

## Some Thoughts on Catharine MacKinnon's Essay "Of Mice and Men"

By Lee Hall [A longer version of this paper will appear later this year in the UCLA Women's Law Journal].

Catharine A. MacKinnon, Elizabeth A. Long Professor of Law at the University of Michigan, specializes in equality issues under international and constitutional law. MacKinnon, who has taught at Yale, Chicago, Harvard, Osgoode Hall, Stanford, Basel (Switzerland), and Columbia, pioneered the legal claim for sexual harassment, establishing it before the U.S. Supreme Court; and the Supreme Court of Canada accepted her approaches to equality, pornography, and hate speech. Professor MacKinnon has represented Muslim and Croat Bosnian survivors of sexual atrocities in the case of *Kadic v. Karadzic*, which secured legal recognition of rape as an act of genocide. MacKinnon is the author of 10 books and numerous scholarly and popular articles in several languages, and is one of the most widely cited legal scholars in English.

In the recently published essay "Of Mice and Men: A Feminist Fragment on Animal Rights," Catharine MacKinnon asks if "missing the misogyny in animal use and abuse" hinders animal rights successes.[1]

How should the animal rights movement respond?

First, we should carefully consider the question. We live in a culture that's largely comfortable thinking that what humans do to nonhuman bodies does not matter — at least what's done in regular, institutionalized ways. As female people have often been defined and valued in terms of the use of their bodies and their reproductive functions, it is logical that nonhuman-rights advocates could find a message of value in the social movement for women's equality.

Regarding the treatment of nonhumans and the treatment of women, Professor MacKinnon notes that the "denial of social hierarchy in both relations is further supported by verbiage about love and protection" as though it mitigates the domination. Often, rights for women have been denied because love and protection have been considered good enough. Could we not say the same about the animals we have domesticated?

Let us look at the most obvious way in which human disregard for other animals plays out. "The place to look for this bottom line," writes Professor MacKinnon, "is the farm, the stockyard, the slaughterhouse." Nonhuman animals, by the billions, are not only enslaved in our markets, but completely consumed in them. Most people barely notice it; the disrespect has become so ingrained that we do not even see it as domination. A radical change in perspective will enable us to make our stand where such deeply-rooted exploitation could be successfully challenged. It would mean a journey into the psychology that leads to oppression and destruction.

### A Unilateral Bargain

Our traditions of breeding and trading other animals as companions involves human control over cats and dogs and horses, but a form that we accept and even regard as virtuous. But is it possible that exchanging other animals in the name of the profound human need for companionship connects with humanity's traditions of trading animals used for the food industry?

We do not eat cats or dogs or horses; nevertheless, they (and similarly situated animals) are born into the world with the status of articles to be exchanged, to be separated from their birth families at the discretion of buyers and sellers, and to enjoy the pleasures of living as long as the luck of the draw places them with benign human caretakers, and just for so long as those caretakers are in the position to continue caring for them. At any time, the kind human owner might lose that position because of a reversal of fortunes including family strife, divorce, illness, or death.

Domesticated horses are fated to die by the hundreds every year on racetracks worldwide, and many others die during vivisection, which the racing industry supports in the interest of improving speed and performance of horses. Many owned horses who pass their primes or the primes of their owners will have no way to escape the common chain of sale, resale or donation to charity, neglect, and finally slaughter.[2]

We talk of pets as our animal companions. The Collins dictionary defines companion as a “mate, fellow, comrade, associate.” Yet the nonhuman animal did not accept the role of our associate; it was imposed upon the animal’s ancestors over the generations. The choice of whether a specific domesticated animal will be a comrade is made unilaterally by the human who, as a legal fact, owns and makes every decision about the life situation of the pet. Collins gives a second definition: “person employed to live with another.” The nonhuman “lives with another” but is not free to make independent decisions as employees usually do. A careful look tells us that the ownership and control exerted over pets – even if exerted in the gentlest possible way – does not fit either classic definition of companionship.

Does questioning the tradition of pet ownership negate our deep caring for the individual animals already in our homes? No. Once specific individuals are born as domesticated animals, they need, and should receive, our protection and care. What the critique does is focus on the tradition of selective breeding itself, and what that activity tells us about our view of independent beings we have happened to find on the planet. If other animals, or the members of any traditionally oppressed groups, are to be regarded as beings with individual dignity, the debate must focus on cultivating respect for the group – not simply protecting the group’s members. What is true for women is true for wolves. Their rights must be on their own terms. As MacKinnon puts it: “Unless you change the structure of the power system you exercise, that you mean well may not save those you love.”

