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This article touches on the evolution of property classifications through history and suggests that the time has arrived for society to re-conceptualize its view on animals as personal property. Re-categorizing animals as equivalent, sentient beings has the potential to affect current search and seizure practices under the Fourth Amendment to the Constitution. This article proposes policy changes that could significantly benefit neglected and abused animals, while still recognizing the fundamental liberty interests of pet owners.

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THE HUNT FOR MERCY

JAY SURSUKOWSKI*

INTRODUCTION

There's none in the world like to merry hunting.
—Peter Beckford, *Thoughts on Hunting*, 1781[1]

The unspeakable in full pursuit of the uneatable.
—Oscar Wilde[2]

A classic work on foxhunting describes the stations of the hunt in the prose equivalent of Handel's Messiah. The first notes of exultant expectation are found in the barking chorus of the hounds: "How musical their tongues! and as they get nearer to him, how the chorus fills! Hark, he is found!"[3] The early hour has brightened now that the dogs are on the scent. Peter Beckford, the writer of this book asks, "Now, where are all your sorrows, and your cares, ye gloomy souls!"[4] The passing traveler, the shepherd, and the farmer all stop in their tracks and put down their labor to meditate on the sweetness of the sound of hounds taking chase.[5] The dogs ascend hills and traverse hedges, they are a "parcel of brave fellows" keeping on the scent with the guidance of a lead dog.[6] Different dogs take up the command, their names alone are triumphantly baroque: Galloper, Victor, Brusher, Lightning, Frantic, Trueman.[7] The hounds and hunters come to a check, the scent is lost and must be found. The hounds need time to figure out the fox again. Then "Hark! they halloo! Aye, there he goes!"[8] The chase is at its breakneck climax punctuated with brief moments of silence as the fox wheels and turns and runs, desperately trying to evade its four-legged hunters.

> How quick they all give their tongues! Little *Dreadnought*, how he works him! The terriers, too, they now are squeaking at him. How close *Vengeance* pursues! How terribly

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[1] PETER BECKFORD, THOUGHTS ON HUNTING (1899). The book was first published in 1781 when Beckford was 41 years of age. The 1899 editor speaks to the book's classic status in the hunting canon.

[2] OSCAR WILDE, A WOMAN OF NO IMPORTANCE (1893).

[3] BECKFORD, *supra* note 1.

[4] *Id.* at 1

[5] *Id.* at 110.

[6] *Id.*

[7] *Id.* at 110-12. Matthew Scully in his book DOMINION refers to such names as "snooty," MATTHEW SCULLY, DOMINION: DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 114 (2002).

[8] BECKFORD, *supra* note 1, at 113.

> she presses! It is just up with him! Gods! what a crash they make! the whole wood resounds! That turn was very short! There! now—aye, now they have him! Who-hoop![9]

To close his book, Beckford reproduces an actual song. Comparison to Handel may thus not be too far off. This verse is especially graphic about what is only left to the imagination in the earlier passage quoted above:

> The hounds how eager to enjoy their reward
> The huntsman as eager checks them with a word
> He beheads old Reynard and takes off his brush
> And to the hounds gives his karcass a toss. . .[10]

In the next verse the huntsmen neatly buckles the hacked-off head to his saddle and ties the brush to his hat with a delicate ribbon.[11]

Beckford's impassioned account is not alone in describing the thrills of the hunt in near poetic terms. Indeed, the most famous modern book on foxhunting was written by a poet. Renowned World War One poet Siegfried Sasson penned the highly popular *Memoirs of a Fox-Hunting Man*, part of a three-volume fictional autobiography.[12] Indeed, before Sasson traipsed off to join the Great War, he had dedicated his young life to fox-hunting and other squirely activities. Anthony Trollope's *Hunting Sketches*[13] and R.S. Surtees' *Jorrocks' Jaunts and Jollities*[14] round out a trinity of the most beloved fictional studies of the pastime. These works are to a degree comic, but do well to lend literary approbation to the ways and means of foxhunting in England. These texts are at the apex of an artistic and literary canon that is plentiful in its glorification of the sport. Hundreds of prints, paintings, books, drawings, and articles also exist.[15] David C. Itzkowitz notes that "as the almost obligatory hunting prints on the oak or pseudo-oak paneled walls of countless restaurants, clubs, and hotels testify, the power of the sport to evoke images of a particular way of life is very strong."[16]

Despite its rich history and its synonymy with all things English, aristocratic, and of the country, the United Kingdom Parliament passed a highly controversial bill in 2004 banning foxhunting. The debate and subsequent votes in both houses of Parliament was electric and provoked widespread protests and demonstrations, making it perhaps the most public and concentrated animal rights debate of all time. The climax was a massive demonstration through the streets of central London that drew upwards of 400,000 protestors to rally against the proposed foxhunting ban and to raise awareness of rural issues in general. Organized by the pro-hunting Countryside Alliance, this protest was not only monumental in a debate over animal rights, it was the largest protest of any issue in the millennia-long history of the British Isles.[17] In

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[9] *Id*. at 114.
[10] *Id* at 218.
[11] *Id.*
[12] SIEGFRIED SASSOON, MEMOIRS OF A FOX-HUNTING MAN (1945) (first published in 1928).
[13] ANTHONY TROLLOPE, HUNTING SKETCHES (1952) (first published in the *Pall Mall* in 1865).
[14] R.S. SURTEES, JORROCKS' JAUNTS AND JOLLITIES (1932) (first published in 1838).
[15] An especially rich collection of images and lore is brought together in ROGER LONGRIGG, THE HISTORY OF FOXHUNTING (1975).
[16] DAVID C. ITZKOWITZ, PECULIAR PRIVILEGE: A SOCIAL HISTORY OF ENGLISH FOXHUNTING 1753-1885 1 (1977).
[17] *The Long March of* History, TIMES, Sept. 23, 2002, at 5.

fact, one of the three marches tied for second-biggest in English history was the first Countryside Alliance march on London which drew 200,000 people four years earlier in 1998.[18] The 400,000 person strong protest in late September of 2002 was widely covered throughout the United Kingdom[19] and Scotland,[20] and made headlines across the Atlantic in the United States as well.[21] The clash of pro- and anti-hunting forces in Parliament and in the streets was not restricted to the democratic mobs. Prince Charles himself, regarded as "the country's most eminent foxhunter"[22] was quite public about his defense of the activity. He continued hunting until the ban's dawn, as did his then partner Camilla Parker Bowles. This, despite the Queen's admonitions to the contrary.[23] He was said to have uttered to a cabinet minister: "If the Labour government ever

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[18] *Id.*

[19] *C.f.* Valerie Elliott, *400,000 March in London: Hardliners Warn Blair of Civil Unrest,* TIMES, Sept. 23, 2002, at 1; Ben Macintyre, *It's Livestock and Two Smoking Barrels as Country Goes to Town,,* TIMES, Sept. 23, 2002, at 1; Kirsty Buchanan, *Country Takes Protest to City with Peace,* TORQUAY HERALD EXPRESS, Sept. 23, 2002, at 3; R.K. Forster, *Country Takes its Case to the Capital* ,SENTINEL, Sept. 23, 2002, at 5; *Here to be Heard; the Day Countryside Came to London,* THE SUN, Sept. 23, 2002, at 4; *The Long March of History; the March* , TIMES, Sept. 23, 2002, at 5; *Protestors Return from Capital March,* BATH CHRONICLE, Sept. 23, 2002, at 2; *Matter of Life and Death,* BATH CHRONICLE, Sept. 23, 2002, at 1; *Liberty and Livelihood: Alliance Warns of Simmering Anger of the Rural Peaceful* , BIRMINGHAM POST, Sept. 23, 2002, at 3; *Invasion Force: Countryside Campaigners in London,* BIRMINGHAM POST, Sept. 23, 2002, at 1; *March for the Countryside: 'Biggest Demonstration of Modern Times' Demands Safeguards for Country Traditions,,* DAILY POST, Sept. 23, 2002, at 45; Jonathan Corke, *Country Army Gives it Welly: 400,000 in Pro-Hunt Protest,* DAILY STAR, Sept. 23, 2002, at 10; Charles Moore, *Were You Listening, Tony Blair? We Were Talking to You,* DAILY TELEGRAPH, Sept. 23, 2002, at 22; Stephen Robinson, *407,791 Voices Cry Freedom,* DAILY TELEGRAPH, Sept. 23, 2002, at 1; *400,000 March for an End to 'Meddling',* DERBY EVENING TELEGRAPH, Sept. 23, 2002, at 2; *400,000 Make the Point but Minister Says He's Puzzled,* EE, Sept. 23, 2002, at 2; *400,000 in Rural Demo: Biggest 'Invasion' of Capital,* EVENING MAIL, Sept. 23, 2002, at 6; Marianne Brun-Rovet & John Mason, *Countryside Protesters Enjoy Field Day in City: There was Plenty of Passion but the Marchers Remained Good-Natured,* FINANCIAL TIMES, Sept. 23, 2002, at 3; *Rural Invaders Claim a Record Turnout at Demo,* GLOUCESTER CITIZEN, Sept. 23, 2002, at 2; *Protest Vents Fury but 'Message is Muddled',* GRIMSBY EVENING TELEGRAPH, Sept. 23, 2002, at 4; Tania Branigan, *Countryside March: 400,000 Bring Rural Protest to London,* GUARDIAN, Sept. 23, 2002, at 4; *Rallying Cry for Country,* HULL DAULY MAIL, Sept. 23, 2002, at 1; Paul Peachey, *Country Invades Town in a Show of Force,* INDEPENDENT, Sept. 23, 2002, at 1; *Can You Hear Us Tony Blair?,* LINCOLNSHIRE ECHO, Sept. 23, 2002, at 1; James Whitaker & Oonagh Blackman, *Think Again: Aides Urged Charles Not to Send Pro-Hunt Noted to No. 10,* MIRROR, Sept. 23, 2002, at 9; Brian Reade, *Vermin, Cunning Vermin (AND NO I'M NOT TALKING ABOUT THE POOR FOXES) Brian Reade on How the Fox Hunters Hijacked the Countryside Protest,* MIRROR, Sept. 23, 2002, at 67; *United to Support the Countryside,* NOTTINGHAM EVENING POST, Sept. 23, 2002, at 12; *Thousands in Protest,* SCUNTHORPE TELEGRAPH, Sept. 23, 2002, at 7; *Campaigners Deliver Their Wish List to Downing St.,* WESTERN DAILY PRESS, Sept. 23, 2002, at 3; *Hunting is not the Only Rural Issue at Stake,* WESTERN DAILY PRESS, Sept. 23, 2002, at 8; Son Groves, *West's 'Magnificent' Show of Strength,* WESTERN MORNING NEWS, Sept. 23, 2002, at 2.

[20] *C.f.* Andrew Denholm & Alison Hardie, *Charles Row as London Turns Rural,* SCOTSMAN, Sept. 23, 2002, at 1; Helen Puttick, *400,000 on March as Countryside Fights Back; Organisers Claim Demo is Biggest Ever,* HERALD, Sept. 23, 2002, at 1; *Countryside Alliance Takes Fight to PM,* EVENING NEWS, Sept. 23, 2002, at 2; Jill Stark, *Down with the Townies: Countryside Takes to the Streets in 'Fight for Survival',* DAILY RECORD, Sept. 23, 2002, at 4.

[21] *C.f.* Reuters, *400,000 Protestors Take to London Streets,* NEW YORK TIMES, Sept. 23, 2002, at A4; AP, *Protestors Hound Blair: Rally for Fox Hunting and Preservation of Rural Life,* NEWSDAY, Sept. 23, 2002, at A6; Jane Wardell, *400,000 March in London Over Hunting, Rural Issues,* CHICAGO SUN TIMES, Sept. 23, 2002, at 27; AP, *Proposed Ban on Fox Hunting Draws Big Protest in London,* MIAMI HERALD, Sept. 23, 2002, at 6A; Mercury News Wire Service, *Rural Britons Accuse Government of Neglect,* SAN JOSE MERCURY NEWS, Sept. 23, 2002, at 7A; *Thousands March to Support Hunting,* AKRON BEACON JOURNAL, Sept. 23, 2002, ay A4.

