



# Animal Law Podcast: Transcript for Episode 94, Interview with Asher Smith

**Mariann Sullivan:** Welcome back to the Animal Law Podcast, Asher.

**Asher Smith:** Thanks for having me again.

**Mariann:** I'm super excited to have you here. We get to talk about a First Amendment right, which is not the one that we usually talk about. It's the right of association. I kind of forgot it was even in there. And the First Amendment is definitely carrying a lot of weight, but this is a really interesting case, and it has to do with animals in research.

You suggested, and I thought it was a good idea, before we talk about the case, maybe you can give us a little background, for people who aren't that familiar with how animals in research are regulated, about what an IACUC is and its relationship to the Animal Welfare Act.

**Asher:** Sure. So any institution that experiments on animals is required to have an Institutional Animal Care and Use Committee, known as an IACUC.

This is a requirement imposed by federal law since the mid-1980s, and IACUCs are responsible for ensuring compliance with the Federal Animal Welfare Act and NIH Animal Welfare policies. And this is so crucial because the regimes that govern animal experimentation mostly rely on IACUCs to self-report what's going on.

And while I'm sure most of your listeners are skeptical of just how strong the Animal Welfare Act protections are, the actual rules that govern IACUCs that they're supposed to enforce, if taken seriously, could be quite transformational. For example, rules that require things like documenting alternatives to painful experiments that have to be considered.

An IACUC that actually wanted to enforce the law just as it's written now could do a ton of good. And that's who federal law suggests should be on IACUCs.

Under Federal Law and Regulation, IACUCs have to include non-scientific members meant, as elaborated in NIH guidance, to represent scientifically naive perspectives, their word. Such as, for example, ethicists or clergy members. They're also supposed to include members not affiliated with the institution they're supposed to be enforcing the law at.

So that's a very long-winded way of saying if they want IACUCs could be a major force for good. And by want, I mean, federal law says they have to.

**Mariann:** Yeah, so it shouldn't just be up to whether they want to. This particular lawsuit involves the IACUC at the University of Washington. In the interest of providing a little bit more background to the case, can you give us a little history on the status of animal research at the University of Washington?

**Asher:** Yeah, so the University of Washington is very high up on PETA's radar, and that's for a number of reasons. They're one of the last remaining institutions in the United States that has a National Primate Research Center, and PETA's noted for years that the UW IACUC is particularly, for lack of a better word, bad at ensuring basic adherence to animal welfare at UW.

PETA's scientists, who scour UW's public record disclosures, found, just for one example, in one eight-month period, the Primate Center had to treat 332 traumatic injuries, about 150 cases of significant weight loss. Things like dehydration and starvation are sadly very common at these kinds of institutions.

And this isn't just PETA out on a limb about this. The United States Department of Agriculture, which enforces the Animal Welfare Act, has called out UW for approving major surgeries on animals without even knowing crucial information experimenters have to disclose. In May 2021, the USDA told UW that its record is, I'll quote from the report here, "not indicative of a facility that's demonstrating success at preventing critical animal welfare issues." Which, if anyone listening speaks bureaucrat, is really damning coming from the government.

**Mariann:** Yeah. That's very harsh. It really is.

Maybe people listening will be relieved to hear we're not going to be talking about a specific experiment and the horrors that that involves, but more about who's on this IACUC, who should be, and who really is. Can you just tell us how this issue came to your attention and what attempts you made to find out what was going on here?

**Asher:** Yeah, so the backstory, given UW's animal care record, is that PETA's been trying for years to confirm its understanding of just who was on the UW IACUC. Well, Washington public records law should help here, so PETA has submitted public records requests for rosters. But conveniently for them, UW has said, for years, they couldn't fulfill those requests.

It just so happens to treat the roster, it says, as a "living document" that it basically deletes and overrides with each new member. What a fortunate coincidence for them. So, PETA went to the one source of documents it knew had to exist to tell PETA who's on this committee- the appointment letters to UW members that would also say whether they were being appointed as a non-affiliated member, as a non-scientist. And that's how this lawsuit started.

I don't know how long you have here, but big evidence that this lawsuit to block PETA from access to these members' identities is just about shielding the IACUC from scrutiny of its composition is that- one, they've already disclosed almost all of the IACUC members to PETA maybe, in retrospect, by accident.

