

2-2021

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Recommended Citation

Karen Bradshaw, Humans as Animals-Pluralizing Humans, 2021 Utah L. Rev 185 (2021). <https://doi.org/10.26054/0D-4TQQ-35C7>

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HUMANS AS ANIMALS

Karen Bradshaw*

Abstract

Species-based inequality is embedded in our institutions of law, government, and property. Legal distinctions between people and animals drive biodiversity loss. Recent environmental movements—including the rights of nature, animal rights, and wildlife property ownership—seek to lessen the gap in law’s unequal treatment of humans and other living things. Despite growing popular support for such reforms, legal scholars have yet to directly grapple with the mindset underlying the legal status quo.

This Article identifies and challenges institutionalized speciesism in law. It critically examines the legal treatment of non-human animals. It also presents an alternative legal worldview—one informed by scientific, cultural, and religious inputs. Current legal discussions operate in terms of “humans and animals”; such conceptions should shift towards a conception of “humans as animals.” Laws do not merely govern human relationships with one another; they also govern human relationships with the broader natural world—which is itself alive and filled with other sentient beings.

Human-created legal institutions are artificially limited in scope to human concerns. Such narrowness conflicts with biological reality, in which we exist within a broader natural context. This creates a fundamental mismatch between our too-narrow institutions and the real world, a world in which humankind lives in constant relationship with all other living things. Anthropocentric institutions artificially stripped of biological context unwittingly drive widespread devastation by systemically failing to account for non-human interests. Until humans broaden our institutions to reflect biological reality, we are doomed to continue decimating the world at ever-increasing rates. Only radically reforming institutions blind to other species will end this cycle, and thus, paradoxically, prevent humankind from indirectly, unintentionally destroying ourselves by destroying the environment upon which we depend.

Law must begin to forthrightly engage questions of equality and distribution between humans and other living things. Our fate is

* © 2021 Karen Bradshaw. Professor of Law and Mary Sigler Fellow, Sandra Day O’Connor College of Law, Arizona State University. I am grateful for the excellent librarian assistance that Beth DiFelice, Andrea Gass, and Sean Harrington provided for this Article. This Article conforms with the Utah Law Review equitable citation rule, which includes the names of all authors in every citation. This Article is dedicated to Tara Welker.

inexorably intertwined with the fate of other living things. To save ourselves requires “saving” the natural world. We must apply the talents of our species—law among them—in a manner better aligned with reality. Shifting to an understanding of humans as animals is not a merely linguistic or philosophical move—it is the linchpin of an emerging conception of law harmonized with the natural world.

INTRODUCTION

When I was six years old, I heard the steely click of a gun’s safety coming off, followed by a boom. I watched my father’s flannel-clad shoulder recoil. I saw a flash of beige-tan buckskin in the woods, heard the bushes shake as the lurching deer took its final leap. My father, crouched and low, raced towards where the deer lay twitching. I watched him artfully and slowly slit the deer from groin to throat. Blade through flesh made a dull, heavy noise. His fingers reached into either side of the slit, grasped, and pulled. With the body cavity open, he sifted through the organs, scooping them out and throwing them on the ground, until he found the heart.

“Do you want to touch it?” he asked. I did not. But I knew what was expected of me. I knelt beside the open body of the deer. When my fingers touched the dark, trembling burgundy membrane, I instinctively recoiled. My father crouched behind me. He leaned heavily across my back, grabbed my hand, and forced it back on to the sticky heart. “Feel this,” he said. “This is a life ending.” His large hand pressed my small one into the quivering heart until the gentle flickering stopped.

I have seen deer fall countless times, watching from the vantage of a dusty pick-up truck. Growing up in rural Northern California, I spent the bulk of my childhood in the woods. There, I came to know the rhythm of the seasons. I watched bears with their cubs, grouse, ducks in the river. Nature imprinted on to me; it embedded in me. I instinctively know the interconnectedness of living things, geographical features, history, and change within a natural setting. Until recently, I thought everyone did. It turns out that belief was naïve.

This Article explores how humans separate from, and connect themselves to, other living things through law. I write this Article as the grateful recipient of the Wallace Stegner Young Scholar Award at the University of Utah’s S.J. Quinney College of Law. In tribute to Stegner’s use of stories to highlight environmental issues, I have incorporated personal narrative in this Article to highlight how personal experience shapes how each of us engages with wildlife and the natural world. Legal thinkers individually telling our stories about nature and place may be the best way—perhaps the only way—to change the larger stories we tell about legal institutions and the natural world.

Sharing my experiences serves as an invitation for readers to reflect upon their relationships with nature, animals, and wildlife. When one starts talking about animal law, some people tune out, assuming that they will disagree. But no normative position, political affiliation, or degree of expertise has a monopoly on

nature.¹ My father is a hunter; I am an environmental law professor. There exists middle ground between us, lessons each of us can teach and learn. So too is there middle ground between the many polarized positions and pieces, in-between spaces that must be found and fostered for the sake of our mutual wellbeing. Wildlife is universal.

One of the most polarizing things about biodiversity law is the fact-based question of whether it is a problem. People who live in areas abundant with wildlife may be skeptical that it is diminishing based on personal observation. People who live in areas with little wildlife may no longer care about its continued existence since they are living without it. Skepticism and apathy threaten not only wildlife but also continued human existence, which is intertwined with biodiversity.²

We all have a story; our stories influence how we approach these topics. Although animal law is deeply polarized, conserving wildlife is less so. Unexpected bipartisan, cross-cultural, pan-religious themes emphasize the universally important nature of having a robust natural world. Unfortunately, science tells us that robustness is quickly shrinking.

Once, my hand held the still-beating heart of a deer. The rhythm weakened, slowed, stopped. Today, each of us holds in our hand the heart of the natural world. We live in a moment at which the pulse is weakening. Do we feel it? Are we poignantly, painfully aware of the death happening all around us? This is the hidden crisis of biodiversity loss—the invisible, largely imperceptible, loss of non-human life that portends a much larger, more devastating loss—one from which Earth will recover but humankind may not.

I. DISAPPEARING WILDLIFE

In the five years since I began writing on biodiversity law, I have read at least one story about animals each day—stories in the most literal sense, as these are

¹ Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 536 (2000) (“[A]nimal rights have no intrinsic political valence. They are as compatible with right-wing as with left-wing views.”).

² EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 133 (1992) (“So important are insects and other land-dwelling arthropods that if all were to disappear, humanity probably could not last more than a few months.”); Jonathan Watts, *Stop Biodiversity Loss or We Could Face Our Own Extinction, Warns UN*, GUARDIAN (Nov. 3, 2018, 02:00 EDT), <http://www.unitedearthfund.org/assets/8stop-biodiversity-loss-or-we-could-face-our-own-extinction%2C-warns-un--environment--the-guardian.pdf> [https://perma.cc/U93R-4LCV] (“The world must thrash out a new deal for nature in the next two years or humanity could be the first species to document our own extinction. . .”); Sandra Diaz, Joseph Fargione, F. Stuart Chapin, & David Tilman, *Biodiversity Loss Threatens Human Well-Being*, 4 PLOS BIOLOGY 1300, 1300 (2006) (“[B]iodiversity also influences human well-being, including the access to water and basic materials for a satisfactory life, and security in the face of environmental change, through its effects on the ecosystem processes that lie at the core of the Earth’s most vital life support systems.”).

children's books. My daughter is five. We read when she wakes up and when she goes to sleep. A self-described zoologist, she ensures that a shocking number of books on her shelf are about animals. Animal-themed stories line so many children's bookshelves.

As I toggled between studies about wildlife and children's stories about animals, I realized that what I was reading—teaching—my child was essentially a lie. Children's books tend to take for granted that animals have always been here and will always be here. Mice and bears and dogs have capricious adventures. Tigers live in the wild. Yet, the natural reality is strikingly different and becoming more so. More recent children's books about animals tend to take a different, more ominous tone.