[22] Stephen Bates, *Prince Charles Still Enjoys the Thrill of the Chase Despite his Mother's Advice,* THE GUARDIAN, Sept. 23, 2002, at 3.

[23] *Id.*

gets round to banning foxhunting, I might as well leave the country and spend the rest of my life skiing."[24]

This article explores the discourse surrounding the foxhunting Bill to determine whether the law was an expression of mercy—an altruistic law focused on the "individual" that is the single fox pursued and violently killed by people and hounds—or whether the law was more human-centered in spirit. Prominent thinkers through the ages have cautioned against animal cruelty for what it does to people. Some animal laws have been written in just such a self-referential manner, banning violence primarily because of the anti-social ramifications on humans—in these laws, concerns for the individual animal seems to play second fiddle, at least in the discourse surrounding the enactment and enforcement of such laws. Certainly both kinds of concern are well-intentioned and are seeking to lessen suffering at the end of the day. But it is an intriguing question which is a part of the greater debate and progress in the matter of whether an animal can be an individual and have both moral and legal standing and attendant rights. Why is this important? Steven Wise notes that there are many obstacles to animal rights. Among these is the legal obstacle. He notes simply that law generally divides the physical world into people or things: "Legally, persons count; things don't. Until, and unless, a nonhuman animal attains legal personhood, she will not count."[25] The Hunting Bill is extraordinarily useful for study because it is a watershed moment in animal law. The contours of the discourse are highly instructive in moving towards answering a central question of the principle motivations at work in legislating animal law today. Is the law more about the animals as individuals or is it more about humans and their well-being? Where have we moved as humanity in relation to animals through this recent debate?

Part I of this article sets aside the high-flown romanticism of the introduction and gives an unembellished primer of what a hunt consists of in its most basic form. Part II briefly sets out the major features of the law as passed in 2004 and set into action on February 18, 2005. Part III of this essay sketches out more clearly what I mean by the discourse labels of "mercy" and "human-centeredness," with a defense of the schema as well as examples of the two kinds of discourse. I also describe the basic content analysis I employ in studying the debates in order to come to more precise reflections of the language that was used in Parliament. Part IV of this essay delves into the debates themselves and contains the results of the content analysis as well as illustrative and compelling examples of each kind of discourse. This Part will reveal an astonishingly high level of concern for the individual animal; a predominance of a discourse of mercy. In the Conclusion I summarize the overall results of the content analysis and comment briefly on the implications of this finding of an overwhelming discourse of mercy. I will also suggest a few future threads of study that would be useful.

I. THE PRACTICE OF FOXHUNTING

Setting the romantic aside, for the unitiated, what follows is a pared down, sober version of what a hunt consists of since about 1820, drawn from Professor David Itzkowitz's good history of the tradition.[26] A fox is hunted by people on horses, on foot, or in a vehicle. The people follow closely behind a pack of hounds, numbering at least forty of fifty. The hounds do

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[24] *Id*.
[25] Steven M. Wise, *Animal Rights, One Step at a Time in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 25 (Cass R. Sunstein and Martha C. Nussbaum eds., 2004).
[26] ITZKOWITZ, *supra* note 16.

all the work of sniffing out, chasing, and dispatching the fox. A given foxhunt will be run by a Master of Foxhounds, a position of "great social prestige."[27] The master has a manager of sorts under him who is the nuts and bolts person in terms of taking care of, and preparing, the hounds. This is the "huntsman." The huntsman in turn has one or several "whippers-in" under him who keep the dogs together during the frenzy of the hunt. Beyond these key figures, a given hunt may employ other servants to tend to kennels and the like.[28]

Before the hunt foxholes are blocked up in a given area, to insure that some foxes will be above ground and ready for the hunting. Blocking the holes also keeps other foxes underground, so that the dogs are not distracted by a new scent. The hunt begins with the huntsman and the whippers-in working with the hounds in a covert known to contain a fox. The goal is for the hounds to scare the fox out of his hiding in the brush of the covert. The sportsmen who will participate in the hunt wait off to the side. They are collectively known as "the field." Once the fox breaks it is incumbent on someone present to make a loud noise, a "Tally-Ho" or an unintelligible shout of some kind. This is the signal for the huntsman and the whippers-in to bring the hounds to where the fox was spotted and then to storm after them once the pack sets-off on the trail. The chase goes on like this with the field in full pursuit of the dogs until the fox is caught or a new trail is started after a break in the scent. At this juncture the huntsman will "cast" the gathered hounds over the grounds, seeking the scent afresh.[29]

When and if the hounds catch the fox, they kill it quickly. The huntsman then fishes the still mostly intact carcass from the hounds and cuts the tail (the "brush") and paws off as trophies for a favored member of the hunt. The carcass is then tossed back, and with death knell cries of "whoo-whoop!" what remains of the fox is torn asunder.[30]

If children are participating on their first hunt, sometimes they will be "blooded," that is to say, smeared with the warm blood of the fox, a kind of primal anointment. Itskowitz observes that this practice fell from favor in Victorian England, but that it still persists in some hunts to the present.[31]

II. THE 2004 HUNTING ACT

The Hunting Act 2004 prohibits all hunting of mammals with dogs in England and Wales with the exception of certain exemptions.[32] The ban came into effect on February 18, 2005. The practice of hare coursing was also outlawed. It is also an offense for a person to knowingly allow land or dogs under his or her control to be used in an illegal hunt.[33] The penalty for a conviction under the Act is a maximum fine of £5,000.[34] A magistrate court may also order the forfeiture of any hunting paraphernalia, vehicle, or dog.[35]

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[27] *Id.* at 2.
[28] *Id.* at 2-3.
[29] *Id.* at 3-4.
[30] *Id.* at 4.
[31] *Id*.
[32] Hunting Act, 2004, c. 37, § 1 (Eng.).(hereinafter Hunting Act).
[33] Hunting Act, 2004, c. 37, § 3 (Eng.).
[34] Approximately $9,745 in American currency, as of January 9, 2007. This monetary fine corresponds with level 5 of the standard scale. Hunting Act 2004 – Chapter 37; Department of Environment, Food, and Rural Affairs Summary of the Hunting Act 2004, at http://www.defra.gov.uk/rural/hunting/summary.htm.
[35] Hunting Act , 2004, c.37, § 9 (Eng.).

The Act has multiple exemptions which are set out in its first schedule. These include provision for the continued allowance for hunting of rats[36] and rabbits,[37] the retrieval of hares,[38] and the flushing out of mammals for birds of prey to dispatch the quarry.[39] There are also exemptions for stalking and flushing out,[40] a so-called "gamekeepers exemption" to contribute to the preservation of birds to be shot,[41] and the use of a pair of dogs for the rescue of a wild mammal,[42] the recapture of a wild animal,[43] or for research and observation[44] (for a complete summary list of all exemptions and their nuances, see Appendix A where a portion of the Department of Environment, Food, and Rural Affairs official Summary is reproduced).

III. MERCY OR HUMAN-CENTEREDNESS?

My methodology is to analyze the final debates on the hunting bill in Parliament with attention to the kinds of language used in the discourse surrounding the bill's enactment. I set-out to uncover whether Members of Parliament (MPs) are speaking and acting out of concern for the individual fox or whether they speak of the ills that the perpetuation of foxhunting causes to humans.

I label concern for individual foxes a discourse of "mercy" and concern for the harm to humans "human-centeredness." The label "mercy" is inspired by Matthew Scully's groundbreaking and moving book *Dominion: The Power of Man, the Suffering of Animals, and the call to Mercy*.[45]

I arrive at these distinctions from a reading of seminal texts studied in animal law/animal rights debates. Throughout this canon, one of the fault lines that emerges involves to what degree animal laws are purely altruistic and cognizant of animals as a kind of individual in the political order—or—as manifestations of a concern for the deleterious effects on human psychology and society. The most famous iteration of the human-centeredness view comes from British historian Thomas Macaulay, who wrote in the second chapter of his history of England: "the Puritan objected to bear-baiting, not because it gave pain to the bear, but because it gave pleasure to the spectator."[46] Catholic Church Father St. Thomas Aquinas held a similar view, noting that cruelty to animals is shunned in scripture for its capacity to provoke the same in us; an "injury of an animal leads to the temporal hurt of man."[47] Cardinal John Henry Newman was explicit in the offense against mankind that cruelty to animals represented. The animals do not have rights in this schema, their welfare is "incidental in the virtuous life, important more as a reflection of human goodness than of the creatures' own goodness," as Matthew Scully writes in summarizing this school of thought.[48] One need not just look to theologians for expressions of this human-centered view about animal cruelty. Immanuel Kant wrote with great clarity: "[H]e

[36] Hunting Act, 2004, c. 37., 3, Sch. 1 (Eng.).
[37] Hunting Act, 2004, c. 37, 4, sched. 1 (Eng.).
[38] Hunting Act, 2004, c. 37, 5, sched. 1 (Eng.).
[39] Hunting Act, 2004, c. 37, 6, sched. 1 (Eng.).
[40] Hunting Act, 2004, c. 37, 1, sched. 1 (Eng.).
[41] Hunting Act, 2004, c. 37, 2, sched. 1 (Eng.).
[42] Hunting Act, 2004, c. 37, 8, sched. 1 (Eng.).
[43] Hunting Act, 2004, c. 37, 7, sched. 1 (Eng.).
[44] Hunting Act, 2004, c. 37, 9, sched. 1 (Eng.).
[45] SCULLY, *supra* note 7.
[46] *Id.* at 338.
[47] *Id.* at 339.
[48] *Id.* at 338.

who is cruel to animals becomes hard also in his dealings with men."[49] Kant gives an example of the wrong inherent in killing a faithful dog. It is not the dog's death that is the evil, it is the fact that the human involved may be less inclined to treat other loyal and faithful human companions with decency.[50] Professor Peter Carruthers also falls into this line of thought. Matthew Scully quotes him on the idea of animals having no rights but "indirect moral significance nonetheless, in virtue of the qualities of moral character they may invoke in us. Actions involving animals that are expressive of a bad moral character are thereby wrong."[51]

Some may argue that the two categories I have set up are an artificial dichotomy. This may be true, since clearly both are often present as motivations. However, in addition to the fact that this tension is represented in the reality of the animal law/animal rights literature, such a dichotomy is also a useful approximation in learning about what is going on in the discourse. A way to think about this set-up is that mercy and human-centeredness are goalposts of sorts. There are some motivations and rhetoric that will be along a continuum somewhere between the two. But many other comments will clearly fall under one side or the other. My analysis seeks to shed light on approximately how much of the recent debate in the United Kingdom over hunting was about "us" and how much of it was about animals. These posts help accomplish that goal.

A. Mercy

What characterizes the language of mercy? Mercy in this debate is represented by comments that are altruistic and focused compellingly on the fate of the individual animal: the fox being hunted by a large pack of hounds.[52] Such language references cruelty and sometimes graphically depicts what happens to an individual fox, i.e., a MP relates how a fox is pursued, overtaken, and torn limb by limb by hounds or a fox cub is dug up and dismembered. The discourse of mercy gives voice to an individual animal that has no voice itself.[53]

B. Human-Centeredness

The discourse of human-centeredness focuses primarily on the harm to humans and society that foxhunting represents. This discourse focuses on the violence done to humans by its example and spectacle. For example, an MP who speaks to the barbarity of the practice is speaking to the violence it does to society—the moral evil's harmful effects to a civilized order.