### **Anxious to Please**

The bottom line for animals other than the human kind is visible at the slaughterhouse. But that is not the only way in which their bodies are used. Evidence of the use of other animals for human sexual gratification is not uncommon, despite the secrecy and the silence that shrouds such abuse. Pornography involving nonhuman animals has become a multimillion-dollar industry.[3] And yet, notes Catharine MacKinnon, it’s an industry barely noticed by animal law scholars. When objections to interspecies sexual abuse do arise, they often traditionally focus on its potential to degrade the human community.[4] Members of the public, and legislators in turn, might reprehend this conduct as an especially abhorrent form of cruelty to animals, but rare is the activist who is prepared to explain it as a symptom of a hierarchical social order.

Sexual activity between human beings and nonhuman animals occurs largely, if not exclusively, within the unnatural relationship of domestication; and domesticated

animals have been bred and trained to adapt to a human environment, to be of use to human beings, and, in the case of pets, to be anxious to please. One can hardly imagine a more vulnerable position. As MacKinnon writes, “Surely animals could be, and are, trained to make it appear that they are enjoying doing what people want them to do, including have sex with people.” But it should be clear that a nonhuman animal within human society has no understanding of the right to say “no.”

### **Crushing the Other**

Crush videos are pornographic films that graphically depict scantily-clad women, sometimes barefoot but usually in stiletto heels, stepping on and killing a variety of small animals. In 1999, Congress has made crush videos a federal crime through a bill providing “punishment for depiction of animal cruelty” into interstate or foreign commerce for commercial gain.[5]

Some people opposed the ban, arguing in the same language that is used to keep violent pornography legal. They said that the bill would intrude on First Amendment guarantees of freedom of expression, constitute an unnecessary federal intrusion into state affairs, and divert prosecutors from more serious misconduct. In response, the bill’s sponsor amended it to exempt films with “serious religious, political, scientific, educational, journalistic, historical or artistic value.” Thus, films of bullfights are legal, and significant recent episodes of torture and killing of nonhuman animals have been defended on the grounds of artistic expression.[6] In a society that endorses the ownership and use of other animals, the law does more to permit abuse through these exceptions than it does to prohibit it. As MacKinnon points out, this exemption for works of serious religious, political, scientific, educational, journalistic, historical or artistic value derives from the traditional list that has exempted imagery depicting violent treatment of women from the weight of the law.[7]

“In California,” recounts Professor MacKinnon, “a bill was introduced in February 2000 that would have prohibited both crush videos of animals and snuff films of human beings...A massive public First Amendment hue and cry, principally by the American Civil Liberties Union, was raised about the human part of the bill only.” MacKinnon explains the reason: While animals presumably either cannot or are presumed not to consent to their videotaped murder, human beings could have consented to their own intentional and malicious killing if done to produce a film, so the film would be legal. It is best for nonhumans, then, that it be made crystal clear that they do not consent to engage in such activities – and it would have helped the sponsors of the California bill if the public had believed that a woman does not give meaningful consent when being killed in a snuff film. That the fundamental issue here is not censorship, but profiting from the using and killing of living individuals. The best advocacy for nonhuman animals will serve as a model for respectful interaction between humans themselves.

### **The Like-Us Trap**

Like animals used in pornography, most animals used in experiments live and die under human control. Without necessarily meaning to do so, some animal advocates seem to be encouraging popular interest in animals studies. These studies are often called non-invasive or benign; yet the objects of analysis are usually isolated, detained, and perpetually at risk of being shuttled off to all manner of studies or storage. There is no sanctuary that can ever make up for their loss of freedom

throughout their lives, while those who study them move up their career ladders – many congratulating themselves profusely in their published claims to a new social bond between humanity and other animals. A notice about “the Intellectual Chimp Ai” from the Discovery Channel described Ai in the following way:

*The Intellectual Chimp Ai, a female chimpanzee, has been learning – and “teaching” – at the Primate Research Institute of Kyoto University for about 20 years. She can grasp abstract concepts such as colour and number and now she’s tackling money, accepting coins as payment for successful work and using them to buy apple slices. Primatologist Jane Goodall believes that Ai is beginning to reveal the full potential of chimpanzee intelligence.*[8]

From the standpoint of respect, however, Ai could have only reached this “full potential” in the chimpanzees’ territory – not stuck for 20 years in a laboratory.

In a Wall Street Journal article that similarly zeroed in on nonhuman apes, constitutional scholar Laurence Tribe argued that “[n]onhuman animals certainly can be given standing.”[9] “[A]nimal rights are poised to develop first for a tiny elite, the direction in which the ‘like us’ analysis tends,” Catharine MacKinnon writes, adding: “Predicating animal rights on the ability to suffer is less likely to fall into this trap.” Professor MacKinnon’s point that “[h]ow to avoid reducing animal rights to the rights of some people to speak for animals against the rights of other people to speak for the same animals needs further thought” is similarly well taken. Much of the debate so far has focused on who may suitably speak for owned nonhuman beings, rather than on how to withdraw from the habit of ownership itself.

