference between man and the higher mammals in their mental faculties . . . [t]he difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind."\textsuperscript{40} Yet, science only influences and does not define society. The historical justifications for human domination over non-human animals runs much deeper.

Historically, Western culture has understood the universe as a linear hierarchical ascendancy.\textsuperscript{41} This concept, known as the Great Chain of

\begin{footnotes}
\item[34] See FRANCIONE, \textit{supra} note 3, at 34-35.
\item[35] See \textit{id.} at 40-46.
\item[36] FAVRE \& LORING, \textit{supra} note 8, at 48.
\item[37] See \textit{id.} (See Chapter Four for discussion).
\item[38] See \textit{id.}
\item[40] CHARLES DARWIN, \textit{THE DESCENT OF MAN} 72, 80 (London, 1871).
\item[41] See Wise, \textit{supra} note 39, at 24.
\end{footnotes}
Being, is one of the most powerful presuppositions in Western thought. The Great Chain of Being is the idea that there is a natural hierarchy, in essence a ladder, which designates a place for everything. Location on the ladder is ordained by a designed and ordered universe. Plants occupy the lower rungs, non-human animals are further up the ladder, humans are even higher up and the upper rungs are occupied by angelic forms with God atop the whole.

The Great Chain of Being has been central to the development of thought in Western systems; specifically, two reasons are given as the justification for the legal status of animals as property. The first has a theological basis, established in the Bible. In Genesis, man is given “dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth.” A second justification rests in the “inferior” status of non-human animals. Historically, non-human animals were viewed as lacking a “soul,” a “mind,” a “will,” or whatever attribute it was thought makes humans uniquely human. The Great Chain of Being fed into and supported this idea because only those beings on the upper rungs, humans and angelic beings, were found capable of rational thought. This second reason is a classic creation of the concept of “other.” By focusing on differences, accentuating what separates human animals from non-human animals, our society has created yet another of its many dualisms by which animal exploitation is justified.

This creation of a dualism and “other” through the confluence of scientific and social rationale spawns some interesting anomalies. For example, the use of non-human animals in vivisection places those animals somewhere in a state of limbo. Modern science presumes that non-human animals are genetically similar enough to humans that experiments on them will help to predict human reaction. Yet it is also simultaneously posited that non-human animals as so different that they do not merit ethical consideration or legal protection.

BLACK AMERICANS AND SLAVERY

“When law made a man or a woman into a thing to be bought and sold, it did more than any other legal maneuver . . . to degrade the humanity of

42. See id.
43. See id.
44. See id. at 25.
45. See id.
46. See FRANCIONE, supra note 3, at 36-37.
47. Genesis 1:26.
49. Some examples of common socially constructed dualisms include: white-black, male-female, straight-gay, rich-poor, young-old and so on.
black Americans. The designation of a group of humans as property is the ultimate form of degradation. Slavery has existed since before recorded history and finds mention in the earliest recorded body of laws, Hammurabi's Code. Regardless of legal justifications, slavery has still been defined as "a system of domination, degradation and subordination, in which some people are allowed in effect to treat other persons—other human beings with God-given rights—as property rather than persons."

All aspects of law surrounding slavery were designed to benefit the slave owners, not the slaves. The legal protections offered to slaves were not for slaves as individuals, but to protect the property value of a slave to the slave's owner. Once the legislatures designated slaves as personal chattel, the elaboration of the rights of this new property was left to the courts. The expansion of common law in this area turned slaves into the objects of mortgages, assignments, inheritance, seizure, bailment, insurance and warranties.

Slavery in America originally arose as a response to economic greed. The realization of the full economic potential of the English colonization of North America was dependent on large numbers of unskilled agricultural laborers. After several failed attempts at enslavement of the native peoples, enslaved Africans proved to be most profitable means of filling this need.

In the United States, plantation owners only enslaved racially distinct people. Subsequently, this racial distinction gave rise to the rationale for enslavement. The explanations for slavery arose only after the practice