An important note to this methodology: both kinds of discourse can be brought up by proponents and opponents of the bill in a given debate. Concern for animals is not always the province of just the supporters of the ban. What matters to my project is that an animal as an individual is being discussed as such or is being discussed via its relation to people. For example, an opponent of the measure can be quite passionate about increased harms that may actually result to foxes as a result of the bill. An illustration is MP Andrew Robathan's comments on foxes shot by marksmen:

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[49] Immanuel Kant cited in Gary L. Francione, *Animals—Property or Persons*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 111 (Cass R. Sunstein and Martha C. Nussbaum eds., 2004).
[50] *Id.*
[51] SCULLY, *supra* note 7, at 339.
[52] Or as will be seen below, other animals whose well-being is wrapped up in the Hunting Bill such as the horses and hounds used in hunting.
[53] At least no voice in the human sense. Animals subjected to cruelty certainly vocalize pain.

> The measure will deliver hunting death by a thousand cuts—the lingering death of a fox shot by those alleged marksmen. As somebody who has shot more rifle bullets than most people in this place, I can tell Members that many foxes shot by people who pretend to be marksmen will die a lingering death.[54]

IV. THE DEBATES

The Hunting Act was debated for many hundreds of hours in committee and on the floor of the two chambers of the United Kingdom Parliament over the course of seven years. In this section, I analyze the discourse of five of these debates, the five most recent on the Act before the House of Commons and the House of Lords. Whereas it may be more instructive to survey the entirety of thousands of pages of public record for every amendment and iteration of the bill, I focus on the final five debates for expediency as well as operating under the assumption that only the most time-tested and salient points will have survived to the climax of this legislative odyssey.

The first debate I discuss occurred on September 15, 2004.[55] The House of Commons was considering the robust version of the bill that included a ban on hunting which had been before the Lords the previous fall, but which was not enacted because the Lords ran out of time.[56] On October 12,[th] after lengthy debate, the Lords allowed the bill to move forward for the sake of amendment.[57] The third debate I examine occurred on October 26, 2004. The Lords rebuffed the Commons and adopted their own "compromise" version. The fourth debate I study occurred on November 16, 2004 in the House of Commons. The Commons rejected both the Lords new language as well as some compromise language advanced by the Prime Minister.[58] The fifth and final debate I analyze was the "last stand" of the House of Lords where they once again voted down the legislation as well as for a measure blocking any change to the status quo before December of 2007.[59]

A. September 15, 2004 - The Commons Affirms its Intent

This debate began at 12:39 PM with a preliminary procedural debate. The crux of this procedural debate was that the House of Commons resolve to guarantee passage of the bill by invoking the rarely used Parliament Acts. The Parliament Acts of 1913 and 1949 are akin to a "nuclear option" in that they are a means of compelling the Upper House to accept the will of the people through their elected representatives. At points in this portion of the day's proceedings, this use of the Parliament Act was analogized to the employing of a legislative steamroller and a guillotine, underscoring the rarity and extremity of its use in the eyes of some members. This dynamic and the attendant debates over representation, majoritarianism, and countermajoritarinism colored much of the debate, call this a constitutionalism angle. Questions of politics also were very present—be they allegations of class warfare, "red meat" for back bench labor MPs disappointed over Blair's Iraq policy, revenge for the Thatcher government's

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[54] Remarks of Andrew Robathan, 425 PARL. DEB., H.C. (6[TH] ser.) (2004) 1398.
[55] *Id*.
[56] GUARDIAN, Timeline, *available at* http://politics.guardian.co.uk/homeaffairs/page/0,,650062,00.html (last visited 3/30/07).
[57] *Id.*
[58] *Id.*
[59] *Id*. The *Guardian* writers refer to the vote as the Lords' "last stand."

treatment of miners, urban vs. rural, tolerance vs. moralistic legislation, personal freedom and government intrusion, criminalization of decent people, unemployment, and other such divisions simmering in British politics.

The bill passed into a second reading on a vote of 356-166.[60] The debate then moved to one on allowing for an eighteen month delay in the enactment of the law. This, too passed by a large margin. The final bill was sent over to the Lords on a vote of 339-155.[61]

A brief word on atmosphere: the debate was a momentous one, with strained emotions and the added backdrop of some violence outside when protesters clashed with each other and police. At approximately 4:22 PM five of eight protestors who had forged an invitation to gain access to the Commons stormed the chamber itself. The "invasion" was so shocking that one member declared "such a breach was probably unknown throughout the 20th century."[62] Another decried: "Is it not a fact that not since Charles I came to this House has there been such an invasion."[63]

Approximately 352 lines of the debate directly addressed the effect of the legislation on animals—primarily the lines concerned foxes, but there were a number on hounds, and some on horses, and even deer.

1. Mercy

A hefty 295 of the animal-related lines or 83.8% could be considered as indicative of a discourse of mercy.[64] One such comment was made by Jean Corston who noted "my opposition was reinforced before Christmas last year when I saw a fox being torn apart by hounds of the Beaufort hunt just off the public highway."[65] She related this narrative of personal witness twice in her remarks. Michael Foster made another remark which was intriguing for his discussion of being present for a hunt. He makes his point strongly, noting that at one point, he and the hunters came into physical contact with the pursued fox: "On one occasion, the fox brushed past my leg—and those of the people accompanying me on the hunt. To show me how humane the hunt was, the fox went past my leg."[66] He concluded forcefully: "Hunt supporters pretend that hunting as an activity is purely natural. I believe that that is a lie."[67]

2. Human-Centeredness

57 of the animal related lines, or 16.2% can be categorized as dealing with human-centered concerns.[68] Despite the low tally for this kind of discourse, when it was invoked, the points were interesting and suggestive. Andrew George couched the matter in terms of the "liberties of those who are displeased by hunting in their parish."[69] He noted that people are

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[60] *Supra* note 55, at 1353.
[61] *Id.* at 1419.
[62] Remarks of David Winnick, *id.* at 1337.
[63] Remarks of Sir Stuart Bell, *id*. at 1337.
[64] See chart in the appendix.
[65] *Supra* note 55, at 1374. The Beaufort is one of the largest hunts.
[66] Remarks of Michael Foster, *id*. at 1388.
[67] *Id.*
[68] See chart in the appendix.
[69] Remarks of Andrew George, *supra* note 55, at 1347-48.

"offended" and "derive displeasure" from hunting.[70] The concern is for the humans and their sensibilities in these remarks. The Department for Environment, Food, and Rural Affairs Minister Alun Michael specifically cited the "evils" associated with hare coursing that the bill addresses, and notes that this is an "important consideration."[71] These evils include "violence and intimidation" associated with the hunting activity.[72] This is an effect of the cruelty on people and is another example of human-centeredness in this debate. Other comments condemned the presence of foxhunting in a "civilized society,"[73] the "cruel spectacle,"[74] and the "barbaric practice."[75] Such comments illustrate a violence done to human society itself.

B. October 12, 2004 – The Lords Debate the Bill Thoroughly

The House of Lords took the bill up again for a second reading on October 12, 2004. Unlike the House of Commons debate, a lopsided number of the over fifty speakers spoke against the ban. Their comments were not always without concern for animal welfare, however, as a significant number of lines was still devoted to that topic—be it the welfare of the fox, the hounds, or horses. Roughly 311 lines of debate centered on animal cruelty.

1. Mercy

A discourse of mercy accounted for 82% of the debate, or 255 of the animal-related lines, when animal cruelty was discussed.[76] One telling comment from Lord Harrison centered on the individual fox's worth through a comparison with human pleasure. He asked, "How can we justify even one ounce of animal pain being suffered for a hundredweight of human pleasure?"[77] Baroness Gale gave a speech which showed an unusual amount of commitment to individual animals when she revealed that not only did she not support hunting, but that she had also given up eating meat because of the cruelty to animals in factory farming and battery chicken operations. A prior speaker[78] had tried to point out a hypocrisy among red meat eating hunting opponents. Baroness Gale responded that she could "truly say that no animal has been reared in cruelty for me to eat."[79]

One of the more explicit speeches given entailed quotation from letters of hunting opponents. Lord Graham of Edmonton read-out letters such as this one which graphically conveyed a picture of cruelty to an individual fox:

> Several years ago, the Wynstay were out cub hunting. They un-earthed a four month old fox cub using terriers, held it down while they broke its lower jaw, and then threw it to hounds some ten yards away. They disemboweled it, and the hunt staff then cut off its testicles and threw them to the hounds, then cut off its brush as a memento. Most of this

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[70] *Id*.
[71] Remarks of Alun Michael, *id.* at 1360.
[72] *Id*.
[73] Remarks of Jean Corston, *id*. at 1375.
[74] Remarks of Michael Foster, *id*. at 1389.
[75] Remarks of David Winnick, *id.* at 1415.
[76] See Appendix.
[77] Remarks of Lord Harrison, 665 PARL. DEB., H.L. (5TH ser.) (2004) 207.
[78] Lord Phillips.
[79] Remarks of Baroness Gale, *supra* note 77 at 185.

> was seen and heard and backed up by photographic evidence, X-rays and a veterinary report.[80]

As noted previously, not all comments focused on animal welfare are from people in support of the bill. There are those that speculate on the possible slaughter of hounds and horses upon the bill's passage. A major theme in this debate was the detriment to the welfare of foxes who would have to be shot, snared, and gassed upon the bill's passage. Some of the most graphic language of all the debates studied actually dealt with the issue of foxes that had been seriously maimed in unsuccessful attempts at killing. There are also stray comments about the welfare of other animals, such as fish, lambs, and deer. A particularly long passage in this debate was explicitly focused on the evidence and measurements possible or not possible with regard to determining suffering in foxes and other quarry. Lord Burns who had chaired the critical study on hunting soberly discussed the problems that inhere in any divining of what the foxes are feeling.[81]

2. Human-Centeredness

Language of human-centeredness appeared in 56 of the animal-related lines of the debate, or 18%.[82] The most dramatic human-centered speech of any debate examined in this essay was delivered by Lord Roberts of Llandudno. Lord Roberts opened his speech with a meditation on recent senseless acts of violence in world events in the days leading up to the debate including the deaths of 300 school children in Moscow, deaths of innocents on the Israeli/Egyptian border, a 14 year-old's murder in Nottingham, and the beheadings and other barbaric activities in Iraq.[83] "Violence is accepted," he noted simply.[84] He then made the connection with the "accepting and condoning" of this violence with the chance to add to its remediation with the passage of the bill:

> …we must take a step away from accepting and condoning violence. The culture of killing is becoming acceptable, and that shows our civilization and society in a very bad and threatening light…the tide of horror is becoming acceptable and society is becoming insensitive. I suggest that today we can at least take one step with this Bill.[85]

Lord Roberts then moved to a criticism of the barbaric nature of the entertainment and pleasure to be found in this activity at the center of a "culture of killing."[86] He noted that bear baiting, cockfighting, and bull fighting "were acceptable forms of entertainment, but they belonged to a medieval age."[87] He then suggested that hunting belongs with these other savage activities.[88]

Lord Harrison spoke in terms of social cost as well. He noted that foxhunting "impoverishes the human spirit, serves as a poor example to children and encourages the hunt

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[80] Remarks of Lord Graham of Edmonton, *id*. at 239.
[81] Remarks of Lord Burns, *id.* at 144-45.
[82] See Appendix.
[83] Remarks of Lord Roberts of Llandudno, supra note 77, at 203.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 204.
[87] *Id.*
[88] *Id.*

havoc that prevents thousands of our citizens enjoying the peace, tranquility and privacy of their own home."[89] Other Peers spoke to additional human-centered concerns, the Lord Bishop of Chelmsford called it a "moral issue."[90] Baroness Gibson of Market Rasen cited the "anger [that] came from the sight and sound of the hunt" and how ever since she was a girl it made the hair stand on the back of her neck.[91]

C. October 26, 2004 – The Lords Try to Compromise

Having allowed the bill to advance for the purposes of Amendment on October 12th, this was the session in which the Lords put forth their compromise: a bill that would allow hunting to continue with a degree of regulation, namely a licensing system.