If Sharks Disappeared, by Lily Williams, contains a story about ecosystem collapse, which should be assigned reading for every adult in America.³ On pages filled with whimsical illustrations, Williams centers on the question in its title: What would happen to the world if sharks disappeared? Williams explains that sharks are apex predators at the top of their ecosystem. If sharks disappeared, the ocean would fall out of balance. Sea lions would overfish, causing the fish, and then the sea lions themselves to die. Plankton would grow out of control, making the water uninhabitable, which would kill the prey of land animals and birds. This pattern of cause and effect, called a “trophic cascade,” could spread “like a wave across countries and continents until animals around the globe were affected, from bees to birds to bears, eventually to us.”⁴

All species depend on one another to survive by keeping our planet's ecosystems in balance. Today's children are learning lessons that their parents may not know, but desperately need to. For adults, too, alarm bells ringing about biodiversity loss are growing louder.

In 2015, Elizabeth Kolbert's bestselling book *The Sixth Extinction: An Unnatural History* described human effects on the planet.⁵ Kolbert's compelling narrative introduced a mainstream American audience to the catastrophic, looming biodiversity loss caused by humankind. Kolbert meticulously interwove the tales of thirteen species with a sweeping analysis of the historical and present state of scientific thinking; she brought to the American public conversations previously confined to discussions among scientists and academics. In the four years since Kolbert's book, the situation has worsened.⁶ Concerned commentators ask: at what

³ LILY WILLIAMS, *IF SHARKS DISAPPEARED* (2017).

⁴ *Id.* at 20–21.

⁵ See generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

⁶ SANDRA DÍAZ, JOSEF SETTELE, EDUARDO BRONDÍZIO, HIEN T. NGO, MAXIMILIEN GUÈZE, JOHN AGARD, ALMUT ARNETH, PATRICIA BALVANERA, KATE BRAUMAN, STUART BUTCHART, KAI CHAN, LUCAS GARIBALDI, KAZUHITO ICHII, JIANGUO LIU, SUNEETHA MAZHENCHERY SUBRAMANIAN, GUY MIDGLEY, PATRICIA MILOSLAVICH, ZSOLT MOLNÁR, DAVID OBURA, ALEXANDER PFAFF, STEPHEN POLASKY, ANDY PURVIS, JONA RAZZAQUE, BELINDA REYERS, RINKU ROY CHOWDHURY, YUNNE-JAI SHIN, INGRID VISSEREN-

point is it too much?⁷ How many species can be lost before trophic collapse occurs, taking out food chains or ecosystems?

Absent conscientious and coordinated action, many species will become extinct.⁸ To my mind, there is no difference between animal suffering directly caused by human hands (e.g., an abused pet or a lab animal) and the less-direct, but still knowing, infliction of suffering through development (e.g., death by starvation or being hit by a car, both of which are statistically inevitable outcomes given land development patterns and the continued foreclosure of natural habitat). In each case, human action directly causes animal suffering. If we are culpable for our treatment of captive animals, then we are also responsible for undertaking actions that we know will lead to the inevitable suffering of wild animals. This is not a normative claim about the need for, or degree, of suffering which we might appropriately inflict, which I believe is more than none since humans are part of the ecosystem. Instead, I want to show that a distinction between harming captive and non-captive animals based upon the directness of harm is insufficient, given the knowledge that harm will be the inevitable outcome of human activity in either case.

Habitat loss is endemic and worsening.⁹ By some accounts, only a massive set-aside of land as habitat for animals can prevent widespread extinctions.¹⁰ Recently, famed biologist E.O. Wilson set forth a proposal to set aside half of the land on Earth for animals to avoid catastrophic species loss.¹¹ Wilson, a prominent advocate for nature, notes: “Unless humanity learns a great deal more about global biodiversity and moves quickly to protect it, we will soon lose most of the species composing life on Earth.”¹²

HAMAKERS, KATHERINE WILLIS, & CYNTHIA ZAYAS, SUMMARY FOR POLICYMAKERS OF THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES—UNEDITED ADVANCE VERSION 13 (2019), <https://assets.documentcloud.org/documents/5989433/IPBES-Global-Assessment-Summary-for-Policymakers.pdf> [<https://perma.cc/VX8Z-99Z7>].

⁷ Gerardo Ceballos, Paul Ehrlich, & Peter Raven, *Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction*, 117 PROC. NAT’L ACAD. SCI. 13596, 13596 (2020); Dirk Sanders, Elisa Thébault, Rachel Kehoe, & F. J. Frank van Veen, *Trophic Redundancy Reduces Vulnerability to Extinction Cascades*, 115 PROC. NAT’L ACAD. SCI. 2419, 2419 (2018); Jane Memmott, Nickolas M. Waser, & Mary V. Price, *Tolerance of Pollination Networks to Species Extinctions*, 271 PROC. ROYAL SOC. LONDON 2605, 2608–10 (2004); Andrew Dobson, David Lodge, Jackie Alder, Graeme S. Cumming, Juan Keymer, Jacquie McGlade, Hal Mooney, James A. Rusak, Osvaldo Sala, Volkmar Wolters, Diana Wall, Rachel Winfree, & Marguerite A. Xenopoulos, *Habitat Loss, Trophic Collapse, and the Decline of Ecosystem Services*, 87 ECOLOGY 1915, 1915–16 (2006); Shahid Naeem, Robin Chazdon, J. Emmett Duffy, Case Prager, & Boris Worm, *Biodiversity and Human Well-Being: An Essential Link for Sustainable Development*, 283 PROC. ROYAL SOC. LONDON, 7–8 (2016).

⁸ KOLBERT, *supra* note 5.

⁹ EDWARD O. WILSON, *HALF EARTH: OUR PLANET’S FIGHT FOR LIFE* 14–17 (2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 3.

Wilson's proposal is partially a response to the "new conservation" movement, which takes a pessimistic position on preserving nature as it has existed in the past. New conservationists suggest that in our capitalist, technologically driven culture, human-driven activity will—and should—entirely replace wilderness, which is, in fact, already gone. Wilson responds by noting that "no species . . . lives alone"¹³ and suggests that "[h]uman beings are not exempt from the iron law of species interdependency."¹⁴

A World Wildlife Fund assessment shows an average decline of sixty percent in the population of vertebrates globally between 1970 and 2019. Only four percent of Earth's mammals are wildlife as measured by biomass or weight; humans and human-owned livestock make up ninety-six percent.¹⁵ A May 2019 report from the United Nations suggests that one in six wildlife species may be endangered by 2050.¹⁶ More tigers live in backyards in the United States than in the wild.¹⁷ Thirty percent of the non-ice surface is used to raise livestock.¹⁸

Ecosystems are like the game of Jenga—a pile of seemingly separate pieces stacked together. Nature is resilient; you can remove several pieces and the ecosystem stands. Eventually, however, if you remove enough pieces, the entire thing collapses. We have removed so many pieces, forgetting that we exist only as one piece among others. It is impossible to predict which piece will cause the collapse. It is certain, however, that ecosystems collapse when enough pieces are removed, just as Lily William teaches that removing sharks from the ocean will cause a trophic collapse.

The fate of wildlife is the fate of humanity and nature more broadly—each a nested part of the interconnected whole. As our society advances in some ways, we are also losing the fundamental understanding that the fate of humankind and nature are linked.¹⁹ Amidst scientific and technological brilliance, people are increasingly

¹³ *Id.* at 106.

¹⁴ *Id.* at 16.

¹⁵ Olivia Rosane, *Humans and Big Ag Livestock Now Account for 96 Percent of Mammal Biomass*, ECOWATCH (May 23, 2018, 12:37 PM EST), <https://www.ecowatch.com/biomass-humans-animals-2571413930.html> [<https://perma.cc/BE2G-YYZW>].

¹⁶ United Nations Environment Programme, *Global Environment Outlook GEO-6: Healthy Planet, Healthy People*, CAMBRIDGE U. PRESS 152 (2019), <https://content.yudu.com/web/2y3n2/0A2y3n3/GEO6/flash/resources/index.htm?refUrl=https%253A%252F%252Fwww.un.org%252Fen%252Fclimatechange%252Freports.shtml>. [<https://perma.cc/AQT8-NVJF>].

¹⁷ Philip Hoare, *More Tigers Live in the US Back Yards than in the Wild. Is this a Catastrophe?*, GUARDIAN (June 20, 2018, 02:00 EDT), <https://www.theguardian.com/environment/shortcuts/2018/jun/20/more-tigers-live-in-us-back-yards-than-in-the-wild-is-this-a-catastrophe> [<https://perma.cc/QZ8V-QDL9>].