They disclosed them in prior public records requests, in prior litigation, even though here what they're trying to say is that if PETA had access to their names, well, they would be subject to grave risk of harm and harassment. But that hasn't happened so far.

**Mariann:** Well, in the disclosures you've gotten, do you have further evidence that the composition is not as is required by law?

**Asher:** Exactly. So because of disclosures like that, PETA does have a pretty good sense of who sat on the UW IACUC historically, including the non-affiliated and non-scientific members. That has included people who've worked at the University of Washington, people whose spouses have worked at UW, who've donated to UW, who've used animals in experiments before, and in one case, someone who's been a non-scientist member is actually the Executive Director of a major animal experimentation lobby group.

And if that wasn't enough suspicion, when PETA mentioned all of this in its briefing at the district court, in their reply brief, plaintiffs in the case, the UW IACUC committee head actually acknowledged in an affidavit what we've always assumed is the case. That the IACUC's institutional view is that under federal law, it's acceptable for even recent UW employees to serve as non-affiliated members. I won't bore your listeners with lots of legal arguments about this, but they can, I think, decide for themselves whether that's consistent

with federal rules that say this person has to have no discernible ties to the institution.

**Mariann:** Yeah. That's pretty crazy. It really is.

You mentioned that the way you got the information that that you got, or the requests that you've made, maybe you haven't gotten any information pursuant to the Public Records Act. Maybe you just said you've made requests, but I know that's an important law that's involved in this particular case and this effort to find more information.

Can you just tell us a little bit about that law?

**Asher:** PETA actually has this very successful history at seeking public records from the University of Washington, and when they don't provide them, suing for them. So what these public records that PETA's seeking would provide would be to explain who is currently on the IACUC.

PETA has these gaps, it doesn't know who some of the most recent additions are, and these appointment letters would confirm that. But in the past, UW has actually engaged in really shocking means of preventing PETA from getting public records. PETA actually just resolved a lawsuit against UW for records of videos and photos from experiments and also just the basic federal reporting that they have to provide the federal government that funds the primate center.

**Mariann:** There was a big judgment in that case, wasn't there?

**Asher:** There was, it was close to, including interest, \$550,000. Which, you know, to some lawyers listening, that might not sound like a lot if you work in securities law, but for public records law... \*laughs\*

**Mariann:** If you work in animal law, that's a lot of money! \*both laugh\*

**Asher:** Yeah. So if your listeners have time, I'd love to go into some of the facts of this case.

**Mariann:** When I first looked at this case, I couldn't figure out who was who. It's kind of weird, procedurally. So the named plaintiff is a current member of the IACUC, and the defendant is the university, and you're an inter... Well, can you just explain who everybody is and how they fit?

**Asher:** So what happened here is, again, PETA is trying to establish just why the UW IACUC is so bad at its job, figure out who sits on this IACUC, so, PETA submitted its request for the appointment letters. The way this lawsuit started is that the University of Washington told members it had no choice but to fulfill this request. This was one source of records that had not been deleted and still existed. So here, the IACUC members themselves, in their personal capacities, sued the University of Washington. And then PETA moved to intervene and appealed the district court's ruling that there are enough open questions to justify a preliminary injunction.

**Mariann:** Okay, so I think I have straight who everybody is. And also just sorting out some of the procedural stuff. It's a punitive class action, so who is the class, and have any steps been taken to certify a class?

**Asher:** It's a really great question because that's really at the core of where this case is at right now. There's been no class certification work yet. Now that we have the ninth circuit decision, we're gonna be back at the district court. PETA submitted a motion to dismiss the remaining counts of the complaint that the ninth circuit didn't address because they were added after the lawsuit was originally filed and appealed.

And what's at the core of PETA's renewed motion to dismiss is the fact that none of the named plaintiffs here should have standing to represent a class. Now, as I think you mentioned, except for the head of the IACUC, Jane Sullivan, the other class members here are anonymous.

But filing a lawsuit anonymously doesn't release you from having to allege enough facts to support standing. And what's so interesting here is that, again, there are two class reps. The non-anonymous head of the IACUC who, because she's not anonymous, clearly doesn't have interest in common with a class of plaintiffs trying to maintain anonymity.