The debate was short and was mostly concerned with amendments which could bolstor a compromise. Animal cruelty was only mentioned in 42 lines, and all 42 fall under mercy.[92] The most poignant and express iteration came from Lord Brooke of Sutton Mandeville: "the issue of animal welfare will determine my own vote when we go into the Lobbies and…animal welfare should remain our guiding star."[93]

D. November 16, 2004 – The Commons Stands Firm

This debate and the next in the Lords may mostly be read as a kind of ping-pong between the two chambers. Very little new substantive commentary was made at this late stage in the game. On November 16, 2004, the Commons soundly rejected the compromise proffered by the Lords, as well as bolted from a compromise offered by the Government.

Accordingly, only about 25 lines of the debate were devoted to the issue of animal cruelty. 23, or 92% were indicative of a discourse of mercy.[94] 8% or just two lines were human-centered in nature.[95] Nothing significantly new in terms of rhetoric emerged in these lines.

E. November 17, 204 – The Lords' Last Stand

For what the press called a last stand, there was not much fireworks in the way of substantive discussion, only 18 lines mentioned animal cruelty, 100% were in language of mercy.[96]

As with the debate in the Commons the day before, the Lords last word on the matter was anticlimactic and more procedural than anything. They voted 188-79[97] against a ban and 176-85 to have no change occur in the law until December 2007.[98] Ultimately they stuck to their guns in defiance of the Commons, and the steamroller of the Parliament Act rolled over them.

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[89] Remarks of Lord Harrison, *id.* at 206.
[90] Remarks of the Lord Bishop of Chelmsford, *id*. at 136
[91] Remarks of Baroness Gibson of Market Rasen, *id.* at 137.
[92] See Appendix.
[93] Remarks of Lord Brooke of Sutton Mandeville, 665 PARL. DEB., H.L. (5TH ser.) (2004) 1202.
[94] See Appendix.
[95] See Appendix.
[96] See Appendix.
[97] 666 PARL. DEB., H.L. (5TH ser.) (2004) 1564.
[98] *Id.* at 1588.

CONCLUSION

In the hunt for mercy, the United Kingdom's Parliament has ostensibly done just that—traded the hunt for a regime of mercy for the individual fox. An overwhelming majority of the 748 lines in the five debates relative to animal cruelty were indicative of a discourse of mercy. 633 lines, an impressive 84.63% were concerned with animals as individuals. 115 lines, or 15.37% were human-centered.

This is a clear indicator that the United Kingdom Parliament was showing concern for foxes as individual creatures. This is significant because the foxhunting debate can be considered the most protracted and contentious animal law debate of recent memory.

Despite the dramatic nature of this finding, we are left with a few factors that negate the best intentions of the legislators who enacted the ban. One is that unlike the premiere exemplar Germany,[99] the United Kingdom is still far from according any manner of dignity to animals in its constitutional order. The discourse of mercy is a step in the right direction, certainly, but there are other regimes who have gone much further.

A second key issue is the paltry enforcement of the act to-date. As of January 9, 2007 there has been only one private prosecution under the new law.[100] The law has caused much confusion with various loopholes. Police are being blocked access to private lands and have also requested more support to have any shot at enforcing the ban effectively.[101] A Wales hunt follower observes that police are not getting tangled up in enforcement for a variety of reasons: "[I]t is an almost impossible law to prosecute, they haven't got the manpower to police it, they don't want to antagonize people who are usually very law-abiding, and in some areas their own officers are members of the hunts."[102] The hunts also seem to be going on stronger than ever, if not enjoying more support. The *Sunday Times* reported in February of 2006 that "dozens of illegal foxhunts are taking place each week."[103] Hunters are not shy about their continued activity, some have even appeared in a recent BBC documentary program and relayed their unabashed law-breaking. One former huntsman of the Vale of White Horse hunt said "we hunted foxes all day and I don't care who knows about it. We were very lucky. We got away with a proper day's hunting."[104] Another hunter interviewed by the *Sunday Times* using an assumed name stated: "Nobody is obeying the law. Trying to keep within the law is a waste of time."[105] League Against Cruel Sports chief executive Douglas Batchelor estimates that more than 40% of hunts were breaking the law "at least some of the time," according to evidence they have gathered.[106] The *Guardian* noted that 2,000 turned out on Boxing Day in December of 2006[107] to support the Beaufort Hunt, one of the largest in England and a hunt that Prince Charles and both his sons have been a part of in the past.[108] The *Guardian* reported that more than 250 hunts

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[99] German Constitution, Article 20(a).
[100] Guy Adams, *Half of Britons Think Ban on Foxhunting Will be Overturned*, THE INDEPENDENT, December 26, 2006, at 8.
[101] Owen Bowcott, *Thousands Turn Out to Defy Hunting Ban*, THE GUARDIAN, December 27, 2005, at 3.
[102] Daniel Foggo, *Hunts Admit they are Flouting Ban*, SUNDAY TIMES, Feb. 12, 2006.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Matthew Taylor, *We're Still Here and We'll Carry On: Hunts Put on Boxing Day Show of Strength*, THE GUARDIAN, December 27, 2006, at 3.
[108] Bowcott, *supra* note 101.

participated on the first Boxing Day since the ban went into effect in February of 2005. The second hunt had 314 on December 26, 2006.[109] This is especially significant because the ban became law only at the tail end of the foxhunting season in 2005. The popularity of hunting has not been dampened by the ban, and has only led to two years of increased turnout.[110] The principality of Wales is cited as being especially unmindful of the new law. According to the *Sunday Times*, Wales is home to more than 100 different hunts and a large number are breaking the law "every time they meet."[111] The *Times* notes this can be several times a week.[112] So it seems that between the intention and the act, the shadow has fallen. Time will tell if more robust enforcement comes.

Some directions for future study would be useful to confirm and extend these findings. One such direction would be a content analysis of earlier debates. The issue had been considered for seven years in its most recent appearance on the political landscape. It would be instructive to study the language used when the issues where first being thrashed out in a major way. Perhaps there would be far less airtime to matters of procedural wrangling, for one.

Another text that would be worth probing would be the 196 page Burns Report which set the stage for the debate over the new law. Other salient texts would be the statements of Tony Blair and various Government ministers who were active on the issue, as well as the reports from committee meetings and the public testimony at the consultations the Government held.

In the meantime, this essay has made a preliminary showing of a strong concern for individual animals in the most salient animal law debate, perhaps ever. These findings will modestly add some empirical meat to the bones of philosophical debates over whether the passage of such laws is primarily out of concern for animals as fellow individuals, or mere mirrors for mankind's humanity or lack thereof.

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[109] Press Association, *Lobby Group to Target Illegal Fox Hunting*, THE GUARDIAN, December 26, 2006, *available at* http://www.guardian.co.uk/hunt/Story/0,,1978673,00.html (last visited 3/15/07).
[110] *Id*.
[111] Foggo, *supra* note 102.
[112] *Id*.

APPENDIX A

Select Provisions of the Official Summary of the Act

Rats, rabbits, retrieval of hares and falconry

Dogs may be used to hunt rats or rabbits, to retrieve a hare which has been shot, or to flush a wild mammal from cover to enable a bird of prey to hunt it.

Stalking and flushing out

Up to 2 dogs may be used to stalk or flush out a wild mammal if the stalking or flushing out is carried out for one of the following purposes: preventing or reducing serious damage which the wild mammal would otherwise cause to livestock;
to birds or other property; or to the biological diversity of an area;
participation in a field trial in which dogs are assessed for their likely usefulness in connection with shooting;
the stalking or flushing out does not involve the use of a dog below ground (unless the requirements of the ‘ gamekeepers’ exemption’ are complied with); and
reasonable steps must be taken to ensure that as soon as possible after being found or flushed out the wild mammal is shot dead by a competent person.

The ‘gamekeepers’ exemption’

A single dog may be used below ground to stalk or flush out a wild mammal if:

the stalking or flushing out is undertaken for the purpose of preventing or reducing serious damage to game birds or wild birds which are being kept or preserved for shooting;
the person doing the stalking or flushing out carries written evidence of land ownership or the permission of the owner or occupier. This evidence must be shown to a police constable immediately on request;
the following conditions are complied with:
reasonable steps are taken to ensure that as soon as possible after being flushed out from below ground the wild mammal is shot dead by a competent person;
the dog used is brought under sufficiently close control to ensure that it does not prevent or obstruct the shooting of the wild mammal;
reasonable steps are taken to prevent injury to the dog; and
the dog is used in compliance with any code of practice which is issued or approved by the Secretary of State for the purpose of this exemption (being prepared by the British Association for Shooting and Conservation).
Recapture of a wild mammal
Dogs may be used to recapture a wild mammal which has escaped or been released from captivity or confinement if:

reasonable steps are taken to ensure that as soon as possible after being found the wild mammal is recaptured or shot dead by a competent person;

the wild mammal was not released or permitted to escape for the purpose of being hunted.

Rescue of a wild mammal

Up to 2 dogs may be used to rescue a wild mammal if:

the hunter reasonably believes that the wild mammal is or may be injured;
the hunting is undertaken for the purpose of relieving the wild mammal's suffering;
the hunting does not involve the use of a dog below ground;
reasonable steps are taken to ensure that as soon as possible after being found appropriate action is taken to relieve the wild mammal's suffering;
the wild mammal was not harmed so that it could be hunted under this exemption.

Research and observation

Up to 2 dogs may be used to track a wild mammal if:

the hunting is undertaken for the purpose of or in connection with the observation or study of the wild mammal;
the hunting does not involve the use of a dog below ground; and
each dog is kept under sufficiently close control to ensure that it does not injure the wild mammal

ADVANCING ANIMAL RIGHTS: A RESPONSE TO JEFF PERZ'S "ANTI-SPECIESISM," CRITIQUE OF GARY FRANCIONE'S WORK AND DISCUSSION OF MY BOOK *SPECIESISM*

JOAN DUNAYER*

I. INTRODUCTION

Defending one's self against unjust attack is, at best, an unpleasant task. I would much rather focus on defending nonhuman animals against injustice. Current circumstances, however, require that I write partly in my own defense. Volume 2 of the *Journal of Animal Law* contains a piece, "Anti-Speciesism,"[1] that maligns my animal rights book *Speciesism*.[2] I became aware of this piece, by Jeff Perz, only after its publication. According to Perz, *Speciesism* "appropriates and misrepresents" Gary Francione's work.[3] In this response I demonstrate the falsehood of Perz's charges; defend *Speciesism*'s originality, integrity, and merit; and present arguments that I believe advance animal rights.

Professor emeritus of philosophy Steve Sapontzis, author of *Morals, Reason, and Animals*, has described *Speciesism* as a "definitive statement of the abolitionist animal rights position, not only in philosophy but also for the law and for conducting animal rights advocacy."[4] Perz relentlessly gainsays such an assessment. "Anti-Speciesism" opens, "*Speciesism* is a book that, for the most part, makes highly progressive, radical and laudable claims regarding animal rights theory and practice."[5] From that point on, however, Perz has nothing good to say about the book. Nothing. At the same time, he has only praise for Francione's work, which he presents as flawless.

Whereas Perz's treatment of Francione's work is wholly uncritical, *Speciesism*'s treatment of Francione's work is objective and evenhanded. The book's first mention of Francione appears in the Acknowledgments: "In *Speciesism* I build on the work of other animal rights theorists, such as Paola Cavalieri, Gary Francione, David Nibert, Evelyn Pluhar, James Rachels, Tom Regan, Bernard Rollin, Steve Sapontzis, and Peter Singer. My intellectual debt to Francione, Regan, and Sapontzis is especially large."[6] Thereafter the book cites Francione fifty-

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[1] Jeff Perz, *Anti-Speciesism: The Appropriation and Misrepresentation of Animal Rights in Joan Dunayer's* Speciesism *(Abridged)*, 2 JOURNAL OF ANIMAL LAW 49 (2006).