50. Wiecek, supra note 5, at 1777.
51. See id. at 1714.
52. Akhil R. Amar, Remember the Thirteenth, 10 CONST. COMMENTARY 403, 405 (1993).
54. See id. at 1070.
55. See Wiecek, supra note 5, at 1779.
56. See id. at 1779-80.
57. See id. at 1711.
58. See id. at 1712.
59. The original colonial settlers enslaved Indian war captives, Africans, and even English men and women. Both Indian war captives and fellow English men and women were difficult and inefficient laborers. Indian war captives, with their knowledge of the surrounding land and the ability to live off of it often escaped slave holders, presumably to return to their tribes. The English were poor laborers, unaccustomed to the heat. Further, escaped English slaves could assimilate back into colonial society without recognition of their former status. On the other hand, African slaves were racially distinct, easily identifiable and in a foreign land. See, e.g., Wiecek, supra note 5, 1735-55.
60. Although restrictions on liberty within the same race existed, i.e. indentured servitude, Caucasians were never viewed in the same way as African slaves. African slavery was viewed as perpetual, established from birth, and the subjects of that slavery were viewed as property. Indentured Caucasians, although sacrificing a number of freedoms within their servitude, were always granted some degree of protection by the law as they were only serving in a temporary role. See Fisher, supra note 53, at 1051-52.
was in full force. The justifications for slavery were rooted in religion, culture and science. The Bible provided Noah’s “Curse of Ham.” To punish Ham, Noah cast Canann, the son of Ham, out of his land and cursed him: “a servant of servants shall he be unto his brothers.” Although neither the Bible nor Christian tradition identified the race of Ham or Canann, Jewish tradition identified Ham as the father of the black African race.

Religion marginalized the status of Africans in other ways as well. To the English, and later the Americans, the people of Africa were heathens. African spiritualism and earth-centered totemism were incomprehensible to the English whose minds were bound by their Christian theology. Heathenism did more than reinforce the difference between Africans and English, it suggested that Africans were “depraved, defective, and something other than human.”

African culture was also a source used to justify this subordinate status. African dress, or lack thereof, was a marked contrast to the conservative English attire. African housing—mud wattles and palm thatch—was different and viewed as inferior. The English found African marriage and family customs alien to their own understanding of proper relationships, especially those embracing polygamy, polygyny, concubinage, matriarchy and clan customs. These African familial structures were not only a source of difference, they were seen as developing from both an untamed nature and a sexuality often categorized as animalistic.

Science likewise played its part in the justification of slavery. Carolus Linnaeus created the modern biological system of classification of plants and animals. Linnaeus’ classification system divided Homo Sapiens into six types based on physical characteristics and the color metaphor. This classification was used not only to reinforce the perception that Africans were different, it was also misinterpreted to feed into the much older concept of the Great Chain of Being. The organizational scheme of the Chain

61. See id. at 1751.
62. Genesis 9:25 (The story is extrapolated from the deluge legend in Genesis. It is said that one day Noah passed out drunk and naked. One of his sons, Ham, found Noah and ran and told two of his brothers about their father. The two brothers respectfully covered up their father. After Noah awoke and sobered up, he was furious over the lack of respect shown by Ham when he ran and told others about Noah’s condition.).
64. Wiecek, supra note 5, at 1731.
65. See id. at 1732.
66. See id.
67. See id.
68. The characterization of African sexuality as animalistic places Africans lower on the evolutionary chain and reinforces the difference or otherness of Africans from the English norm. See Fisher, supra note 53, at 1063.
69. See Wiecek, supra note 5, at 1733.
70. See id.
was seen as an uninterrupted progression upward. Linnaeus' unranked classification became hierarchical when his ideas were merged into the Chain.  

The lowest human type, the African Hottentot, was placed just above the highest non-human, presumably a simian, and the highest human type, the European male, was just below the angelic realm. Thus racism, and consequently slavery, was now supported by scientific rhetoric.

An outgrowth of this scientific argument was the concept that an African had no mind, or lacked the "will" to truly be a person. Slaves were born "weak in body and mind"—in essence nature had created them for slavery. These were not just lay justifications, but arguments relied upon by the legal system. In Creswell's Executor v. Walker, the Alabama Supreme Court declared that a slave "has no legal mind, no will which the law can recognize."

THE TRANSITION OF SLAVES FROM PROPERTY TO PEOPLE

The Thirteenth Amendment was an outgrowth of the Civil War, which was, in many ways, a struggle over ideals. The Thirteenth Amendment marks the official end of slavery in this country. It also begins the transformation for a whole class of living beings from being defined as "property" to gaining recognition as "people."

The principles fought over in the Civil War were for some Americans the very same as those disputed in the American Revolution. As the Declaration of Independence set out: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." Foreigners were among the first to focus on the inherent contradiction between the ideals espoused in the Declaration of Independence and the continuation of slavery. As illustrated below, some of the Northerners of the new nation agreed and understood "all men" to include slaves.