And the other class representative is someone referred to only as P Poe one, like John Doe one. Well, who is P Poe one? It's not like, even if you make your plaintiffs anonymous, you can keep substituting who gets what label. Once you commit to who the class rep is, that's still a real person who exists. And we know from the declaration this person filed at the preliminary injunction stage they've served on the IACUC for, according to them, several years. So that tells us something important. It tells us that their identity was in prior disclosures made to PETA, and that means that, like Jane Sullivan, this P Poe one, whose identity PETA surely already has, can't share interests with the tiny number of actually still anonymous class members.

**Mariann:** Wow, that is disturbing. I also just want to make clear there's no relation between me and Jane Sullivan. \*chuckles uncomfortably\*

So standing is an issue, but let's take a step back. There's something I really don't understand here. Was it that, at first, they just brought a cause of action based on the right of association, and that's what we're going to be talking about today that went up to the circuit court? And then, after that, they have added some additional claims?

Is that what happened here?

**Asher:** That's exactly right. When they first sued the University of Washington, the only claim in the lawsuit was about plaintiff's freedom of association rights. But as if they saw the writing on the wall, before the Ninth Circuit ruled, they amended their lawsuit to include a bunch of other theories that they hope can support an injunction.

This includes arguments about their fear for their bodily autonomy. And my favorite argument citing an arcane 1991 Washington State law that actually allows animal experimenters to sue for an injunction if they fear "harassment by persons whose intent is to stop or modify a facility's use of animals."

**Mariann:** Yeah, I definitely want to get into that one, but let's start with the right of association case. Let's do it in order because that is really a very cool decision that you got. So first, that's the only cause of action that they had and tell us, basically, what is the right of association and what were they arguing?

How was this constitutional right being violated?

**Asher:** Sure. So a group of people coming together for private purposes have a right to express themselves. They have a right to advocate. It's basically an extension of the first amendment right that everyone knows how to refer to—freedom of speech.

And the gist here is that The University of Washington IACUC claim they have a First Amendment freedom of expression right to serve on the IACUC anonymously. The ninth circuit explained, though, that this is a right that could only be claimed by groups actually engaged in expressive association. I don't want to call any appeal easy, but the Ninth Circuit really did dispense with this quickly.



The group association here isn't about advocating views or pursuing personal interests; it's really only about fulfilling federal law. And as the Ninth Circuit pointed out, they're actually barred by federal law from taking any part in academic inquiry, that is, taking part in decisions about what to experiment or why.

**Mariann:** So what was their argument? What was the gist of their...I mean, I know it's hard to explain an argument that you totally don't agree with.\*laughs\* But the district court did go with it. What were they claiming?

**Asher:** So, what the district court found in its decision was that it basically wasn't willing to commit to a view of what an IACUC is, whether or not they're only engaged in government work or whether there's some kind of academic function there such that academic freedom rights have to be taken into account. And that's really a consequence of how this case unfolded because the IACUC members first sued the University of Washington before PETA intervened.

Within a matter of hours, basically, they got a temporary restraining order under this theory, and PETA intervened and, in a very brief period of time, presented the court with its arguments and evidence. What we got at the preliminary injunction stage was just a repeat basically of the TRO premised on the idea that “Well, maybe the IACUC does have an academic function, and the district court didn't acknowledge other sources of federal law that say the IACUC can't do anything of this sort.”

Really the opposite of gratifying was that the University of Washington also argued, “Well, this isn't something the public has a need to know or a right to know because the federal government oversees IACUCs.” And they actually cited private oversight by a group the University of Washington pays to certify it as a source of regulation, so the case was pretty confused by the time it got to the Ninth Circuit.

**Mariann:** Yeah, they made short shrift of it, pretty much. And there wasn't a lot of back and forth in that opinion. Is this an issue of contention anywhere else in the country? Has this decision helped settle something for you?

**Asher:** I think it really has. Many IACUCs across the country are not anonymous, and that's actually an important piece of evidence here that there's not some kind of imminent threat from IACUC member names being public.