¹⁸ Bryan Walsh, *The Triple Whopper Environmental Impact of Global Meat Production*, TIME (Dec. 16, 2013), <https://science.time.com/2013/12/16/the-triple-whopper-environmental-impact-of-global-meat-production/> [<https://perma.cc/5S43-B3ZA>].

¹⁹ Although I do not personally believe that continued human existence is the primary rationale for preserving biodiversity, I recognize that biodiversity in the service of

ignorant about humankind's role in planetary dynamics. Across time and history, most people spent their lives immersed in nature, learning its fundamental truths through daily interactions and observations. Today, spending time outdoors is a rarity, increasingly available only to elites and dwindling rural populations. We are slowly becoming a society of natural illiterates.

Despite this, I believe every living thing understands their relationship with nature—we are reminded each time we eat, breathe, and drink. However sophisticated the human mind, we exist in shared space with every other living thing. We breathe the air in which birds fly and drink the water in which fish swim. However we pollute our air and water, however much our eyes are fixed on screens, these truths remain.

If you go outside, close your eyes, and allow your mind to turn off, can you feel the interconnection with nature? I believe that everyone feels this connection at some level. It is embedded, engrained, biological, fundamental, and universal. In this connection rests the limiting principle of how much harm humans can do to nature. In this awareness, we see that the destruction of nature is the destruction of self. Natural systems tell us when we harm nature by making us physically feel the effects—poor health, hotter fires, rising seas. The more we ignore nature, the stronger the signals to restore the balance become.

II. DISTINGUISHING HUMANS AND ANIMALS

While presenting a paper about biodiversity, I had a public debate with a dear friend and mentor—a brilliant man. He began saying, “Humans and animals have . . .”

I cut him off. “That’s the fundamental problem,” I said with a smile. “You distinguished humans and animals. Humans are animals.”

“I know,” he said. “I know, but you know what I mean. If we made animals part of human . . .”

“You did it again,” I said.

“Yes,” he said, growing exasperated. “You know I am a universalist. You know that I understand we are all a part of a bigger whole. Anyone with a brain understands that. But what I am saying is with respect to law, to legal systems.” He proceeded to make an argument that depended on the separation of human and animal, which, moments before, he had acknowledged did not really exist.

anthropocentric purposes is an accepted, established legal argument that appeals to many. *See generally* *Gibbs v. Babbit*, 214 F.3d 483, 486 (4th Cir. 2000) for an example of this legal argument. The importance of seemingly inconsequential aspects of nature to continued human existence is poignant at the moment I am writing this Article, due to the COVID-19 pandemic. For example, the blood of horseshoe crabs is needed to test for the vaccines that scientists predict will save millions of lives. *See* James Gorman, *Tests for Coronavirus Vaccine Need this Ingredient: Horseshoe Crabs*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/science/coronavirus-vaccine-horseshoe-crabs.html> [<https://perma.cc/R257-VWAZ>].

And this is what we do. We know humans are animals. If pressed, we can readily acknowledge it. Then, we set that aside and operate as if it were not true. We operate within a legal fiction that we are not one of the same component parts in the larger whole. Religion, biology, and moral philosophy suggest this fiction is false or wrong, and, yet, it persists because it is politically expedient.

In my opinion, distinguishing humans from other animals is the central driver of biodiversity loss. Of course, humans are animals. We forget this, then claim to know it, but we do not reflect it in our laws. We neglect to account for animals' interests in the natural world. We forget to account for how maximizing our interests requires robust ecosystems. Amidst shiny technology, we are increasingly disconnected from our natural environment. But, in the words of Professor Robin Kundis Craig, "nature always wins in the end."²⁰ Regardless of technology, humans will breathe air, drink water, live, and die. So long as that is the case, we remain rooted in biology and thus reliant upon nature. The more we forget that we need nature, the more nature reminds us.

Many cultures and religious traditions emphasize the innate connection between humans and nature. Yet, our actions can fall out-of-step with careful accord with nature. How does this duality emerge?

A. Dehumanizing Animals

Professor Brené Brown teaches America about courage, vulnerability, shame, and empathy.²¹ Brown is a chaired professor who has translated her academic research into stories that inspire people to be more honest, bold, and authentic. In her most recent book, *Braving the Wilderness*, Brown talks about dehumanization.²² She summarizes the work of David Smith, noting that "it goes against our wiring as members of a social species to actually harm, kill, torture, or degrade other humans."²³ To treat other people badly, Brown explains, we must practice the dark art of "moral exclusion."²⁴ Brown notes animal comparisons of people, such as Nazis describing Jews as rats and Hutus calling Tutsis cockroaches.²⁵

²⁰ Professor Robin Kundis Craig was discussing the power of the ocean. *See also* ALAN WEISMAN, *THE WORLD WITHOUT US*, (Picador 2008).

²¹ *See* Dan Schawbel, *Brene Brown: How Vulnerability Can Make Our Lives Better*, FORBES (Apr. 21, 2013, 11:30AM EDT), <https://www.forbes.com/sites/danschawbel/2013/04/21/brene-brown-how-vulnerability-can-make-our-lives-better/#5229fec236c7> [<https://perma.cc/6Z9U-BSNF>].

²² BRENE BROWN, *BRAVING THE WILDERNESS: THE QUEST FOR TRUE BELONGING AND THE COURAGE TO STAND ALONE* 71–73 (2017).

²³ *Id.* at 71.

²⁴ *Id.* at 73.

²⁵ *Id.* In an important article on African American perspectives on environmental law, Shannon Joyce Prince provides a series of examples in which African Americans were treated or talked about as if they were equivalent to animals. She warns that equating humans and animals does not necessarily lead to increasing the prioritization of animals but can also

Of course, Brown is talking about how othering allows people to treat other people in terrible ways. She does not mention that the very root of dehumanization is grounded in our longstanding ability to treat animals as morally less than human, to inflict on them the harms, killing, torture, and degradation that we find reprehensible when it occurs to another human being. But, of course, this is the root of the word: the fallacy that humans are biologically distinct from animals in ways that matter.

Brown provides the useful exercise of degrees of connection as humanization. I borrow it here to include animals in our conception. It is easy to imagine family members, friends, and neighbors as close. You may feel similarly about your dog or cat. Outside that circle of known parties, there is a lesser connection with others: graduates of your university or residents of your state. I would add the speciesism here of domestic animals, livestock, and farm animals. You might take a great deal of satisfaction in knowing some majestic or cute animals exist in the world, regardless of whether you will see them. Giraffes, lions, panda bears, and dolphins generate such a connection. Outside of that, you can imagine wildlife generally—the lesser species. You might forget the kinds of animals people tend to dislike, such as rodents, reptiles, and insects. Surely, they do not come near your human core.

I have just described the process of dehumanism. Many people would likely be fine with someone killing a mouse, snake, or mosquito. Yet, some would risk their lives to save their dog or cat. The feelings and motivations behind what you categorize as more or less human-like can vary. Most people consider smart mammals as closest to us on that so-called tree of life. Unsurprisingly, these are the creatures who receive the greatest degree of protection. Because they are humanized, we can less easily justify harming them.

Part of the reason we do not start down the path of acknowledging that animals matter is because we think we know where that path leads, and it looks inconvenient. If I believe animals are the moral equivalent of humans, must I stop eating meat? Can I ethically eat a burger in a world where animals are the moral equivalent of humans? Swat a mosquito? And I believe it is this inquiry that creates the life-long, society-wide project of trying to distinguish human from animal. It is inconvenient to shift our worldview, so we continue to foolheartedly believe it because the costs of doing otherwise are too great. So great, we cannot wrap our heads around it.

There are real-world consequences to putting words and action behind what you believe. No choice is costless. Most people look at the potential consequences and weigh them as too great. The same fear of consequences stops us from acknowledging the similarity between human and animal. If we block it out, we do not have to face the frightening consequences of re-forming our industrial food systems or incurring great personal inconvenience to reshape our consumption patterns.

lead to dehumanizing marginalized groups of people. See Shannon Joyce Prince, *Green Is the New Black: African American Literature Informing Environmental Justice Law*, 32 J. ENVTL. L. & LITIG. 33, 67–68 (2016).