[2] JOAN DUNAYER, SPECIESISM (2004).

[3] Perz, *supra* note 1, at 65.

[4] Steve Sapontzis, quoted in DUNAYER, *supra* note 2, at back cover.

[5] Perz, *supra* note 1, at 49.

[6] DUNAYER, *supra* note 2, at ix.

eight times. Twenty-four of these references cite statements by Francione with which I agree;[7] thirty-four cite statements that I find speciesist, logically inconsistent, or otherwise problematic.[8] Do these numbers prove that my treatment of Francione's work has been scrupulously fair? No. Nor can they convey the contexts in which the citations occur. However, the numbers do show that my treatment of Francione's work is far from either totally positive (like Perz's) or unremittingly negative (like Perz's treatment of *Speciesism*).

Dubbing Francione's theory "genuine animal rights theory,"[9] Perz speaks of animal rights theory and Francione's theory as synonymous. In reality, of course, animal rights theory continues to evolve not only in Francione's work but also in the work of other theorists. In Perz's view, Francione's theory is "consistent" and "readily and effectively applied to practical situations."[10] In some fundamental ways, I disagree on both counts. I'll be explaining why.

While duly crediting Francione's work, *Speciesism* advances animal rights theory beyond that work. The book offers clear, explicit guidelines for abolitionist action against speciesist exploitation, expands and deepens people's understanding of speciesism, and specifies the legal rights that all nonhuman beings should possess after their emancipation from property status.

Unfortunately, before proceeding to substantive discussion, I must refute the allegations with which Perz has impugned *Speciesism*'s integrity and worth.

II. PERZ'S FALSE CHARGES

A. "Appropriation"

As Perz himself states, his allegations that I've appropriated and misrepresented Francione's work are "serious charges."[11] Depicting Francione as the only worthy abolitionist theorist, Perz attempts to discredit *Speciesism*. In his efforts to give the appearance of appropriation and misrepresentation, he omits crucial facts, deceptively manipulates quotations, and falsely paraphrases and summarizes.

Among other things, Perz ignores all of my published work before *Speciesism*. He accuses me of appropriating content that appeared in my own writing *before* it appeared in the Francione work that he cites—in some cases, years before. At best, Perz has charged me with appropriation without bothering to familiarize himself with my body of work or even my first major work: *Animal Equality: Language and Liberation*.[12] He says of the alleged appropriation, "The reader of *Speciesism*, Francione's books and articles and this review must consider all three of these sources and judge for her or himself based upon the evidence."[13] To judge fairly, readers must consider not only Francione's books and articles but also mine, including the book and articles that I wrote before *Speciesism*.

In his concluding section, Perz presents four examples of alleged appropriation. Each example juxtaposes text from Francione's work with text from *Speciesism*. I'll provide each example exactly as it appears in "Anti-Speciesism." All ellipses and bracketed words are Perz's.

Here is the first example:

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[7] *See Id*. at 31, 35, 38, 40-41, 53, 56, 58, 62, 63, 65, 67, 69, 70, 72, 124, 139, 142, 143-44, 145.
[8] *See Id.* at 56-57, 69, 70, 95-96, 115-16, 124, 126, 127-28, 139, 141, 142, 143-46, 147.
[9] Perz, *supra* note 1, at 49 n. 2.
[10] *Id.*
[11] *Id.* at 49.
[12] JOAN DUNAYER, ANIMAL EQUALITY: LANGUAGE AND LIBERATION (2001).
[13] Perz, *supra* note 1, at 65.

2004 Dunayer without reference to Francione:

> U.S. law is even more speciesist than the U.S. public. Most U.S. residents believe that it's wrong to kill animals for their pelts, but the pelt industry is legal. Most believe that it's wrong to hunt animals for sport, but hunting is legal. Two-thirds believe that nonhumans have as much "right to live free of suffering" as humans, but vivisection, food-industry enslavement and slaughter, and other practices that cause severe, prolonged suffering are legal.

2000 Francione:

> There is a profound disparity between what we [the public] say we believe about animals, and how we actually treat them. On one hand, we claim to treat animal interests seriously. Two-thirds of Americans polled by the Associated Press agree with the following statement: "An animal's right to live free of suffering should be just as important as a person's right to live free of suffering." More than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or hunt them for sport.
>
> . . . .
>
> On the other hand, our actual treatment of animals stands in stark contrast to our proclamations about our regard for their moral status. We subject billions of animals annually to enormous amounts of pain, suffering and distress. . . . [W]e kill more than 8 billion animals a year for food. . . .
>
> . . . .
>
> Hunters kill approximately 200 million animals in the United States annually. . . .
>
> [W]e use millions of animals annually for biomedical experiments, product testing, and education.
>
> And we kill millions of animals annually simply for [fur] fashion.[14]

Although Perz doesn't acknowledge the fact, I cite my source, also used by Francione: an article by Associated Press writer David Foster that reported the results of an AP poll.[15] Perz has inserted my word "public" into the Francione quotation; that word doesn't occur in Francione's discussion of the poll.[16] Perz's use of ellipses also misleads; in Francione's text nothing after the first ellipsis refers to the poll.[17] Ironically, whereas my wording largely differs from both Francione's and Foster's, Francione's closely resembles Foster's. Here are the relevant portions of the three texts:

Foster (1996):

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[14] *Id.* at 65-66.
[15] David Foster, *Animal Rights Activists Getting Message Across*, CHICAGO TRIBUNE (evening ed.), Jan. 25, 1996, at 8.
[16] *See* GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? xix (2000).
[17] *See Id.* at xix-xxi.

> Two-thirds of the 1,004 Americans polled agree with a basic tenet of the animal-rights movement: "An animal's right to live free of suffering should be just as important as a person's right to live free of suffering." . . . 59 percent say killing animals for fur is always wrong; and 51 percent say sport hunting is always wrong.[18]

Francione (2000):

> Two-thirds of Americans polled by the Associated Press agree with the following statement: "An animal's right to live free of suffering should be just as important as a person's right to live free of suffering." More than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or to hunt them for sport.[19]

Dunayer (2004):

> Most U.S. residents believe that it's wrong to kill animals for their pelts, but the pelt industry is legal. Most believe that it's wrong to hunt animals for sport, but sport hunting is legal. Two-thirds believe that nonhumans have as much "right to live free of suffering" as humans, . . .[20]

Finally, the point that I'm illustrating in the *Speciesism* excerpt differs from Francione's. My point is that U.S. law lags behind public opinion. Francione's point is that people don't act in accordance with their beliefs about nonhuman animals. I had no reason to cite Francione. I simply used the same report to make a different point in very different language. My paragraph in no way appropriates.

Perz's second example of alleged appropriation is equally spurious:

2004 Dunayer without reference to Francione:

> "Welfarists" seek to change the way nonhumans are treated within some system of abuse. They work to modify, rather than end, the exploitation of particular nonhumans.

1996 Francione:

> Both [welfarists] Spira and PETA . . . seek to effect change within the system. This inevitably requires the acceptance of reformist measures. . . .[21]

Once again Perz has inserted one of my words into the Francione quotation; Francione doesn't use the word "welfarists" anywhere in his paragraph:

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[18] Foster, *supra* note 15, at 8.
[19] FRANCIONE, *supra* note 16, at xix.
[20] DUNAYER, *supra* note 2, at 49.
[21] Perz, *supra* note 1, at 66.

> PETA, however, despite its flair for attention-grabbing media events and its generally confrontational tactics, was and is no more (though no less) radical on a substantive basis than Spira, and has always accepted the view that although the long-term strategy is abolition, the short term may require reformist compromise. Both Spira and PETA espouse a radical rights ideology, but seek to effect change within the system. This inevitably requires the acceptance of reformist measures, which are then seen by these "radicals" as necessary stepping stones to the abolition of exploitation. So, although PETA and Spira have long-term goals that Jasper and Nelkin label "fundamentalist," they both adopt tactics that are "pragmatic."[22]

Apart from the commonplace language *seek to*, *change*, *within*, and *system*, my paragraph differs from Francione's in both wording and focus. Also, I cite Francione at the end of the paragraph:

> "Welfarists" seek to change the way nonhumans are treated within some system of speciesist abuse. They work to modify, rather than end, the exploitation of particular nonhumans. In effect, "welfarists" ask that some form of abuse be replaced with a less cruel form. In contrast, rights advocates oppose exploitation itself. As Francione has written, a rights advocate "rejects the regulation of atrocities and calls unambiguously and unequivocally for their abolition."[23]

Perz's third example, too, shows no more likeness than a few words:

2004 Dunayer without reference to Francione:

> [N]ew speciesists endorse basic rights for some nonhuman animals, those ostensibly most similar to humans.

2000 Francione:

> [The work of (speciesist) cognitive ethologists] is also dangerous in that it threatens to create new hierarchies in which we move some animals, such as great apes, into a "preferred" [personhood-rights] group based on their similarities to humans, and continue to treat other animals as our property and resources.[24]

Yet again Perz has inserted language ("speciesist," "rights") into Francione's text that doesn't appear there but creates some artificial resemblance between Francione's wording and mine. Yet again the context of my quotation substantially differs from that of Francione's. My sentence contrasts old and new speciesism:

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[22] GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 65 (1996).
[23] DUNAYER, *supra* note 2, at 58. Nonhuman animals exploited by humans lack genuine welfare. For this reason I place the terms *welfare*, *welfarist*, and *welfarism* inside negating quotation marks when the context is speciesist exploitation.
[24] Perz, *supra* note 1, at 66.

> Unlike old-speciesists, new-speciesists endorse basic rights for *some* nonhuman animals, those ostensibly most similar to humans.[25]

Francione's sentence focuses on cognitive ethology:

> Although the work of cognitive ethologists has been very important, it is also dangerous in that it threatens to create new hierarchies in which we move some animals, such as the great apes, into a "preferred" group based on their similarity to humans, and continue to treat other animals as our property and resources.[26]

Surely I'm entitled to argue, without citing Francione, that rights shouldn't be restricted to those nonhumans who most resemble humans, especially given that I'm framing that argument in a new way: in terms of my original category "new speciesism." Moreover, I already was publicly contesting speciesist hierarchies a decade before Francione's *Introduction to Animal Rights*. In a 1990 article I rejected an animal "hierarchy with humans at the top."[27]

Perz's final example of alleged appropriation juxtaposes two sentences:

2004 Dunayer without reference to Francione:

> We consider it immoral to treat any human, whatever their characteristics, as property.

2000 Francione:

> We do not regard it as legitimate to treat *any* humans, irrespective of their particular characteristics, as the property of other humans.[28]

My wording is similar to Francione's but not the same. I didn't cite Francione because the similarity was unintentional. As for the idea that modern society considers human enslavement (property status) immoral, that's common knowledge. Nor did I have reason to credit Francione for the point of my sentence: people apply a double standard when they cite nonhuman characteristics as justification for nonhuman enslavement. I made that point in my first book, *Animal Equality*, which repeatedly discusses parallels between human and nonhuman enslavement.[29] For example, in *Animal Equality* I comment, "[E]aters of turkey flesh call turkeys ugly and stupid. Do they also consider it acceptable to enslave and kill humans whom they regard as ugly and stupid?"[30] Nothing in *Animal Equality* can have derived from *Introduction to Animal Rights*; I wrote the former before I read the latter.[31]

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[25] DUNAYER, *supra* note 2, at 98 (emphasis in original).
[26] FRANCIONE, *supra* note 16, at 119.
[27] Joan Dunayer, *On Speciesist Language*, ON THE ISSUES: THE PROGRESSIVE WOMAN'S QUARTERLY 30 (Winter 1990).
[28] Perz, *supra* note 1, at 66.
[29] *See* DUNAYER, *supra* note 12, at 4, 144, 161-64, 170-71, 175.
[30] *Id.* at 146.
[31] Francione's *Introduction to Animal Rights* was published in August 2000. *Animal Equality* went to the printer in January 2001. Among others, Carol Adams, Evelyn Pluhar, and Tom Regan read the manuscript of *Animal Equality*

Perz's *Journal of Animal Law* piece appears as an abridged version of a much longer "Anti-Speciesism," which constitutes an entire website.[32] In the unabridged "Anti-Speciesism" Perz accuses me of appropriating arguments and examples that first appeared in my published writing *before* publication of the Francione work at issue.