The Massachusetts Constitution of 1780 echoed the above sentiments

71. See id. at 11-12 (explaining the Great Chain of Being).
72. See id.
75. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.
76. See Finkleman, supra note 73, at 1017.
77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
78. Finkleman, supra note 73, at 1019 (For example, "the English Tory Samuel Johnson was known to have asked, 'How is it that we hear the loudest yelps for liberty among the drivers of negroes?'"). Id.
of liberty and equality.\textsuperscript{79} In fact, the Supreme Court of Massachusetts held that these words, in light of the Revolution, ended slavery.\textsuperscript{80} The Court could find no justification for denying slaves the “natural rights of mankind” and held that we all share “that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast.”\textsuperscript{81}

The Pennsylvania legislature reflected a similar perspective of Revolutionary ideology and rhetoric.\textsuperscript{82} The passage of the Pennsylvania Gradual Abolition Act of 1780 spelled out the Pennsylvania legislatures’ recognition of the rights common to all individuals. “Negro and Mulatto slaves . . . [could no longer be denied] the common blessings that they were by nature entitled to.”\textsuperscript{83} The perspectives of both Massachusetts and Pennsylvania show the recognition of the similarity between slaves and the rest of their society. The Virginia Supreme Court also expressed its concerns by the freeing of a family of mixed racial ancestry because they “lacked any visible features of Negroes.”\textsuperscript{84} This breakdown in the concept of “other” eroded the foundation upon which differential treatment was based.

The visible distinction of racial difference helped to perpetuate slavery. Race provided a justification for the inapplicability of the Declaration of Independence. As one Louisiana slave holder put it, all men were created “free and equal as the Declaration of Independence holds they are . . . But all men, niggers, and monkeys aint [sic].”\textsuperscript{85}

Although the thirteen original colonies were all slave holding, by the Nineteenth century slavery was a geographically sectional institution. Arguably, the regions which had moved beyond economic dependence on rural agricultural labor recognized rights for Blacks and outlawed the practice of slavery. As the power and influence of the North grew, conflict ensued, followed by the Civil War, the Thirteenth Amendment and the end of slavery.

\textsuperscript{79} “All men are born free and equal, and have certain natural and inalienable rights, among which may be reckoned the right of defending their lives and liberties; that of acquiring, possessing and protecting property, and in fine of seeking and obtaining their safety and happiness.” \textit{Id.} at 1017.

\textsuperscript{80} See Commonwealth v. Jennison. The text of this unreported 1783 Massachusetts case is reprinted in \textsc{Paul Finkelman, The Law and Freedom of Bondage} 36 (1986).

\textsuperscript{81} Finkelman, \textit{supra} note 73, at 1017.

\textsuperscript{82} See \textit{id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 1020.

\textsuperscript{85} \textit{Id.} (quoting \textsc{James Oakes, The Ruling Race: A History of American Slaveholders} 143 (1982)).
WOMEN AND THE SOCIAL RECLASSIFICATION OF MARRIAGE

As with slaves, the subjugation of women was based on the classification of living beings as property in order to facilitate domination and to reinforce male power structures. However, the property status of women differed from that of slaves. Slaves had no legal existence outside of their classification as property. Women, on the other hand, only became property upon marriage, when “the very being or legal existence of the woman [was] suspended . . . or at least incorporated and consolidated into that of the husband.” The following discussion addresses only this particular form of control. Although women’s “property” status under marriage, or coverture, is only one part of the historical domination of women and cannot be looked at in a vacuum, the following discussion focuses on this classification for its symbolic and legal value.

The role of women in American society has traditionally been in the home. Since colonial days, social customs and legal rules were used to perpetuate this structure. Women were given responsibility for maintaining the house and all its domestic affairs. Social institutions such as marriage foreclosed women’s ability to do anything outside of the home. Following English common law tradition, upon marriage women lost their ability to sue, to own property and in general to gain any recognition in the eyes of the law.

In the words of a colonial woman, “marriage is a kind of preferment; and . . . to be able to keep their husband’s house, and render his situation comfortable, is the end of her being.”

The justifications for women’s subordinate position run parallel to the justifications for slavery. Religious, cultural and scientific arguments were relied upon to support the subordination of women. In Genesis, God himself is said to have declared to women that “your desire shall be for your husband, and he shall rule over you.” Social customs became self-fulfilling prophecies. The traditional role of women working in the home fed on itself so that “homemaker” was no longer a role but the “natural” place for women. As women came to be relegated to the “private” sphere of the home, men in contrast dominated the “public” sphere of government.

86. Slave women occupied an even lower tier in the scheme of things. The property status of a slave trumped everything. Masters had no obligation to recognize marriage and marriages were often broken up as a form of control, punishment or even economic convenience.
87. LANGLEY & FOX, supra note 6, at 7. See also Brawner v. Brawner, 327 S.W.2d 808, 811 (Missouri, 1959).
88. See LANGLEY & FOX, supra note 6, at 7.
89. See id.
90. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1899).
91. LANGLEY & FOX, supra note 6, at 69.
trade, business and law. This separate sphere ideology rationalized the exclusion of women from political and economic self-rule.