Truths that stand in opposition to our daily actions are daunting because they operate against the backdrop of everyday life. We have lives—jobs, children, families, parents, houses to clean. To not feel bad about ourselves, to maintain our worldview, it is easier not to acknowledge the inner knowing that humans are animals.

Why are we so opposed to acknowledging that humans and animals are more similar than different? The reason, I believe, circles back to Brown's work on dehumanization: if we treat someone as different than us, we can morally justify killing and torturing them. To think seriously about animals as beings with emotions and families, who experience the world as we do, creates a moral dilemma. It may push an individual to feel that social norms are wrong but abide by them anyway. We do this all the time: accepting default rules to which society collectively agreed in the past because rethinking the situation would take time away from our day-to-day life.

Charles Darwin's reticence to upset Victorian ideals is partially to blame for the West's persistent biological fallacy that humans are distinguishable from animals. The father of evolutionary biology, Darwin's theories about natural selection were anathema to mainstream Christian ideology of his time. Yet, for all of Darwin's willingness to engage in controversy, his desire for book sales seems to have embedded the fallacy of animals representing human thoughts.

In his third book, *The Expression of Emotions in Man and Animals*, Darwin showed uncharacteristic timidity when he argued that people and animals universally express certain states of mind using identical physical reactions.²⁶ Sprinkled among such observations, Darwin wove anecdotes about animals into his series. He framed these parallels as ways in which animals resembled humans, instead of humans resembling animals. In a 1998 review of the 1873 book, Eric Korn notes, "[t]he Victorian public was unsettled by evidence of animal traits in humans but delighted by anecdotes of human traits in animals."²⁷ Darwin's teachers discouraged scientific commentary on inborn differences, concerned it would form the basis for eugenics.

Later generations of scientists decried Darwin's mix of biology and anecdotes. They termed such conflation of human emotion and animal behavior as *anthropomorphism*, which means assigning human emotion and behavior to animals or other nonhuman beings, such as plants, or microbes. Anthropomorphism is said to "infect[]" fields and "misdirect[] research[.]"²⁸ For decades, biologists have refused to believe animals can feel, emote, socialize, and grieve, suggesting that such emotional reactions were simply humans imposing our experience on animals.

²⁶ CHARLES DARWIN, *THE EXPRESSION OF EMOTIONS IN MAN AND ANIMALS* 17–18 (1998).

²⁷ Eric Korn, *How Far Down the Dusky Bosom?*, 20 LONDON REV. BOOKS (1998), <https://www.lrb.co.uk/v20/n23/eric-korn/how-far-down-the-dusky-bosom> [<https://perma.cc/W6PH-B8L9>].

²⁸ Julian Davies, Abstract, *Anthropomorphism in Science*, EMBO REP. (2010).

Generations of humankind have asserted our collective superiority over animals using arbitrary, cherry-picked metrics. Mainstream thinking teaches that only humans feel pain, or talk, or can recognize ourselves in a mirror, or feel, or have community or governance. Yet, science is confirming what people with a more direct connection to nature have always known: these distinctions are arbitrary. Some birds recognize themselves in the mirror, prairie dogs talk, whales have culture, and elephants grieve.

Also, our metrics are suspect. We chose things we are good at as “mattering” for superiority. Along with other metrics of sophistication, humans would be inferior. Can you echolocate like a dolphin or a bat? Hold your breath like a whale? Forgive like a dog? Coordinate like a pack of lions? What if we accept that all living things have purpose in the greater whole, but that the skills are just different?

Only recently have scientists and other scholars begun to acknowledge that humans and animals are remarkably similar. Barbara J. King’s *How Animals Grieve. Personalities on the Plate: The Lives and Minds of Animals We Eat*, dismantled human-animal distinctions. Socially, human treatment of some animals has dramatically improved. In a generation, the norms surrounding the role of pets in families have dramatically shifted.²⁹ We spend billions of dollars on animals.³⁰ Many people feel safer in their relationship with their dog than they do their partner.³¹ Commentators love to observe that Americans are treating their pets like children, giving them gifts and throwing birthday parties.³²

We are humanizing our pets, accepting them into our circle of “ins” rather than others. In the process, we shift a moral stance on how they can be treated. And, to some extent, so too have the laws. In most places in the United States, it is illegal to beat, starve, or otherwise abuse a pet.³³ Abusers can be fined or imprisoned. In the past ten years, most states have enacted laws allowing pets to inherit money from

²⁹ See Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP NEWS (May 18, 2015), <http://www.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/3Y7N-GGB3>].

³⁰ See Tony McReynolds, *Americans Spent \$72 Billion on Their Pets in 2018*, AAHA (Mar. 27, 2019), <https://www.aaha.org/publications/newstat/articles/2019-03/americans-spent-72-billion-on-their-pets-in-2018/> [<https://perma.cc/TZ5K-UWVB>].

³¹ See Lisa Beck & Elizabeth A. Madresh, *Romantic Partners and Four-Legged Friends: An Extension of Attachment Theory to Relationships with Pets*, 21 ANTHROZOÖS 43, 52 (2008).

³² See *More than Ever, Pets Are Members of the Family*, HARRIS POLL (July 16, 2015), <https://theharrispoll.com/whether-furry-feathered-or-flippers-a-flapping-americans-continue-to-display-close-relationships-with-their-pets-2015-is-expected-to-continue-the-pet-industry-more-than-two-decades-strong/> [<https://perma.cc/K7BA-5LXF>].

³³ See, e.g., Penny Conly Ellison, *Enforcing the Animal Cruelty Laws Should Not Be a Charity Case*, 4 PENN. UNDERGRADUATE L.J. 1, 3 (2017).

their human owners.³⁴ Several pets have inherited millions from wealthy owners, which are managed for them by human trustees.³⁵ We treat our pets like humans. In the process of doing so—or perhaps as motivation for doing so—we make it unacceptable to harm, torture, or eliminate them.

In the same era, animal law has polarized. On the one hand, the American public is demanding heightened protections for animals.³⁶ Vegetarianism and ethical treatment of farm animals were once considered fringe positions; today, they are mainstream.³⁷ On the other hand, Senators Orrin Hatch and Mike Lee sponsored a bill to remove Endangered Species Act protections on animals that exist only within one state.³⁸ This would remove federal protections for over 1,000 of the nearly 1,500 endangered species, including many endangered animals.³⁹ Paradoxically, animals are at once more cared about, but also more at risk than ever before.

B. Worldviews About Humans and Animals

Journalist Ross Andersen recently reported that “alongside the human world, a whole universe of vivid animal experience” exists.⁴⁰ But, Andersen says, scientists cannot tell us how to grapple with this reality. He notes this is a philosophical

³⁴ Karen Bradshaw, *Animal Property Rights*, 89 UNIV. COLO. L. REV. 809, 828 (2018) (summarizing state statutes and the uniform trust code provisions allowing animals to inherit property from their human owners in trust).

³⁵ Brad Tuttle, *The 10 Richest Pets of All Time*, MONEY (Oct. 5, 2015), <https://money.com/richest-pets-all-time/> [<https://perma.cc/R5GF-FRKE>].

³⁶ See Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP NEWS, May 18, 2015, <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/7553-S3QR>] (noting that one third of Americans believe animals should “have the same rights and protections as people,” and nearly two-thirds believe animals “deserve some protection”); Justin F. Marceau, *Killing for Your Dog*, 83 GEO. WASH. L. REV. 943, 948 (2015) (noting a trend among judges and juries towards protecting people who commit criminal acts to protect or vindicate their pets).

³⁷ For example, PETER SINGER’S, ANIMAL LIBERATION (2015) has been reprinted in multiple editions. The first was published in 1975, the second in 1990, the third in 2002, the fourth in 2009, and the fifth in 2015.