It's the case that, like anyone else, members of IACUCs don't like being yelled at. They don't like being criticized. And I think if you have time for it, getting

into exactly the kind of harassment that the IACUC members claim they feared and that members across the country are supposedly so afraid of would be really interesting.

**Mariann:** Yeah, I definitely want to get into that. Leading up to that, can you just comment a little on the concurrence? I think the concurrence, in this case, kind of encouraged the IACUC members to pursue that line of argument. Would you agree?

**Asher:** Yeah, and I think there's really nothing to fear there from a legal standpoint because the state of Washington Public Records law doesn't have any exemptions that should allow the members of the IACUC to claim that just because some members of the public are mean to them, they shouldn't have to release their names. But it really dovetails with the arguments they're trying to make now about bodily autonomy and safety and the evidence they brought to bear in the freedom of association context about their personal safety.

**Mariann:** Yeah. And I just wanted to specifically reference the concurrences language, which, you know, people haven't read that really kind of very unfairly, I think, more or less said, "Well, it's PETA, of course they're scared."

Which I thought was without any evidence to support that. But, you know, I'm sure that PETA runs into that a lot. I won't make you say that. I'll just say it myself.

All right. So as we've made clear, this case is far from over. And because they've come up with all these new arguments, having been encouraged to some extent by the concurrence in the Ninth Circuit case. So there's a new second amended complaint, and you have now moved to dismiss it, but can you tell us what the causes of action are that are now pending?

**Asher:** Yeah, it's that the members have fear for their body of autonomy, essentially reframing their freedom of association arguments as due process arguments, and then also, they've made arguments under a Washington State law. That's a kind of retro version of an ag law if your listeners are familiar with that.

Again, what this law does is it says that if you work for an institution that experiments on animals and you fear harassment from people trying to stop or modify experimentation on animals, you can maybe get an injunction. And I think those arguments about personal safety can be dispensed with pretty easily, and I'll be happy to get into that.



But to talk a little bit about this strange Washington ag-gag type law. It's a law that that kind of on its face is viewpoint discrimination. It literally says if you are trying to engage in this kind of advocacy, your rights might be less than someone not engaging in that advocacy. And the arguments there are pretty funny. Plaintiffs have actually argued, "Oh, there's no discrimination here because it could apply to activists trying to increase animal experimentation."

**Mariann:** Which, of course, happens a lot. They're all those demos.

**Asher:** And I mean, look, if you wanna...

**Mariann:** I have seen that language. I've seen that language in animal enterprise terrorism cases from the courts, so I'm not surprised they tried it.  
\*laughs\*

**Asher:** I mean, two very quick answers to that. It's a really easy one. There is legislative history here. This isn't just text in a vacuum. The legislators are pretty clear. Their fear was so-called animal terrorism. And then two, if you want to grant them their view, "Oh, what if you wanna increase animal testing?"

Well, the law says stop or modify. So if you want to advocate for the status quo, status quo viewpoints aren't being discriminated against.

**Mariann:** Yeah, no, it's pretty clear. It's a very hard argument for them to make. You also made other arguments about the unconstitutionality of this statute under the First Amendment.

And one of them was over breadth, and can you just talk about the mental health provision? I found that fascinating.

**Asher:** Under federal law, you can't criminalize or otherwise bar conduct on the basis of terms that give no one an idea of what the government can basically bother them for. And what this provision says is that it has a definition of harassment.

That definition of harassment is as expansive as possible to say that employees of animal experimentation facilities can sue, even if the threat is just to their mental health. And you know, luckily, this is one context where we actually do have case law that says, "OK mental health, that is unconstitutionally vague."

**Mariann:** Yeah, I mean, what if you get depressed because people are mad at you? It's literally affecting your mental health. That seems like a pretty poor standard.

We didn't actually go into the facts here. Can you give exactly what kind of threats, shall we call them, that they are talking about, that they're giving as examples of the kind of threats that they've been subject to?

**Asher:** Yeah, so that didn't end up in the Ninth Circuit decision. They kind of said, "Well, this is so easy. We don't have to take the time for that." But I think it's actually the most interesting part of the case and really illustrates why these concerns are so specious.