In addition, biological difference played into and reinforced these stereotypes. Women, the physically weaker sex, were seen as delicate and less rational, therefore unable to handle the rights reserved for men. The most pervasive scientific justification for this attitude came from defining (white, upper-class) men as the embodiment of a "fully human being." Once white males were set up as the standard, then everyone else was different. Consequently, women as "different" (other) were relegated to a subordinate position in society.

THE TRANSITION OF MARRIED WOMEN FROM PROPERTY TO PEOPLE

The end of classification as property was less of a watershed for women than for slaves. Still, although more of a gradual switch, it was no less important. During the last half of the Nineteenth century, some states began passing Married Women’s Property Acts. These acts redefined the legal position of women within a marriage by recognizing women’s rights as individuals within marriage. In other states, the laws of marriage were rejected and some couples even exchanged feminist wedding vows that redefined the marriage relationship and specifically condemned the traditional laws. Women signed petitions to pressure states to amend their constitutions to include the rights of women.

At this time significant social change was also taking place in other areas of women’s lives. The first women’s college was established in

94. See id.
95. See LANGLEY & FOX, supra note 6, at 14.
96. See id.
97. See id.
98. See id. at 80.
99. See id. at 108. An excerpt of the 1855 marriage vows of Elizabeth Stone and Henry Blackwell is reprinted below:

We believe that personal independence and equal human rights can never be forfeited, except for crime; that marriage should be an equal and permanent partnership, and so recognized by law; that until it is so recognized, married partners should provide against the radical injustice of present laws, by every means in their powers. . . . We believe that where domestic difficulties arise, no appeals should be made to legal tribunals under existing laws, but that all difficulties should be submitted to the equitable adjustment or arbitrators mutually chosen. Thus reverencing law, we enter our protest against rules and customs which are unworthy of the name, since they violate justice, the essence of law.

Id.
100. See id. at 80.
1837. The first woman was admitted to medical school in 1847. The first National Women's Rights Convention was held in 1850. Hence, the end of the Nineteenth century saw women working increasingly outside of the home.

THE MEETING OF SLAVES, MARRIED WOMEN AND NON-HUMAN ANIMALS

The shift from "property" to "people" is but the first step in the recognition of legal rights. The discussion here does not meant to suggest that the affected groups of American slavery or marriage are examples of groups that have successfully achieved equality within our society. Rather, both groups were selected as examples precisely because of their continuing struggle for social equality and the light that this evolution can shed on the relationship and interconnectedness of different forms of oppression. This analysis examines how that struggle began and how the first recognition of their rights occurred with their change in legal status.

Underlying the shift from "property" to "people" is a major change in the way society views the groups who are objectified. A major part of the story behind this transition is the deconstruction of the concept of "other." The justifications for the property status of slaves and women were all reinforcements of the "otherness" of that class of people. Slaves were a different skin color than those in power. Slaves were also seen as primitive, heathenistic, animalistic and intellectually inferior. Women were a different sex than those in power. Women were also seen as weaker, less rational, more emotional and intellectually unable to handle the realities of the public sphere.

The social, political and scientific deconstruction of these differences was the predecessor in the shift of the legal status of both slaves and married women. By including slaves in their understanding of "men" in the Declaration of Independence, the Massachusetts and Pennsylvania colonies were able to look past cultural and religious difference to the logical similarities. Likewise, women's status within marriage shifted after the success of female individuals in the traditionally male public sphere. The creation of the first women's college, the graduation of the first women from medical school and increasing numbers of women working outside the home all preceded the recognition of women's rights within a marriage. These moves away from the concept of "other" forced society to question the foundation upon which the institutions of slavery and coverture in marriage were built. As these examples illustrate, without support, it is

101. See id. at xxxi.
102. See id.
103. See id.
104. See id. at 87.
only a matter of time before a repressive structure collapses.

The institution of animal persecution is founded on the same type of socially, politically and scientifically unstable ground under which slaves and women were oppressed. Non-human animals are, obviously, a different species. The social construct of "species" is but the creation of difference, the reinforcing of "other." To what point in the ancestral evolution of humans should our circle of moral concern extend? If our closest evolutionary predecessor existed today, would we extend rights to her or him? There is no scientific rationale that provides humans with the distinct and superior position in nature that they have assumed. As stated earlier, non-human animals use tools, communicate with language, display rational thought and even exhibit signs of altruism. Non-human animals express emotions and develop their own relationships and cultures.