Perz states, "Francione gives evidence and accounts of non-human animals acting morally and having moral sentiments. Dunayer even uses the same example of discovering more altruism in monkeys than humans via electric shock experiments. . . ."[33] In 1990, a decade before the Francione book cited by Perz, my article "The Nature of Altruism" appeared in *The Animals' Agenda*. That article, on nonhuman altruism, opens with the example to which Perz refers. Using the same language that I later would use in *Speciesism*, I wrote:

> Rhesus monkeys learned to pull two chains for food. Then one of the chains was linked to a shock generator. Now, in addition to releasing food, this chain would inflict an electric shock on another monkey, visible in an adjoining cage. To get adequate food, a monkey needed to pull both chains. Unlike Milgram's subjects, the monkeys were forced to choose between equally grave alternatives: shock another monkey or go hungry. Most monkeys went hungry.[34]

Other animal rights theorists, too, have used the example before Francione—no doubt, because it's a powerful one. For instance, in 1995 Evelyn Pluhar wrote:

> [A] majority of the subjects prefer to go hungry rather than hurt other monkeys. (Pulling a chain to obtain food would also severely shock another monkey who had been placed in full view of the subject.)[35]

Similarly to Pluhar, in 2000 Francione wrote:

> . . . 87 percent of the group preferred to go hungry rather than pull a chain that would deliver food but would also deliver a painful electric shock to an unrelated macaque housed in a neighboring cage.[36]

Ironically, Perz has accused me of appropriating content that I first presented ten years before the Francione work that he cites. Also ironically, Francione's wording resembles Pluhar's. Whereas *Speciesism* cites the experimenters' original report,[37] Francione's book cites a secondary source, a 1992 book by Carl Sagan and Ann Druyan.[38] The Francione excerpt includes most of this

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before *Introduction to Animal Rights* was published. I still have the electronic files of the manuscript and the hard copies of colleagues' comments that predate Francione's book.

[32] Jeff Perz, *Anti-Speciesism: The Appropriation and Misrepresentation of Animal Rights in Joan Dunayer's* Speciesism (2006), http://www.speciesismreview.info, accessed Oct. 6, 2006, on file with the author.

[33] *Id.*

[34] Joan Dunayer, *The Nature of Altruism*, THE ANIMALS' AGENDA 27 (April 1990); DUNAYER, *supra* note 2, at 28.

[35] EVELYN B. PLUHAR, BEYOND PREJUDICE: THE MORAL SIGNIFICANCE OF HUMAN AND NONHUMAN ANIMALS 55 (1995).

[36] FRANCIONE, *supra* note 16, at 116.

[37] *See* DUNAYER, *supra* note 2, at 165 n. 40.

[38] *See* FRANCIONE, *supra* note 16, at 213 n. 38.

wording by Sagan and Druyan: "87% preferred to go hungry," "pull a chain and electrically shock an unrelated macaque."[39]

"In 2004, Dunayer states that a 'someone' is a sentient, thinking, feeling *individual* with unique life experiences whereas a 'something' is not. She rightly criticizes speciesists for characterizing non-human animals as things," Perz notes. He decries my doing this "without citing Francione," who made these observations "four years earlier."[40] Again Perz has it backwards. In my 1990 article "On Speciesist Language," I objected to categorizing nonhuman animals as "things"[41] and stated, "Every sentient being is a *someone*, not a *something*."[42] I developed this theme in much greater depth in *Animal Equality*, which contains a section headed "Someone, Not Something"[43] and statements such as the following: "No sentient being is an 'it,' 'that,' or '-thing.' Each is equally someone."[44]

Perz claims shared intellectual territory as Francione's personal property. "Dunayer's references to 'needlessly' and 'unnecessarily' killing and otherwise harming non-human animals for 'mere convenience and taste [enjoyment]' contain elements of Francione's thesis in *Introduction to Animal Rights*," he remarks.[45] The theme of needless harm runs throughout my first book, *Animal Equality*, in which I stress that speciesist exploitation is unnecessary and therefore morally wrong. "We're guilty if we participate in needless, unjust practices that cause suffering or death," I state.[46] "[H]umans don't need to eat flesh. . . ."[47] One after another, I describe various forms of speciesist exploitation as "needless" or "unnecessary." Human violence toward chickens? "[N]eedless."[48] Hunting? "[U]nnecessary killing."[49] Sportfishing: "needless infliction of suffering and death."[50] Vivisection: "unnecessary."[51] In a section titled "'Necessary' Evil" I argue, "By definition, evil entails unnecessary harm. And that's what vivisection inflicts."[52] Years before *Introduction to Animal Rights* I already was expressing the view that speciesist exploitation itself constitutes needless harm. In a 1997 letter published in *The Washington Post* I stated, "Because humans don't need to eat flesh, hunting lacks a moral defense." The letter ended, "Hunting, which needlessly causes suffering and death, epitomizes evil."[53]

Similarly, Perz falsely accuses me of appropriating Francione's assertion that humans have no moral right to breed other animals.[54] It should be illegal for any human to breed any nonhuman, I maintained in *Animal Equality*.[55] I elaborated:

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[39] CARL SAGAN & ANN DRUYAN, SHADOWS OF FORGOTTEN ANCESTORS: A SEARCH FOR WHO WE ARE 117 (1992).
[40] Perz, *supra* note 32 (emphasis in original).
[41] Dunayer, *supra* note 27, at 30.
[42] *Id.* at 31 (emphases in original).
[43] DUNAYER, *supra* note 12, at 155.
[44] *Id.* at 156.
[45] Perz, *supra* note 32.
[46] DUNAYER, *supra* note 12, at 175.
[47] *Id.* at 70.
[48] *Id.* at 37.
[49] *Id.* at 56.
[50] *Id.* at 70.
[51] *Id.* at 106.
[52] *Id.* at 121.
[53] Joan Dunayer, Letter to the Editor, *A Celebration of Cruelty*, THE WASHINGTON POST, Dec. 13, 1997, at A21.
[54] *See* Perz, *supra* note 32.
[55] *See* DUNAYER, *supra* note 12, at 175.

> Envision nonhuman emancipation. With hunting, fishing, and trapping outlawed, free-living nonhumans adjust to their ecosystems in ways guided by natural selection; human interference no longer harms individuals, populations, or environments. Humans stop "producing" dogs to be merchandise, mice to be tools, and turkeys to be flesh. A ban on "selective breeding" ends centuries of inflicting deformity and genetic disease. The number of "domesticated" nonhumans rapidly declines.[56]

Moreover, in a 1991 letter published in *The Animals' Agenda*, Eric Dunayer and I said of dog breeding, "Would we 'trash' thousands of years of selective breeding? Absolutely."[57] We also made this general statement about human breeding of nonhumans: "Humans don't have the right to genetically manipulate other animals, or make them subservient."[58] Again: 1991, years before *any* Francione work cited by Perz.

According to Perz, I "borrow" Francione's "insight" that nonhuman animals who can't be rehabilitated after emancipation should be cared for in sanctuaries.[59] My thoughts on post-emancipation sanctuaries also appeared in *Animal Equality*. The paragraph from *Animal Equality* excerpted immediately above continues as follows:

> All captive nonhumans are liberated from exploitation and cruel confinement. Those incurably suffering from deformity, injury, or illness are euthanized; all others receive any needed veterinary care. Liberated non-"domesticated" nonhumans are set free if they can thrive without human assistance (after any necessary rehabilitation) and if appropriate habitat exists. If not, they're permanently cared for at sanctuaries. As much as possible, these sanctuaries provide natural, fulfilling environments. Hens liberated from egg factories, cats liberated from "shelters," and other homeless "domesticated" nonhumans are fostered at sanctuaries and private homes until adopted.[60]

Speciesism's chapter "New-Speciesist Law" contains an original ten-page critique of Steven Wise's approach to nonhuman legal rights.[61] Perz goes so far as to indicate that Francione deserves credit for this critique. After discussing a 1993 Francione article on the Great Ape Project (GAP), Perz states, "Dunayer's objections to Wise's views are more specific than Francione's objections to the GAP, but if Dunayer's objections to Wise were generalized they would become similar to Dunayer's objections to the GAP. These, in turn, are similar to Francione's."[62] In other words, if my A were different, it would be similar to my B, which allegedly is similar to Francione's C; therefore, my A derives from Francione's C. Still straining to credit Francione with my work, Perz then falsely suggests that Francione has addressed Wise's publications. Citing a 2004 Francione article, Perz remarks, "[A]lthough Francione does not thoroughly discuss the views of Steven J. [*sic*] Wise, . . . many of Francione's arguments

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[56] *Id.* at 176.
[57] Joan Dunayer & Eric Dunayer, Letter to the Editor, *To Breed or Not To Breed: Joan and Eric Dunayer Reply*, THE ANIMALS' AGENDA 7 (March 1991).
[58] *Id.* at 8.
[59] Perz, *supra* note 32.
[60] DUNAYER, *supra* note 12, at 176.
[61] *See* DUNAYER, *supra* note 2, at 100-11.
[62] Perz, *supra* note 32.

against the GAP can be directly used against Wise's arguments."[63] With the words "does not thoroughly discuss," Perz understates to the point of being deceptive. The article doesn't even *mention* Wise except to say in an endnote, "For an approach that argues that characteristics beyond sentience are necessary and not merely sufficient for preferred animals to have a right not to be treated as resources in at least some respects, see Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002), and Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000)."[64] That's it. Nothing more. In reality Francione has published nothing remotely similar to my critique of Wise's views.

Perz accuses me of failing to give credit where credit is due.[65] He's the one who fails to give proper credit, and to an extraordinary degree. By ignoring my earlier work, manipulating quotations in misleading ways, and otherwise distorting, Perz erases my contributions to animal rights theory and grossly inflates Francione's. He persistently credits Francione with my original work.

Speciesism "cites all of the major and several of the minor works of Francione," Perz notes.[66] Perversely, he presents even that fact as evidence of opportunity to appropriate Francione's work rather than evidence of thorough citation.[67]

Perz's allegation that I've appropriated Francione's work is false.

B. "Misrepresentation"

No less adamantly than he charges appropriation, Perz charges that *Speciesism* misrepresents Francione's work.[68] In his *Journal of Animal Law* piece, Perz makes four specific claims of misrepresentation. All pertain to my argument that a ban on egg-industry caging of hens is not abolitionist but "welfarist."