³⁸ Native Species Protection Act, S. 1863, 115th Cong. (2017). The bill’s stated purpose is “[t]o clarify that noncommercial species found entirely within the borders of a single State are not in interstate commerce or subject to regulation under the Endangered Species Act of 1973 or any other provision of law enacted as an exercise of the power of Congress to regulate interstate commerce.” *Id.*

³⁹ Press Release, Ctr. for Biological Diversity, Senate Bill Aims to Strip Protections from Nearly 1,100 Endangered Species (Sept. 28, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/endangered-species-09-28-2017.php [<https://perma.cc/6SV4-U36X>].

⁴⁰ Ross Andersen, *A Journey into the Animal Mind*, ATLANTIC (Mar. 2019), <https://www.theatlantic.com/magazine/archive/2019/03/what-the-crow-knows/580726/> [<https://perma.cc/KN4F-EHKX>].

problem with which humans will struggle for a while. Andersen looks to Jainism, which is a three-thousand-year-old Indian religion that holds all souls are sacred regardless of species.⁴¹

Jains extend the concept of ahimsa—nonviolence—to animals, microbes, plants, micro-organisms, and things with the potential for life.⁴² Although Jains make up less than one percent of the population of India, they influenced Buddha and Gandhi.⁴³ Strict adherents to the religion do not eat root vegetables, splash in puddles, or drive, all to avoid disturbing other species. They live gently.

Buddhists take a similarly nonviolent approach. Traditional Buddhist teachings do not differentiate humans and animals and extend the same moral obligations to each. Westerners tend to believe that such ideas are a remote ideal, incompatible with modern daily life. But, Buddhist principles of animal welfare operate against a backdrop of reality.

Lama Gelong Kalsang Rinpoche describes that a former Dalai Lama prohibited the human consumption of meat but relaxed the ban during times of famine.⁴⁴ Today, many Buddhists eat meat. Lama Rinpoche does not see this as inherently problematic, equating the practice with the many ways in which humans live in a way that falls below the ideal. “You take on the karmic consequence when you eat meat,” he told me. “You do what you need to do in this life, but you understand what you are doing, that it has consequences.”⁴⁵

Lama Rinpoche understands people who eat meat to survive. However, he views buying prepackaged meat in grocery stores as morally problematic; people who distance themselves from the lives of animals lost for their sustenance do not fully grapple with the karmic consequences of their decisions.⁴⁶ In effect, they do not take conscious responsibility for the choice to eat meat; they are participating in the act of taking an animal’s life, but they are less inclined to appreciate the karmic significance of this act. The duality of animals as both valued like humans but also deemed edible exists in other cultures as well. The apparent conflict is resolved through respect of the animal as a sentient, spiritual being.

Many indigenous communities have treated animals as the moral equivalent of humans for generations, considering each a part of an interconnected whole.⁴⁷ Yet, this understanding does not preclude humans as active resource users within the natural system—killing and eating animals is accepted as a necessary part of life.

⁴¹ *See id.*

⁴² *See Ahimsa*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/ahimsa> [<https://perma.cc/Z8FY-FRHK>].

⁴³ Andersen, *supra* note 40.

⁴⁴ Interview with Gelong Kalsang Rinpoche, Lama, in Phoenix, Ariz. (Nov. 6, 2018).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ DIANA GILIO-WHITAKER, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE FROM COLONIZATION TO STANDING ROCK 27 (2019) (“In Indigenous worldviews, there is no separation between people and land, between people and other life forms, or between people and their ancient ancestors whose bones are infused in the land they inhabit and whose spirits permeate place.”).

Rather than not hunting, scholars describe Indigenous groups hunting with sanctity. Sarah Deer and Liz Murphy describe:

[H]unting is often laden with ceremonial requirements, which reflect deep respect and consideration for the animal's spirit. For example, the Lac du Flambeau Band of Lake Superior Chippewa Indians believes respect for a deer must be at the core of hunting. This respect is found in various hunting moral codes, including, but not limited to: (1) only shoot to kill; (2) only take meat that is needed; (3) give thanks (known as *miigwetchitaagoziwin*) to the deer for its life, and place tobacco (known as *semaa*) near the deer before and after the hunt as semblance of that gratitude; (4) only hunt when sober; and (5) conduct efficient and careful butchering, so as not to disrespect or waste the life the deer gave.

Another example of a tribe's hunting laws is those related to the Makah Indians' whaling traditions. Prior to the hunt, whalers will fast, ritually cleanse, pray, remain celibate, and abstain from drugs and alcohol. Additionally, when a whale is harpooned, it is sprinkled with eagle feathers to release its soul back to the sea. Again, the core of hunting for the Makah is respect for the whale and acknowledgement that the whale provides not only sustenance but also social identity.⁴⁸

In this way, the intergenerational traditions of some indigenous peoples resolve one of the most fundamental questions that arise around the treatment of animals: if we accept that animals are sentient, how can we continue to live on this planet, to eat meat? Societies across place and history have answered this question through the treatment of animals during their lives, how they are killed, and the rituals surrounding their consumption.

Traditions around the world link human wellbeing to the continued wellbeing of animals or plants, sometimes literally linking humans with plants or animals.⁴⁹ The Quran recognizes that humans are similar to, not better than, animals, as with the passage reading: "And there is no creature on [or within] the earth or bird that flies with its wings except [that they are] communities like you."⁵⁰

⁴⁸ Sarah Deer & Liz Murphy, "Animals May Take Pity on Us": Using Traditional Tribal Beliefs to Address Animal Abuse and Family Violence Within Tribal Nations, 43 MITCHELL HAMLIN L. REV. 703, 715 (2017).

⁴⁹ Prince, *supra* note 25 (providing several literary examples of African American characters being literally linked to trees, but warning against equating humans and animals given its historical and present potential to disadvantage marginalized people); TREVOR REED, ITAATAATAWI: HOPI SONG, INTELLECTUAL PROPERTY, AND SONIC SOVEREIGNTY IN AN ERA OF SETTLER-COLONIALISM 16 (2018) (describing a Hopi conception of corn as the children of humans).

⁵⁰ *The Qur'an* 6:38 (Saheeh International Version).

Some suggest that early Christians were vegetarian, citing red-letter biblical verse:

God said, “See, I have given you every plant yielding seed that is upon the face of all the earth, and every tree with seed in its fruit; you shall have them for food. And to every beast of the earth, and to every bird of the air, and to everything that creeps on the earth, everything that has the breath of life, I have given every green plant for food.” And it was so.⁵¹

Some modern Christian vegetarians cite this verse as indicative that God intended for plants, not animals, form the basis of the human diet.⁵²

Numerous biblical verses situate mankind as equal participants in sharing Earth’s resources, or animals as the source of wisdom about how humans should interact with nature:

- “For the fate of humans and the fate of animals is the same; as one dies, so dies the other. They all have the same breath, and humans have no advantage over the animals”⁵³
- “Even the stork in the heavens knows its times, and the turtledove, swallow, and crane observe the time of their coming.”⁵⁴
- “[W]ho teaches us more than the animals of the earth, and makes us wiser than the birds of the air?”⁵⁵
- “The righteous know the needs of their animals, but the mercy of the wicked is cruel.”⁵⁶
- “Go to the ant, you lazybones; consider its ways, and be wise. Without having any chief or officer or ruler, it prepares its food in summer and gathers its sustenance in harvest.”⁵⁷
- “But ask the animals, and they will teach you; the birds of the air, and they will tell you; ask the plants of the earth, and they will teach you; and the fish of the sea will declare to you.”⁵⁸

⁵¹ *Genesis* 1:29–30 (New Revised Standard Version).

⁵² See SAMANTHA JANE CALVERT, OURS IS THE FOOD THAT EDEN KNEW: THEMES IN THE THEOLOGY AND PRACTICE OF MODERN CHRISTIAN VEGETARIANS, IN *EATING AND BELIEVING: INTERDISCIPLINARY PERSPECTIVES ON VEGETARIANISM AND THEOLOGY* 124 (David Grunett & Rachel Muers, eds., 2012).

⁵³ *Ecclesiastes* 3:19 (New Revised Standard Version).

⁵⁴ *Jeremiah* 8:7 (New Revised Standard Version).

⁵⁵ *Job* 35:11 (New Revised Standard Version).

⁵⁶ *Proverbs* 12:10 (New Revised Standard Version).

⁵⁷ *Proverbs* 6:6–8 (New Revised Standard Version).