In addition, social and political evolution cannot be taken out of its economic setting. The United States experienced a considerable amount of economic change during the Nineteenth century. The ultimate rationale behind the classification of both slaves and women as property was in the economic benefit that it provided. Pre-Civil War agriculture was extremely labor intensive. The Industrial Revolution and the creation of machines that improved the efficiency of agriculture eased the demand for unskilled agricultural labor. This technological change was related to the undermining of the economic dependence on slaves to harvest agricultural crops. Similarly, the Nineteenth century brought increasing numbers of women outside of the home for employment. This exodus of women from the home altered financial dynamics within the home. Women were no longer solely financially dependent on husbands. Hence, the climate of economic change laid the groundwork for social, political and legal change.

The economic interests implicated in the status of non-human animals as property are enormous. In this country alone, billions of animals are slaughtered each year for human consumption. Yet, the true economic expense of the animal industry is not borne by business. The economic pressures for social evolution are being artificially staved off. For example, government subsidization of animal agriculture defrays its true cost. Further, the environmental impact of pollution from factory farms is not

105. For a discussion of animal sentience see REGAN, supra note 20, at 3-33. See also ROBERT GARNER, ANIMALS, POLITICS, AND MORALITY 11-21 (1993).
106. See REGAN, supra note 20, at 3-33. See also GARNER, supra note 105, at 11-21.
107. See REGAN, supra note 20, at 3-33. See also GARNER, supra note 105, at 11-21.
regulated. If animal agriculture were faced with economic reality, forced to bear its own costs without government subsidization and responsibility for its environmental impact, its days would surely be numbered.

MOVING FORWARD

Society must change dramatically before the recognition of the rights of non-human animals can occur. Just as in the cases of slavery and coverture, the artificial socially created differences assigned to non-human animals must be deconstructed. Challenge to these social constructs can take shape within the legal discourse in at least three ways: recognition of the social value of non-human animals through tort litigation, recognition in statutory language of non-human animals' self-interest in their own lives and breaking down the species barrier by challenging and restructuring standing doctrines.

One way to recognize and establish the social value of non-human animals is through loss of companionship tort litigation for companion animals. Tort law plays a normative role in our society. Tort law both reflects and shapes the values of society. Increasingly, courts have been willing to recognize valuation of companion animals above their fair market value. This increased valuation is a recognition of a companion animal's worth beyond mere property status. The recognition of this value achieves two ends: first, it acknowledges the social significance of human and non-human relationships. Second, it questions the status of non-human animals as property. Consequently, pursuit of the recognition of loss of companionship under tort law can drive the legal discourse forward.

The recognition of non-human animals' interest in their own lives can be accentuated by inclusion of their interest in statutory language. Statutes are enacted to regulate the use of non-human animals. Although most statutes pertaining to non-human animals purport to protect them, the statutes in fact do little to provide this safety. If language recognizing the self-interest of animals was inserted, there would be less room for compromise in the interpretation of the statutes, as well as more room to argue for expansion of animal rights.

Finally, the most significant step in the direction of rights for the non-human animal can be made by expanding the standing doctrine to allow the rights of non-human animals to be litigated in their own interest. Standing

111. See id.
112. See id.
is a prerequisite for the enforcement of rights. Currently, our legal system limits use of the courts to natural persons and other legally recognized entities such as corporations and ships. However, standing for a grove of trees has been recognized by a Supreme Court Justice. Likewise, non-human animals, ecosystems and other non-traditional parties have been named in suits, but each has had at least one real person named as a co-party. In order to move forward, we must establish standing for an animal to sue in her or his own right. Our closest living relatives, chimpanzees, share 98.4% of our genetic material. Chimpanzees are one of science’s animals of choice for vivisection precisely because of this degree of similarity. If chimpanzees are scientifically similar enough to appear as our proxy in the laboratory, what makes them so different that they should be barred from the court?

The above suggestions fit very closely into the general categories of justification for the oppression of animals. Recognizing loss of companionship for domestic animals tugs at our notions of social interaction and emotional dependence. Inclusion of statutory language recognizing the interests of animals goes exactly to the heart of what our morals comprise. Breaking down the species barrier questions the scientific validity of where we draw the outer edge of our circle of concern.

CONCLUSION

Classifying beings as property is a powerful tool of oppression used to quell animal rights today. However, just as slaves and married women were able to overcome insurmountable odds and achieve freedom from the property status, non-human animals stand today at that brink, awaiting liberation. Although the law does not strictly dictate norms to society, it is an integral and powerful part of it. Advocating change within the legal system is an effective means of pushing forward social evolution toward the cessation of oppression in all of its forms.

113. See FRANCIONE, supra note 3, at 67.