While quoting Francione extensively, Perz quotes very little of my discussion on this subject. Here, then, is my full discussion as it appears in *Speciesism* (minus the original note superscripts):[69]

> What about seeking an ostensibly less problematic ban, one with no apparent tradeoffs, such as a ban on the caging of "laying hens"? Like a ban on forced molting, such a ban wouldn't emancipate hens from the egg industry, so it wouldn't be abolitionist. Also, it actually would involve all sorts of tradeoffs.
>
> First, like other attempts to make abuse less severe, a cage ban focuses on one particularly cruel aspect of exploitation rather than exploitation itself, the cause of all the cruelty. Most people don't question the necessity of nonhuman exploitation, Francione comments. They question only "particular practices" within some area of exploitation. For example, they question the necessity of branding cattle but not of eating cow flesh. A campaign to ban the caging of hens

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[63] *Id.*
[64] Gary L. Francione, *Animals—Property or Persons?* in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108-42, 141 n. 94 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).
[65] *See* Perz, *supra* note 1, at 49 n. 2.
[66] *Id.* at 66.
[67] *See Id.*
[68] *See Id.*
[69] Throughout this article I've omitted the note superscripts in quoted text, to avoid their being confused with this article's note superscripts.

obscures the importance of eschewing eggs. Such a campaign encourages the public to overlook the immorality of speciesist exploitation except where that exploitation entails extreme cruelty.

Second, bans that don't prevent or end exploitation suggest that an inherently abusive enterprise can be fixed, made humane. A ban on caging hens invites the conclusion that caging (torture) is abusive but the egg industry per se (exploitive captivity) is not. Modifications to exploitation make it appear acceptable, especially when nonhuman advocates have sought and approved the modifications. I can't think of a better way to soothe the conscience of humans who eat animal-derived food than to suggest that food-industry enslavement and slaughter can be humane. That misconception enables people to tell themselves, "The problem isn't my consumption of animal-derived food. The problem is the way it's produced. I'm opposed to cruel practices like caging hens, which should be illegal. Lawmakers and the industry should make the necessary changes."

Third, a cage ban implies that cageless confinement is morally acceptable. The term *free-range hen* suggests freedom. But "free-range" hens aren't free, and most do precious little ranging. Many spend their lives with thousands of other hens in filthy, windowless warehouses. Many are debeaked because they're so crowded. Many never go outside. When uncaged hens do have access to the outside, this access often consists of nothing more than an opening to a grassless area large enough for only a few hens. Do uncaged hens suffer less than caged ones? There's every reason to believe that, yes, in general they suffer less. However, they still suffer. They're still manipulated, deprived, and, usually, killed when their egg laying declines. Currently in the United States, 282 million hens are laying eggs for human consumption. If cages were banned and egg consumption remained anywhere near current levels, hens still would be torturously crowded. The best way to reduce the suffering of hens is to reduce the number who are, *and ever will be*, exploited for eggs—by convincing people to stop eating eggs.

Fourth, a ban that replaces one method of enslaving or killing with another method can make the exploitive industry more profitable. In 1981 Switzerland set new egg-industry standards, with full compliance required as of 1992. The standards proved incompatible with caging. Did the mandated changes hurt the Swiss egg industry? No, they boosted its profits. Enslavers managed to hold nearly as many hens within the new confinement systems as within the former cage systems. Although the industry raised the price of eggs, demand for Swiss eggs increased: the public preferred eggs from uncaged hens.[70] The end of caging benefited the Swiss egg industry. And what benefits an industry prolongs its life.

The economic outcome of eliminating caging might be very different in another country, such as the United States, but this fact remains: Changing the method of confinement (or other abuse) can make an animal-derived product

[70] Recently it was brought to my attention that the wording "demand for Swiss eggs increased" isn't strictly correct. According to available statistics, Swiss consumers didn't purchase more Swiss eggs *in absolute terms*; instead a higher percentage of the eggs that they purchased were Swiss. Therefore, more accurate wording would be "Swiss demand for Swiss shell eggs increased relative to Swiss demand for imported shell eggs." *See* HEINZPETER STUDER, HOW SWITZERLAND GOT RID OF BATTERY CAGES 22, 31 (Anja Schmidtke trans., 2001).

more desirable. A cage ban gives the egg industry added legitimacy and makes eggs more attractive to many consumers. Nonhuman advocates can't predict such a ban's economic consequences and shouldn't attempt to, just as they shouldn't attempt to calculate which of two abusive situations causes more suffering. They should oppose the egg industry's very existence. The relationship between abolitionists and enslavers must be adversarial, as it was with regard to African-American enslavement.

A ban on caging hens is old-speciesist. It changes the way that hens are held captive but doesn't prohibit holding them captive. It doesn't free hens from exploitation or prevent more of them from being bred for exploitation. "Welfarist" bans really aren't bans: they can be reworded as standards. As I mentioned, a ban on forced molting actually is a requirement that enslaved hens receive adequate food and water. Similarly, a caging ban actually is a requirement that enslaved hens have more space. Indeed, the Swiss cage "ban" wasn't expressed as a ban. Instead the law required that enslavers provide each hen with, among other things, at least 124 square inches of floor space. The effect was the elimination of cages.

Throughout his work, Francione emphasizes that property status violates nonhumans' moral rights. Nonhuman advocacy, he states, shouldn't compromise those rights. I strongly agree. At the same time, Francione argues that an egg-industry prohibition on caging hens can be "consistent with rights theory." I hope I've shown that it can't. Whether or not hens are caged, exploiting them for their eggs is inconsistent with animal rights.

To be acceptable, Francione says, a ban on caging must result in hens being treated in a way that "completely" respects their moral right to freedom of movement. That isn't possible. Exploiting hens for their eggs automatically entails holding them captive and limiting their freedom of movement. When a hen is enslaved, neither her right to freedom of movement nor she herself is respected. The only bans that are consistent with nonhuman rights are those that are consistent with nonhuman freedom from exploitation.

Although "still regarded as property" and "exploited as property," Francione further stipulates, the hens must be treated as if they *weren't* regarded as property. Again, that condition never could be satisfied. The egg industry regards and exploits hens as property and treats them accordingly—as property. I find it wholly implausible that the egg industry ever would do otherwise.

A prohibition mustn't "substitute" or "endorse" an "alternative form of exploitation," Francione repeatedly states. Explicitly or implicitly, a cage ban does just that: it condones other forms of confinement. As I stated, the Swiss cage ban wasn't expressed as a ban but as new requirements. That fact demonstrates such a ban's "welfarist" nature. Any distinction between a ban that permits the continued exploitation of the animals in question ("You can't cage hens") and new requirements as to how that exploitation is carried out ("You must provide each hen with at least 124 square inches of floor space") is largely academic. Francione apparently recognizes this because he expresses a caveat: It *is* acceptable to "explicitly endorse" an "alternative form of confinement" if that confinement "fully recognizes the animals' interests in freedom of movement."

> Again, no exploitive confinement does that. Endorsing any form of nonhuman exploitation is inconsistent with animal rights.
>
> Francione objects to proposals that endorse nonhumans' property status. Any proposal to modify the confinement of exploited hens endorses their property status.[71]

Now I'll address Perz's four specific claims of misrepresentation. "Contrary to Dunayer's depiction," Perz writes, "Francione opposes welfare regulations that increase cage-size specifications for hens who are used for their eggs."[72] As readers can see, I do *not* depict Francione as other than opposed to "welfare regulations that increase cage-size specifications." I state, "Francione argues that an egg-industry prohibition on caging hens can be 'consistent with rights theory.'"[73] A prohibition on caging, not an increase in cage size. I also state, "To be acceptable, Francione says, a ban on caging must result in hens being treated in a way that 'completely' respects their moral right to freedom of movement."[74] Again: a ban on caging, not an increase in cage size.

Perz's second claim basically repeats his first: "[C]ontrary to Dunayer's innuendos," Francione rejects "welfarist proposals such as increasing battery cage size."[75] Nowhere do I either state or imply that Francione does *not* reject such proposals. Unlike Francione, I consider a ban on egg-industry caging of hens to be automatically "welfarist" rather than abolitionist—because it leaves the animals in question (hens) within a system of exploitation (the egg industry). Disagreement isn't the same thing as misrepresentation, although Perz repeatedly equates the two.

Perz further claims, "[C]ontrary to Dunayer's false depiction, Francione does not contradict himself by suggesting that prohibitions should substitute or endorse alternative forms of exploitation."[76] I don't indicate that Francione thinks prohibitions "should" substitute or endorse other forms of exploitation. Instead I argue that, in effect, any ban on egg-industry cages substitutes another form of exploitation: cageless exploitation. By definition any prohibition *that leaves hens within the egg industry* changes the way they're exploited rather than ends their exploitation and is therefore "welfarist." As the above excerpt shows, I wrote, "A prohibition mustn't 'substitute' or 'endorse' an 'alternative form of exploitation,' Francione repeatedly states. Explicitly or implicitly, a cage ban [not Francione] does just that: it condones other forms of confinement."[77] What about my statement that Francione considers it "acceptable to 'explicitly endorse' an 'alternative form of confinement' if that confinement 'fully recognizes the animals' interests in freedom of movement'"?[78] In *Rain without Thunder* Francione states with regard to prohibitions such as a battery-cage ban, "The only time that a rights advocate should explicitly endorse an alternative arrangement is possibly, as I argued earlier, when that alternative *fully respects some relevant animal interest*."[79] Can "an alternative form of confinement" do that? According to Francione, yes. In his next paragraph he states that animal

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[71] DUNAYER, *supra* note 2, at 67-70.
[72] Perz, *supra* note 1, at 54.
[73] DUNAYER, *supra* note 2, at 69.
[74] *Id.*
[75] Perz, *supra* note 1, at 55.
[76] *Id.* at 62.
[77] DUNAYER, *supra* note 2, at 69-70.
[78] *Id.* at 70.
[79] FRANCIONE, *supra* note 22, at 215 (emphasis in original).

rights advocates should not support alternative forms of exploitation "unless the alternative form of confinement fully recognizes the animals' interests in freedom of movement."[80]

Finally Perz states, "Contrary to Dunayer's suggestion, Francione does not suggest creating new requirements regarding cage sizes or guidelines about how confined exploitation is to be carried out. Francione does not propose modified confinement."[81] Again, I don't indicate that Francione recommends new cage-size requirements or other confinement guidelines. Instead I argue that a ban on caging is, in effect, a guideline regarding confinement because the egg industry never would or could allow hens complete freedom of movement. As I express it in *Speciesism*, "Exploiting hens for their eggs automatically entails holding them captive and limiting their freedom of movement."[82]

Perz uses misrepresentation to charge *me* with misrepresentation. Like his allegation of appropriation, his allegation of misrepresentation is false.

III. *SPECIESISM*'S UNIQUE CONTRIBUTIONS: PROGRESS BEYOND FRANCIONE'S WORK

A. What Is and Is Not Abolitionist

"Francione argues that one must follow his criteria in order for the change to be abolitionist," Perz states.[83] I disagree with Francione regarding what is and is not abolitionist. *Speciesism*'s argument on this topic is one of the book's contributions to animal rights theory.

I explain:

> [M]any activists misunderstand the term *abolitionist*. Bans aren't automatically abolitionist. Yes, a ban abolishes something. However, if it leaves the animals in question within a situation of exploitation (such as food-industry enslavement and slaughter), it isn't abolitionist in the sense of being anti-slavery. An abolitionist ban is consistent with nonhuman freedom. It prevents or halts, rather than mitigates, abuse.[84]

According to Francione, bans on particular "husbandry" practices, such as the caging of hens or crating of calves, can be abolitionist.[85] To the contrary, such bans are inherently "welfarist" because they modify, rather than prohibit, exploitation. Francione argues that, in theory at least, such bans could have the effect of weakening a particular form of exploitation.[86] The same could be said of requirements for more cage or stall space. In Francione's view a caging ban could erode hens' property status and therefore qualify as incremental abolition.[87] Whatever its ultimate effect, such a ban isn't abolitionist. To be abolitionist (consistent with rights theory), an action must oppose exploitation itself.