⁵⁸ *Job* 12:7–8 (New Revised Standard Version).

Many Christian denominations are embracing an environmental theology, which draws upon a variety of biblical mandates to “respond to our intensifying sense of ecological crisis.”⁵⁹ The Catholic Pope Francis noted that people are culpable for “thousands of species [that] will no longer give glory to God by their very existence We have no such right.”⁶⁰

Millions of people on Earth today believe animals are the moral equivalent of humans for a variety of spiritual and scientific reasons.⁶¹ Yet, in Western society, we treat that information as new. Scientists are inexplicably becoming teachers of morality, informing us through research of facts our ancestors knew from firsthand observations and unbroken oral tradition. Animals live, feel, and communicate. They are not merely dependent upon us, but we upon them. All too often, modern Western perspectives treat the sentience of animals as novel, as something they learned instead of as something that we forgot. Western perspectives privilege scientific research, instead of lived human experience and observation, as the key basis for re-integrating humans into the natural environment. A more pluralistic, inclusive review of the treatment of animals across religion and culture yields important additional perspectives.

III. INSTITUTIONS DETACHED FROM NATURE

Wildlife is a bipartisan issue, in a time when there are few. Hunters want wildlife. Environmentalists want wildlife. So why are we destroying wildlife? Why are we driving wildlife off the face of the planet? The answer is that we are not: our legal system of property is. Once we realize that, it is up to us to make our laws and institutions change to afford wildlife the rights to survive that we as individuals believe they deserve.

When I lived in New York City, I often thought one of the functions of riding in cabs was to drive more aggressively than would an average citizen without

⁵⁹ Laurel Kearns, *Saving the Creation: Christian Environmentalism in the United States*, 57 SOCIO. RELIGION 55, 55–57, 64 (1996) (describing three models of Christian eco-theology in the United States as Christian stewardship, eco-justice, and creation spirituality).

⁶⁰ John Copeland Nagle, *Pope Francis, Environmental Anthropologist*, 28 REGENT U. L. REV. 7, 8 (2015).

⁶¹ For a vitally important discussion about the dangers of decentering the humanity of marginalized humans through comparison to animals, see Prince, *supra* note 25, at 67–68. Prince warns: “If ecocritics argue for human equality with nonhumans, not all humans will be repositioned as equal to nonhumans. Marginalized humans, such as African Americans, will be the first to have their humanity decentered.” Diminishing or otherizing marginalized humans in the name of promoting animals is an unambiguously unacceptable outcome. Prince offers a path forward to at once improving the fate and treatment of the environmental and marginalized people by creating a richly diverse environmental justice movement. She notes: “Ultimately, the environmental justice movement must . . . become a space of legal pluralism, inhabited by multiple communities that, despite sharing the goal of justice, are understood to have unique histories and cosmologies. This means employing a biocentric critical race theoretical perspective that, at every juncture, rejects anthropocentrism, anti-indigenism, racism, classism, national chauvinism, and uncritical homogeny.” *Id.* at 70.

incurring the consequences. New Yorkers want to get everywhere faster. Having the aggression to honk, yell, and maneuver illegally allows one to move throughout the city more freely. I was embarrassed, but also grateful, when my driver did these things, but I would not do them myself. So, one benefit I received from riding in the cab was that I arrived at places faster because the driver acted as a proxy to do things that I would not feel right doing.

Law, government, and corporations are a bit like the cab driver. We do not want to be the person acting more aggressively than social norms might dictate, but we benefit from someone else—something else—that will do it. We co-evolved on this planet with billions of other living things. A drone feels no joy in seeing the whale it tracks; a real estate investment trust sees no sorrow in the forest that it clear cuts. Urban or rural, we exist within ecosystems. Things that do not live cannot reflect human values unless we make them.

Institutions distance our actions, create a pretend separation that allows people to take positions they could not without the cover of separation. “I do not drive like this in my own car,” a particularly aggressive cab driver once told me. “It is the yellow cab that allows me to become this person.” The corporation, the government, and the app allow humans to cloak their behavior in a veil of separation, to believe that they are not the actions that they take. Institutions create a false sense of inculpability for getting away with things that our biological programming knows better than to do.

Institutions lack the fundamental connection that people have with other living things, with our natural environment. Human understanding of nature—its fragility, its interconnectedness—is innate, engrained within each person. Corporations, governments, machines, and laws lack the natural awareness that is fundamentally programmed into the human body. Through the actions of faceless institutions—real estate development firms, timber investment management organizations, corporate landowners—humans have created proxies devoid of our natural awareness and exempted from our social norms. So long as we focus on the level of individual choice, instead of societal reform, we are addressing only part of the forces that fuel losses to natural spaces.

A. Institutional Problems, Institutional Solutions

If one believes nature matters and that it is at serious risk, there are two institutional solutions. The first is to dismantle the institutions that harm wildlife. This is not my approach. The other—far easier—approach is to force institutions to fold in updated ethical rules. Institutions exist at the whim of society, which can forcibly overturn corrupt or harmful institutions. Against this backdrop threat of revolt, institutions negotiate with society writ large.

Society sets the rules that institutions must follow. Society has renegotiated institutional norms countless times in the past, creating new norms, including new groups that were once forgotten and marginalized. If American society is no longer willing to allow our governments and corporations to decimate nature and wildlife, we must renegotiate the terms institutions must follow in order to continue.

B. Is Law the Problem?

Much of wildlife conservation is about property rights, not what you eat for dinner. The only mechanism for saving wildlife is a change through courts and Congress, not something you can select at the grocery store. Individual actions matter, but they alone are not enough. Legal institutions must shift.

American law made a mistake. Two hundred years ago, a group of judges assumed only humankind could own property. They wiped out age-old animal claims to land under indigenous systems. This was unthinking, a mistake. It is not Christian: Spanish conquistadors recognized the king had a duty from God to protect land for both humans and animals. It is not American: indigenous people understood man as equal users of land and resources with animals.

Yet, the moment the judges assumed animals could not own the land, they put the nail in the coffin of wildlife. We have been pounding away ever since. It took a century of population growth and economic development to hammer it in. But, the moment that we said that animals could not own—something we did not even say, just assumed—the die was cast.

We have never before directly linked the system of property ownership in this country with the widespread extinction of wildlife. Now, we know better. We know that we cannot live without animals, that we rely on nature. But we have not updated our institutions, and for wildlife preservation, institutions matter.

In *Wildlife as Property Owners: A New Conception of Animal Rights*, I describe this dynamic saying:

Enacting a system of property rights is frequently framed positively, as “creating” rights. In fact, the very process of creating property rights for some entails taking away preexisting uses for others. Initial entitlements include creating categories of individuals eligible to own property. The infrequently discussed flipside of this exercise is implicit: it is the process of divesting all who use the resources being allocated, which includes both current and future users. Property claimants will seek to establish a protocol for who may own that excludes categories of current users of the land and resources in question (with whom they would otherwise have to bargain for transfer payments).

In our system of property, there exists a latent right for landowners to unilaterally extinguish customary land uses in any future period. For example, a landowner might allow a neighbor to cross her property to reach a road. Any time the landowner decides to withdraw this permission for a non-owner to use her land, she may do so. If the neighbor refuses to go, the landowner can call the police to remove a trespasser. The police, on behalf of the government, will remove the trespasser, thus protecting the right of a landowner. Among people, the neighbor is entitled to go to court to argue before a judge that her customary usage of the land—long, regular, ongoing—created a prescriptive easement that allowed irrevocable future use. If the judge finds that the neighbor has created a

prescriptive easement, the landowner can no longer remove it. The neighbor has the right to continue crossing the private property in perpetuity.⁶²

At present, advocates for wildlife rarely advance such arguments. If a family of prairie dogs lives in my desert-landscaped yard for ten years, I may decide in year eleven to exclude them. I can plug their dens, poison them, or shoot them without anyone stopping me. It is perfectly legal. The prairie dogs do not participate in our legal systems or have advocates communicating their concerns. As a result, I can displace many wildlife species from my private property any time, for any reason or no reason whatsoever. There exists no process I must satisfy and no recourse for displaced wildlife.