So in their declaration supporting their motion for a preliminary injunction, the plaintiffs, in this case, raised examples of supposed harassment. We investigated each and every example they cited, and it's really funny and telling how much they fall apart with the slightest scrutiny. So, for example, IACUC members said they were threatened by a member of the public calling them sadistic Nazis, as they put it.

PETA, through its diligence, actually has video of that meeting, and it turns out the speaker here was a retired UW professor, Professor Wayne Johnson, who politely... This elderly man used his two minutes not to call them sadistic Nazis but to recite a famous aphorism from a Nobel laureate, an actual refugee of Nazi Poland, and your listeners might have heard this before, "In relation to animals, all people..."

**Mariann:** \*laughs\* Oh, of course. The Isaac Bashevis Singer quote! Oh my God! That's hilarious. Well, it's not... it's horrifying and hilarious. That's crazy!

**Asher:** I think we can find it hilarious.

I mean, we disagree. That's a model of how free speech is supposed to work. And the other example...

**Mariann:** But even if this person or some other person had called them Nazis, you're allowed to call people things.

**Asher:** Oh my God, I'm glad you said that. I mean, again, as a lawyer, we're duty-bound to point out you're allowed to call public officials Nazis.

Literally a week ago, actually, a Massachusetts court actually ruled on exactly this issue, explaining that under the Massachusetts State Constitution, and they explained this is just like how the First Amendment works, members of the public can be rude at public meetings. They can even call public officials Hitler-like, and it actually went through all the fun colonial and revolutionary history of messy public activism that the Constitution's framers would've had in mind.

And that's not what we're dealing with here. We're dealing with polite, reasoned remarks at IACUC meetings. This is a settled issue, and there's one more incident I'd love to get into if you have the time.

So after we pointed out this is a famous quote by a survivor of Nazi Europe. In their reply brief, they tried one more time. Here's a new example. This was in a declaration from Jane Sullivan herself. We have another example of an unnamed member of the public calling us Nazis, AND they mentioned the name of my cats to intimidate me, suggesting this person would use nefarious means to hunt down the cats' names and intimidate her.

Because I know that he goes to every IACUC meeting, I went to retired Professor Johnson and asked him, "Hey, have you heard of this incident? What happened here?"

And he said, "This actually was not an unknown member of the public."

It was him again! \*both laugh\* That's so funny because, again, he's at every meeting Jane Sullivan knows who he is.

For example, he takes experimenters up on their offers to take tours of facilities. He is as genteel an activist as you can ever find. But not only was this exchange polite, he knew the cat's names because he and Sullivan had a pleasant chat before the meetings when she told him the names. \*laughs\*

**Mariann:** Oh my God...

**Asher:** I know. The distortions are unbelievable.

**Mariann:** That's crazy. Truly crazy.

They also complained about picketing, which I have heard is often protected by the First Amendment. \*laughs\* Peaceful picketing.

**Asher:** In advising PETA, the number one rule is to stay in public spaces. Public sidewalks, public roads, if you're allowed, and not disrupting traffic. It has to be a traditional public forum. These people are not going up to houses. They're not screaming; they're not getting in people's faces. They're just showing that if you're going to use what, in these contexts, are literally hundreds of millions of taxpayer dollars, the public has a right to know who's getting that money and what they're doing with it.

**Mariann:** You know, a lot of what you're saying kind of explains to me there was this language within the papers that they kept talking about threats of bodily harm to them and their pets. I was like, why do they keep mentioning their pets? Is that typical language, or was it specifically because of this quote-unquote threat against Jane's cats?

**Asher:** No, it's stupider than that. \*laughs\*

So this was actually not something they brought up on reply to save their argument. This was actually in their papers from the very beginning. And it's another illustration of how divorced from reality this lawsuit is. What you're referring to was a completely unsourced, uncorroborated allegation in one of the anonymous declarations that, and I'll just quote, this person is “aware that members of other IACUC committees have had their pets kidnapped by persons who oppose animal research.”

So there's no way for a finder of fact to ever corroborate this. It's just that, “oh, I heard that someone somewhere won't say who or where had something bad happen to their companion animal.” And it would be funny if that wasn't being used temporarily successfully as a way to shield a state governing body from accountability.

**Mariann:** Yeah, and I totally believe it. And I totally believe the people hear that, and they're like, “oh yeah, that's exactly what happens.” Unbelievable.