Of Jerom, a young chimpanzee who died in 1996 in an Atlanta laboratory after being used in HIV experiments, Professor Tribe has declared, “Clearly, Jerom was enslaved.” Tribe added here that “recognizing that a being is entitled to being treated with respect, not wanton cruelty, and an eye to its own flourishing by no means translates into an absolute right, an absolute veto, over any possible use of that entity to save a human life, or achieve a higher goal.” The reporter immediately reassured the Journal’s readers: “In other words using chimps for medical research would remain possible.”

As MacKinnon has noted, “People tend to remain fixated on what we want from them, to project humans onto animals, to look for and find or not find ourselves in them.” The question for the animal rights theorist and activist is “what they want from us, if anything other than to be let alone, and what will it take to learn the answer.”

### **The Most Comprehensive Right**

Supreme Court justice Louis Brandeis found that the right to be free of public curiosity was rooted in something more deeply than a study of property rights could reach. Justice Brandeis wrote that “the right to be let alone” is “the most comprehensive of rights and the right most valued by civilized men.”[10] The right is valued not only by men, and not only by the civilized. Surely, at the core of nonhuman rights is the right to life, to enjoy liberty of movement, and to an inviolate personality – “the right to be left alone.” Surely this, for other animals, is the most comprehensive of rights.

And if this is so, then the animal advocacy movement richly needs the filter MacKinnon’s feminist fragment provides. Much more work remains to be done before our society acknowledges the importance of understanding the ways in which the domination of any group affects all. Critically, animals are still property, rendering their position the most demeaned of any thinking, feeling beings in our

midst; serious animal advocacy, by working at the base, will only strengthen respect for all groups. We have something to teach all movements for social betterment, even though there are relatively few of us, so that we face great pressure to focus its energy on “the animal question” specifically. The fewer theorists and activists there are in this area, the more critical it is that they are informed by (and inform) people who work in interrelated areas of social justice.

*This review appeared in ActionLine (Friends of Animals; Winter 2004-2005) at 26-29.*

## Footnotes

1. The essay appears in [Animal Rights: Current Debates and New Directions](#) (Cass R. Sunstein and Martha C. Nussbaum, eds., 2004). All quotations attributed to Professor MacKinnon refer to this book chapter, at pages 263-276.
2. See Mark Gold, “Racing’s Dead End,” *Outrage* (magazine of Animal Aid, Britain, Dec.-Jan. 1996/97) at 11.
3. Richard Simon, “House Votes to Criminalize Interstate ‘Crush Video’ Sales,” *Los Angeles Times* (20 Oct. 1999) at A5.
4. Modern lawmakers also typically point out that violent treatment of nonhumans forewarns a danger to the human community. “What do serial killer Ted Bundy and Unabomber Ted Kaczynski have in common? They tortured animals before killing people,” said Rep. Elton Gallegly, a California Republican who authored a bill to ban crush videos. Richard Simon, “House Votes to Criminalize Interstate ‘Crush Video’ Sales,” note 3 above. Tom Connors, in the capacity of deputy district attorney of Ventura County, California, stated: “We have some stills of a baby doll they’re crushing. So our feeling is that in time, like all perversions, buyers will get desensitized and it’ll get to be a baby.” See Martin Kasindorf, “Authorities Out to Crush Animal Snuff Films,” *USA Today* (27 Aug. 1999) at 4A. Such arguments imply that the abuse of nonhuman animals is taken seriously only insofar as intervention could potentially protect the human community from harm, instead of focusing on the abusive act itself. Potential harm to the human community is undoubtedly a serious connection. To focus on the act, arguably, is the better ethical route, as to do so would protect anyone who could suffer harm.
5. President Clinton signed P.L. 106-152, the “Crush Video” bill, into law on the 9th of December 1999. Proponents of the bill argued that federal legislation is necessary because of the difficulty in proving that the cruelty featured in the video occurred within the state’s animal cruelty law statute of limitations; it also is difficult to identify people in the videos because often only legs and feet are shown.
6. See Ellie Maldonado, “Killing For Art,” *Friends of Animals Act•ionLine* (Spring 2004).
7. The traditional test for obscenity, set out by the Supreme Court in *Miller v. California*, exempts pieces with “serious literary, artistic, political, or scientific value.” 413 U.S. 15, 24 (1973). It is not surprising, given the Court’s treatment of pornography under the “obscenity” category, that arguments over the issue focus on concerns over censorship rather than about the concept of dividing society into two classes with one domineered by the other.

8. "Primetime Primates" (12 Mar. 2002; advertising an April 2002 broadcast for Discovery Channel Canada).
9. David Bank, "A Harvard Professor Lobbies to Save U.S. Chimps From Monkey Business," *The Wall Street Journal* (25 Apr. 2002).
10. *Olmstead v. United States* (1928); U.S. Supreme Court Justice Louis Brandeis, dissenting.