With respect to any individual landowner, excluding wildlife is only problematic for the specific displaced wildlife—the family of wildlife. But, because millions of landowners may do the same thing over time, the problems become exponential. At some point, it is not only directly displaced wildlife that is harmed but entire ecosystems. At some point, species that prey on prairie dogs no longer have access to them or when vegetative species kept at bay by prairie dogs degrade. Eventually, the harms may multiply in ways we cannot anticipate.

For example, it turns out that prairie dogs are incredibly communicative.⁶³ One prairie dog can verbally communicate to another: “A fox is coming quickly from the West.”⁶⁴ This simple mammal can describe a type of predator and the speed and direction from which it is approaching. Uncovering the surprisingly sophisticated language of prairie dogs is a recent innovation. Until Con Slobodchikoff devoted decades to studying the humble creatures, few knew that prairie dogs were incredible linguists.⁶⁵ Yet, today, Slobodchikoff’s research is informing cutting-edge technology about communication. In this simple story lays a vital point: There is so

⁶² KAREN BRADSHAW, *WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS* (University of Chicago Press, 2020) [hereinafter *WILDLIFE AS PROPERTY OWNERS*].

⁶³ See generally C.N. SLOBODCHIKOFF, *PRAIRIE DOGS: COMMUNICATION AND COMMUNITY IN AN ANIMAL SOCIETY* (2009) (detailing a research study of Gunnison’s prairie dogs).

⁶⁴ See Judith Kiriazis & C.N. Slobodchikoff, *Perceptual Specificity in the Alarm Calls of Gunnison’s Prairie Dogs*, 73 *BEHAV. PROCESSES* 29, 30 (2006) (“Gunnison’s prairie dogs have alarm calls for four different species of predator: hawk (*Buteo jamaicensis*), human (*Homo sapiens*), coyote (*Canis latrans*), and domestic dog (*Canis familiaris*), as well as vocalizations for objects in their environment that are not known to them but could potentially represent a predator [W]ithin the call type given for humans, there is a considerable amount of variation that can be ascribed to descriptors of body size, shape, and color of clothes.”) (internal citations omitted).

⁶⁵ See C.N. Slobodchikoff, Andrea Paseka & Jennifer L. Verdolin, *Prairie Dog Alarm Calls Encode Labels About Predator Colors*, 12 *ANIMAL COGNITION* 435, 435 (2009).

much we do not know. Many of our assumptions and beliefs about the natural world—like “animals cannot talk”—are untrue.

Yet our system of property is premised upon such human assumptions as if they are truths. As such, the landowner removing prairie dogs does not seem like a catastrophic or important event. But, had every landowner eradicated prairie dogs systematically, we might remove without knowing a vital little creature that is teaching machines. Similar stories can be told with bees, ants, insects—all creatures who were long-overlooked yet whose social systems are informing scientific innovation. Imagine where innovation might be if we be given access to thousands of animals that have gone extinct at the hands of mankind.⁶⁶

At the core of the legal treatment of animals is the willingness to shift to institutionalized others, behavior that would personally be immoral. We shift from a universal knowing that animals and people coexist as part of a greater whole to a world in which human institutions—property rights, governments, and development goals—are allowed to be considered in a vacuum devoid of the animal interests we know exist. It is as if stepping into the law absolves us of the moral responsibility we would have for direct acts—as if the desires of mankind are all that matter and can be considered without the underlying biological realities.

This is an example of a “collective action problem”: a situation in which lots of people care about something, but do not act. Everyone looks around and hopes someone else will act, and if they do, everyone sighs with relief and assumes the problem is taken care of. Wildlife conservation is a massive collective action problem. Most people care, but not enough to become vegan and move to condos or write checks to wildlife organizations.

Many people care—really care—about animals and the environment. They worry about biodiversity loss and have watched that pathetic starving polar bear on television. We read our kids stories about animals and hope that the lions and leopards we are reading about will be there for their children. But caring and individual action is not enough. Remember—of all the mammals on Earth, only four percent are wildlife. Humans and human-owned wildlife comprise ninety-six percent of the biomass of mammals on Earth. But what can we do?

Many people have said change individual choices. The scale of the problem is such that our institutions need to be doing this work for us. Governments and markets know how to react, but they must be given something to react to—the outrage of people who care. There is none of this for wildlife, or at least very little. Some people care and do a whole lot, but most of us are freeriding off them, hoping and thinking they do enough for everyone. They cannot do it alone. I respect them and admire their efforts, but they are failing. Four percent tells you they are failing.

Legal scholars have a unique capacity to understand the link between institutions and outcomes. There exists a clear connection between law and wildlife. The problem began when we created institutions focused on humans alone. The

⁶⁶ This is an anthropocentric argument for animals, one that focuses on how they help humans, rather than their own inherent worth divorced from human assessment or well-being. Such arguments are interesting and valuable, but outside the scope of this Article.

problem persists because we have failed to update institutions to understand humans as animals. In this simple but profound shift exists a solution: the legal system that created this demise of wildlife can be fixed to save it.

C. *Law as the Solution*

In other work, I have charted a legal path towards biodiversity preservation through habitat conservation.⁶⁷ Essentially, wildlife could own land in trust, operated by human fiduciaries.

The current political climate, coupled with the lived history of the Endangered Species Act, has resulted in wildlife forever shifted to less and lower-valued land. The problem is land in the United States is seen as property. As a result, wildlife preservation is about land. It is a property problem that can and should be solved with a property-rights solution. Once we understand that, it becomes clear there are two paths towards stemming catastrophic species loss: either we can undo our system of property or we can fold animals into our system of property. I suggest leveling the playing field between humans and other animals by allowing them into the game—allowing them to own the land on which they live.

Acknowledging animal property rights is a radical proposition and may seem outlandish at first glance. However, further examination of the idea suggests a preexisting legal foundation for such a rights-expansion. Exploring animal rights expansion highlights the potential of the field to improve the plight of animals in a politically feasible way. In a forthcoming book on the topic, I outline the legal path to a new approach to the currently bifurcated field of animal law and invite scholars and advocates to reimagine differing approaches to the field as both complementary and pluralistic.⁶⁸

I have summarized the proposal for wildlife property ownership in the following way:

Under an animal property rights regime, human trustees would manage land at an ecosystem level for the collective benefit of animal beneficiaries and have a fiduciary duty.⁶⁹ To ensure consistently sound practices, each trustee would operate under the guidance of a private governance committee, which would regularly update standards that require best practices.⁷⁰ Trustee selection could be determined on a trust-by-trust basis, so long as it is accorded with the general principles established by the overarching governance committee and common law trust principles.

⁶⁷ WILDLIFE AS PROPERTY OWNERS, *supra* note 62; Challie Facemire & Karen Bradshaw, *Biodiversity Loss, Viewed Through the Lens of Mismatched Property Rights*, 14 INT'L J. COMMONS 650 (2020); Karen Bradshaw, *Expropriating Habitat*, 43 HARV. ENVTL. L. REV. 77 (2019) [hereinafter *Expropriating Habitat*]; Bradshaw, *supra* note 34.

⁶⁸ WILDLIFE AS PROPERTY OWNERS, *supra* note 62.

⁶⁹ See Bradshaw, *supra* note 34, at 830–35.

⁷⁰ See *id.* at 831.

Trustees would manage animal-owned lands for the health of the overall ecosystem. As with any policy decision, trustees would weigh the interests of competing constituencies—here, animals—and make difficult decisions about the winners and losers. Determinations would be highly localized and best determined by interdisciplinary teams familiar with the social-ecological context; the parallel successes of small groups of interested stakeholders in reaching decisions about managing land and resources may provide a template for trustee boards.⁷¹ As with stakeholder collaborations, trustee boards could be backstopped by a mix of private and public oversight.⁷²

In my view, we do not need to grant animals property rights. They already have them.⁷³ For the whole of human existence, we have always—and will always—share physical place on the planet with other living things. This is a biological fact; much like a law need not be passed to say that humans have a right to breathe, the law need not give animals the right to take up space. Despite the obviousness of the principle, modern courts and commentators sometimes forget how animal interests intersect with human land ownership. Nevertheless, laws have granted animals sweeping property rights at times.⁷⁴ This merely recognizes, formalizes, and expands what always exists.