All right. So, what are next steps in this case? I just want to clarify something. You mentioned that the ninth circuit didn't go into these particular arguments because they thought the legal question before them on the association right was so clear they didn't have to go into this. But these allegations are still out there because of these new causes of action, is that right? And, if so, what are the next steps on those new causes of action?

**Asher:** That's right, and the next step is back in the district court to have the rest of the lawsuit dismissed.

Both because of all these issues I've been talking about that even though these are factual questions, it's a legal fact. It's a question of law as to whether any of the alleged facts are even legally sufficient to support the kind of injunction and limit on free speech and first amendment rights being sought. And they're not. So the next step is to convince the district court that, "okay, this is back from the ninth Circuit. They thought it was an easy question whether or not there's free expression rights here. Well, we think these bodily autonomy arguments are a repeat. They're exactly the same issue. And then you have this additional count using this law that is facially discriminatory."

So hopefully, fingers crossed, the lawsuit can get thrown out soon, and we can move forward. We can get the appointment letters for the IACUC members. We can figure out who's sitting on the IACUC and whether they are actually legally constituted.

**Mariann:** And do you have a legal recourse if you find it is illegally constituted?

**Asher:** There are. So I think what's motivating this lawsuit really is the fact that the IACUC members and UW are probably aware that if it was found the IACUC is legally constituted, they could be subject to liability. While their regulators could enforce it if they were actually, you know, faced with the evidence head-on in a way they couldn't deny.

And then two, Washington, like every other state, I believe, and like the federal government, has its own administrative law books, and it's just a fact that an administrative agency, which the IACUC basically is, or UW is, and the IACUC is a governing body of that agency, can't take actions that are against the law.

So it could potentially have ramifications for actions that were undertaken in violation of the law. Like here, approving experimental protocols.

**Mariann:** Wow, that sounds like a really powerful direction to be headed in.

Is there anything about...oh, you mentioned that you hope to get the case dismissed, but I wanted to add that I hope you get the case dismissed and get this law declared unconstitutional in the process because it really sounds completely unconstitutional to me. But, you know, they don't ask me.

So is there anything else that I should have asked you that I haven't that we should know about this case?

**Asher:** Yeah. So what's so interesting here, I think, is some of PETA's other litigation history against the University of Washington. One is that before this case started, PETA had actually filed a lawsuit under Washington Public Meetings law to try to have their practice of members during public meetings being anonymous held illegal under state law.

I mean, the state bans conducting public meetings in secret. I don't know what can be more secret than literally having an anonymous membership. That case was in limbo. We've actually recently amended that lawsuit to add a new charge over another way the IACUC is violating public meetings law- that they require attendees to register their names and other information when they attend remotely. That's squarely illegal.

And there's actually an infuriating story behind that too, which is that last summer, a brave young woman stood up during a meeting to criticize the IACUC based on her knowledge as someone who actually works in the hard sciences. And what happened next to her? Well, as she said, at a later IACUC meeting, someone at UW actually found her name that she was required to provide before the meeting and reached out to her employer to complain. So literally, the kind of retaliation that the law is designed to prevent.

**Mariann:** Well, no wonder they think everybody is out to get them because they're actually out to get everybody else.

So the members of the IACUC can remain totally secret, but the members of the public who want to go and find out what's going on have to expose themselves to that kind of abuse. That's crazy.

**Asher:** I know, and really everything about this process is secrecy. I know I mentioned our public records lawsuit earlier, and the genesis of that lawsuit was that if you got to the UW Primate Center, you'll be presented with a photo and video policy. They make sure everyone knows about it. It includes clip art images of a camera and of a cell phone in basically no smoking posture. Red circles with a line through it that says, "thank you for observing our no photo policy." And there's fine print in the policy that elaborates on why, which is that if you take photos and videos in the Primate Center, they are records subject to public records law.

**Mariann:** Wow. Boy, paranoia strikes deep.



I'm really grateful to you for sharing all of this with us and getting us up to date on these lawsuits. It sounds like there's a lot more to uncover, but so far, you're doing pretty well.

**Asher:** Thank you. It's really a joy to hear that, and thank you again for having me on.

**Mariann:** My pleasure.