People always stop me at this moment when I describe the idea of animal property rights. They ask, “But how would that work? Do animals have human rights? Can I eat meat? Can I own a pet? Can my pet sue me if I do not walk her?” These questions are not responsive to the narrowness of the property rights approach. I am thinking of habitat for wildlife, not of the important questions of animal rights. It is tempting to lump these as generally dealing with animals, but the means and the ends differ.

Questions about eating meat or medical testing on animals speak to the animal rights movement in the United States, which has existed since roughly the 1970s.⁷⁵ Organizations such as PETA and Defenders of Wildlife have acted towards the goal of having courts and legislators recognize animals as having some degree of the rights afforded to humans.⁷⁶ What does this mean, exactly? Animals would not be

⁷¹ See Karen Bradshaw, “Stakeholder Collaborations for Managing Land and Natural Resources,” Admin. Conf. of the U.S. (Sept. 28, 2017), <https://www.acus.gov/sites/default/files/documents/Natural%20Resource%20Collaborations%20Report.pdf> [<https://perma.cc/7DES-8XZN>].

⁷² *Expropriating Habitat*, *supra* note 67, at 114.

⁷³ Bradshaw, *supra* note 34, at 845–47.

⁷⁴ *Id.* at 816 (revealing expansive animal property rights in existing laws).

⁷⁵ See *id.* at 817–23 (discussing the history of animal rights movement).

⁷⁶ See Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG. (Apr. 23, 2014), <https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> [<https://perma.cc/DQL3-AGUM>]; Nonhuman Rights Project *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392, 397–98 (N.Y. App. Div. 2017) (denying habeas corpus relief for

used for medical testing; orcas could not be contained in cages and people would have to stop hunting and likely become vegan. It is a bold vision and one that many people are not yet ready to embrace. In the meantime, wildlife cannot wait.

My proposal is different. Animal property rights are narrowly focused on habitat conservation—securing land for wildlife to live on. This does not achieve many of the aims of the popular animal rights movement. They are different proposals.

Extending property rights to animals simply means the right to own—the very kinds of rights the law has granted ships and corporations. Under my conception, you can still eat a burger or swat a mosquito. This is about property rights—line drawing on other issues requires a separate discussion. One could hunt every weekend or throw paint on people wearing fur and still agree that animals should have property rights.

Humans made a mistake when we crafted laws reflecting a worldview that we were the only ones living on Earth. That worked until our population grew. We can no longer pretend animals do not have natural rights to be on this planet. It is a biological mandate for their survival and ours. It is a legal truth, based upon the common law of property and the history of land development in the United States. And, it is a scientific reality that other animals practice property much as we do: with boundaries, exclusion, and peaceful resolution of dispute, making us co-participants in a shared, inter-species system of property.

What about plants? They live, they support ecosystems, and they share physical space with us. Might my arguments extend equally to plants? Do I care about their existence, biodiversity, and relationship with humankind? In a word, yes.

Wildlife truly functions as a placeholder for ecosystems. The biological arguments apply equally to bacteria, plants, and oceans. By sketching the idea in the context of the familiar—animals—I hope to make it both more understandable and more appealing than an abstract concept of an ecosystem that stands somewhat outside the popular grasp. Nestedness allows this simplification; what is true for animals is true for nature more broadly. But, if we understand wildlife as a synecdoche of nature, then it is clear this idea accords well with the movement to afford nature property rights, a growing trend.⁷⁷

two adult male chimpanzees); Matter of Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652, 653–54 (N.Y. App. Div. 2015), *leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015) (same concern with one chimpanzee); People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 252 (N.Y. App. Div. 2014), *leave to appeal denied*, 38 N.E.3d 828 (N.Y. 2015); *In re* Nonhuman Rights Project Inc. v. Stanley, 2014 N.Y. Slip Op. 73149(U) (N.Y. App. Div. 2014).

⁷⁷ See generally CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE (2d ed., 2011); RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989); see also THOMAS BERRY, THE GREAT WORK, OUR WAY INTO THE FUTURE 5 (1999) (claiming that “every being has rights to be recognized and revered”).

A decade ago, giving nature property rights was a radical thought experiment. Today it is a burgeoning movement, internationally and within the United States.⁷⁸ Bolivia and Ecuador have included a human right for nature in their constitution.⁷⁹ New Zealand gave a river the legal status of persons.⁸⁰ Australia granted a river a right to nature.⁸¹ Lake Erie has been granted legal personhood.⁸² A far more systematic and sweeping rights expansion is poised to occur. It is impossible to know whether these reforms are the product of a shift in mindset, or the creation of a new worldview. The story could be told either way.

CONCLUSION

I am an optimist. The shift that animal activists are calling for is already happening. In Millennials, I see the beginnings of tremendous change toward animals and the environment. The questioning of extreme capitalism without human values, skepticism of hierarchy, and the embrace of animals portend great things for the fate of wildlife.

On the whole, the tide is beginning to shift towards a new relationship with animals. More Americans are vegans than hunters.⁸³ Trends like “meatless Monday” and “cruelty free” products have become mainstream. A 2015 Gallup poll showed that about one-third of Americans think animals should have equal rights to people.⁸⁴

⁷⁸ See generally DAVID BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* (2017) (explaining that the idea that nature has rights is gaining momentum).

⁷⁹ E.L. O'Donnell & J. Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, *ECOLOGY & SOC'Y* 23, no. 1: 7, <https://doi.org/10.5751/ES-09854-230107> [<https://perma.cc/82L8-J4SZ>] (“In 2008, Ecuador granted legal rights to nature in its constitution (Constitution of the Republic of Ecuador 2008, articles 71–74) . . . Similarly, in 2010, Bolivia created broad legal rights for nature when it passed ‘Ley de Derechos de la Madre Tierra’ (the ‘Law of Mother Earth’).”

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jason Daley, *Toledo, Ohio, Just Granted Lake Erie the Same Legal Rights as People*, *SMITHSONIAN* (Mar. 1, 2019), <https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/> [<https://perma.cc/F5R9-3U4A>].

⁸³ A 2018 Gallup poll shows five percent of Americans are vegetarian. R.J. Reinhart, *Snapshot: Few Americans Vegetarian or Vegan*, *GALLUP*, (Aug. 1, 2018), <https://news.gallup.com/poll/238328/snapshot-few-americans-vegetarian-vegan.aspx?> [<https://perma.cc/BUJ7-VEM5>]. The U.S. Fish and Wildlife Service published a survey showing only 4.4 percent of adult Americans hunt. Nathan Rott, *Decline in Hunters Threatens How U.S. Pays for Conservation*, *NPR* (Mar. 20, 2018), <https://www.npr.org/2018/03/20/593001800/decline-in-hunters-threatens-how-u-s-pays-for-conservation> [<https://perma.cc/B93H-EALD>].

⁸⁴ See Riffkin, *supra* note 29.

Within the past decade, most states have passed laws allowing people to set up trusts to give their pets money when they die.⁸⁵ The movement has started.

My concern amidst this change is that wildlife may be ignored because they are deemed different from humans. Although we cause much of their suffering, we largely do not witness it.⁸⁶ Wildlife usually dies in remote places away from human sight, but the blood of wildlife is on our hands when fundamental flaws in human institutions cause their demise. If we save wildlife, we save the planet.⁸⁷

The very move that doomed wildlife can be its salvation: We must restore the natural rights of non-human animals by reshaping law and other human institutions to accommodate their needs. By re-integrating animals' rights to land, air, and water, we can bring our laws and institutions into alignment with a worldview that understands humans as animals.

As a child holding the heart of a deer in my hand, I was powerless to stop the inevitable. Today, I refuse to passively witness wildlife collectively suffering the same fate of a slow fade into death. We have a chance to resuscitate the dying collective wildlife. That answer rests in folding wildlife interests, nature's interests, into our institutions—making law reflect the interconnected reality embedded in every human, in every animal, in every living thing.

⁸⁵ Bradshaw, *supra* note 34.

⁸⁶ TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT 3–4 (2013).

⁸⁷ WILDLIFE AS PROPERTY OWNERS, *supra* note 62, at 1–2, 154–56.