Incremental abolition prevents or ends the exploitation of *some* (rather than all) nonhuman beings. It doesn't modify their exploitation. Like a requirement for increased cage

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[80] *Id.* at 216.
[81] Perz, *supra* note 1, at 62.
[82] DUNAYER, *supra* note 2, at 69.
[83] Perz, *supra* note 1, at 63.
[84] DUNAYER, *supra* note 2, at 152.
[85] *See* FRANCIONE, *supra* note 22, at 214-16.
[86] *See Id.* at 198, 202-03, 210, 214-16.
[87] *See Id.*

space, a ban on caging changes the *way* that hens are exploited. Banning the production or sale of eggs in a particular jurisdiction would be incremental abolition. Increasing the percentage of humans who are vegan also is incremental abolition. In contrast, banning egg-industry caging is automatically "welfarist." It rests on the premise of continued exploitation. That's the case whether or not activists themselves expressly condone cageless exploitation. By definition a ban on caging, chaining, beating, or otherwise harming *exploited* nonhumans is "welfarist."

Francione himself emphasizes that any human exploitation of nonhumans is inconsistent with nonhuman rights.[88] At the same time, he contends that a change in exploitation can be consistent with rights theory if it fully respects some "interest"[89] or "protoright"[90] of the exploited animals, such as enslaved hens' interest in "freedom of movement."[91] That argument, too, collapses into "welfarism." After all, an egg-industry hen has an interest in spreading her wings, a zoo-confined polar bear has an interest in cool temperatures, and a laboratory-imprisoned dog has an interest in daily exercise. Such considerations are "welfarist." Abolitionist actions directly and unequivocally oppose the hen's being in the egg industry, the polar bear's being in a zoo, and the dog's being in a laboratory.

In addition to obscuring the meanings of *abolitionist* and *rights* by allowing for actions that are actually "welfarist" and "protorights," Francione further confuses the issues by sometimes arguing in terms of unrealistic outcomes. For example, he contends that a ban on caging could result in egg-industry hens' having complete freedom of movement.[92] "That isn't possible," I state in *Speciesism*.[93] In defense of Francione's contention, Perz writes:

> Before chickens were artificially bred by humans, their ancestors were jungle-birds who nested in trees. If birds such as these were being exploited for their eggs in battery cages today, the result of Francione's suggested prohibition would be that the birds would be removed from the cages and, after successful rehabilitation, returned to their jungle homes. The birds would be free to go anywhere in their environment they chose without any human intervention. There would be no fences or any other system of confinement. Humans would not touch or disturb the birds, save for stealing their eggs from their nests when the birds were away.[94]

According to Perz, this scenario "could be achieved now by an eccentric millionaire."[95] The entire scenario is absurd: ancient-ancestor-like chickens in battery cages; hens removed from cages, rehabilitated, and placed in the jungle; a jungle-based egg industry that allows hens to go wherever they choose and takes their eggs only when they happen to be away. Remember: Francione contends that an egg-industry ban on caging could result in complete freedom of movement for exploited hens. While resorting to fantasy to defend that contention, Perz praises Francione's guidelines as "readily and effectively applied to practical situations."[96]

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[88] *See Id.* at 2.
[89] *Id.* at 201-06.
[90] *Id.* at 206.
[91] *Id.* at 210.
[92] *See Id.* at 202, 210.
[93] DUNAYER, *supra* note 2, at 69.
[94] Perz, *supra* note 1, at 61.
[95] *Id.*
[96] *Id.* at 49 n. 2.

Perz claims that Francione offers "clarity" whereas I "obscure."[97] To the contrary, Francione's criteria obscure. They entail contradictions, as well as numerous caveats and exceptions, because they miss the essence of what is and is not abolitionist.

For example, Francione's first criterion for abolitionist change is that the change "constitute a prohibition."[98] As Francione himself observes,[99] both abolitionist and "welfarist" actions may or may not be expressed as prohibitions. The declaration "Nonhuman great apes now are legal persons" certainly is abolitionist, but it isn't expressed as a prohibition. Conversely, the declaration "Battery cages are hereby prohibited" is "welfarist," but it *is* expressed as a prohibition. As I note in *Speciesism*, Switzerland didn't expressly ban battery cages but instead legislated new standards, such as increased floor space per hen, that *resulted in* the elimination of battery cages.[100] Wording or not wording a change as a prohibition doesn't make it abolitionist or "welfarist." I agree with Francione that all abolitionist changes are, *in effect*, prohibitions. Again, though, the same can be said of all "welfarist" changes. A requirement that a caged hen have at least 67 square inches of floor space is a prohibition against less space. Even a requirement that exploited nonhumans be treated "humanely" is a prohibition—against whatever treatment is deemed inhumane. Therefore, the idea of prohibition *per se* isn't helpful; it confuses rather than clarifies. Whether or not a change is abolitionist depends on *what* is prohibited. An abolitionist measure prohibits exploitation.

Perz remarks, "Francione rejects Regan's rights theory, in part, because its multiple criteria for being a subject of a life and its other [*sic*] are overly complicated."[101] Francione's criteria regarding what is and is not abolitionist certainly warrant the same criticism: overly complicated. Indeed, they're tortuous. In contrast, *Speciesism* offers this one clear criterion: If an advocated measure leaves the animals in question within a situation of exploitation, it's "welfarist"; if the measure prevents or ends their exploitation, it's abolitionist.[102]

Apart from *Speciesism*'s discussion of cage bans (which I've already presented), here is the book's argument on what does and does not qualify as abolitionist:

> Like a ban on caging hens, a ban on confining pregnant sows in crates isn't abolitionist. Instead of removing sows from the pig-flesh industry, such a ban alters the way in which they're held captive. Just as the egg industry isn't consistent with chicken freedom, the pig-flesh industry isn't consistent with pig freedom. After all, why are the sows pregnant? Their exploiters have bred them to obtain more victims. A ban on the pig-flesh industry *would* be abolitionist. It would prohibit putting pigs into the situation of abuse. In effect, it would say, "You can't legally breed, rear, or kill pigs for food." Such a ban would emancipate. Whether or not it freed currently enslaved pigs, it would prevent the future enslavement of other pigs (who wouldn't be born).

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[97] *Id.* at 50. Reviewers have praised *Speciesism*'s clarity. For example, Steve Sapontzis has remarked on the book's "uncompromising clarity" (Steve Sapontzis, quoted in DUNAYER, *supra* note 2, at back cover), and a *Choice* reviewer has described the book as "[a]dmirable for its clarity" (W. P. Hogan, Review of *Speciesism*, 42 CHOICE 1601, 1602 [May 2005]).

[98] FRANCIONE, *supra* note 22, at 192.

[99] *See Id.* at 195.

[100] *See* DUNAYER, *supra* note 2, at 68, 69.

[101] Perz, *supra* note 32.

[102] *See* DUNAYER, *supra* note 2, at 65-66, 152.

> Francione doesn't categorically reject pursuing bans on such pain-inflicting practices as the dehorning of cattle exploited for food and footpad injections in rats used in vivisection. I do. Such bans are inconsistent with animal rights because they leave cattle and rats within a situation of abuse (the flesh industry or vivisection). Their context is exploitation. If cattle enslavers and rat vivisectors are forbidden to dehorn cattle or inject rats in their footpads, they'll simply accomplish their exploitive ends by other (possibly worse) means. Nineteenth-century bans on the branding of enslaved African-Americans weren't abolitionist; they didn't advance emancipation. Nor would a ban on the branding of enslaved cattle be abolitionist.
>
> All abolitionist bans protect at least some animals from some form of exploitation. They prevent animals from entering the situation of exploitation and may also remove current victims from that situation. Consider a ban on elephants in "animal acts." Abolitionist? Yes. Such a ban doesn't necessarily emancipate all elephants within a particular jurisdiction; for example, it doesn't prevent elephants from being exploited in zoos. However, it *does* prevent their being exploited in circuses and other performance situations. More than a dozen U.S. cities already have banned "animal acts" with elephants and other "wild" animals.
>
> A ban on nonhuman primates in vivisection also is abolitionist. Althougt it doesn't free nonhuman primates from zoos or "animal acts," it does free them from vivisection.
>
> A ban on bear hunting? Abolitionist. It prevents bears from being wounded or killed by hunters—prevents, rather than modifies, their abuse. Such a ban doesn't state, "Bears are persons, not property," but it's *consistent with* their not being property.
>
> Abolitionist bans respect the moral rights of the nonhumans they're intended to protect. They're analogous to laws prohibiting child labor. Such laws didn't modify the treatment of children forced to labor. They prohibited the exploitation itself.[103]

In *Speciesism* I then give other examples of abolitionist bans, including bans on leghold traps, exotic pets, cockfighting, rodeo, the calf-flesh industry, wolf killing, dog breeding, foie gras production, and cosmetics testing on nonhuman animals.[104] Consider each of these bans, and you'll realize that they all prevent at least some exploitation.

Perz claims that my leghold-trap example contradicts my view that abolitionist bans "do not leave non-human animals in situations of exploitation."[105] There's no contradiction. Leghold traps *bring* nonhuman animals into a situation of exploitation. A ban on leghold traps reduces the chances that foxes, raccoons, and other animals commonly caught in leghold traps will be caught (and therefore exploited). Such a ban qualifies as incremental abolition. It's preventive, not

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[103] *Id.* at 70-71, 152.
[104] *See Id.* at 152-53.
[105] Perz, *supra* note 1, at 63.

"reformist." Compare a ban on leghold traps to a ban on egg-industry cages. By the time a hen is confined to a cage, she's already being exploited. Indeed, she's exploited from birth. Perz argues that a ban on leghold traps doesn't prevent animals from being trapped by other means or "farmed" for their pelts.[106] An abolitionist act doesn't necessarily abolish an entire industry (such as the pelt industry). It does, however, prevent the exploitation of the animals in question. In this case the animals in question are those who would otherwise be caught in leghold traps and thereby enter a situation of exploitation.

Perz similarly objects to my example of a ban on exotic pets on the grounds that such a ban "fails to protect native or local non-human animals."[107] Treating "foreign species" differently than "local species" is "arbitrary and speciesist," he says.[108] First, I didn't use the word *exotic* to mean nonindigenous. I used the term *exotic pets* as veterinarians and the general public do, to mean most or all pets other than cats and dogs. A ban on such pets wouldn't be arbitrary or speciesist but a major abolitionist step. Second, a ban on exotic pets would be abolitionist even if "exotic" meant nonindigenous. As I've discussed, an incremental abolitionist ban doesn't prohibit all speciesist exploitation, only some. Perz objects that animals categorized as exotic (nonindigenous) in one jurisdiction might not be categorized as exotic in another. Chipmunks, he notes, are exotic in Alaska but not in Maine.[109] Whether or not a ban is abolitionist doesn't depend on which animals it covers in which jurisdictions. It depends on whether the ban prevents or modifies the exploitation of the animals in question. In Alaska, chipmunks would be among the animals in question; in Maine they wouldn't (again, if "exotic" meant nonindigenous). By Perz's faulty logic, a European Union ban on vivisection wouldn't be abolitionist because it wouldn't also ban vivisection in the United States. Mice couldn't be vivisected in one jurisdiction (the EU) but still could be vivisected in another (the U.S.). That fact wouldn't make an EU ban on vivisection any less abolitionist.

Currently, many animal advocates are thoroughly confused regarding what is and is not abolitionist. In my view, part of the problem is that *Rain without Thunder* fails to provide clear, consistent, easily applied guidelines. *Speciesism*'s discussion of abolitionist strategy is intended to help rectify the situation. *Speciesism* reformulates abolitionism.

B. Speciesism Redefined

Speciesism also uniquely advances the concept of speciesism. In the book, I coin and define the terms *old speciesism* and *new speciesism*. Old-speciesists oppose nonhuman rights.[110] New-speciesists favor rights for *some* nonhuman beings, those who seem most human-like.[111] Nonspeciesists advocate basic rights, such as rights to life and liberty, for all sentient beings.[112] Applying this original framework, *Speciesism* examines philosophy, law, and advocacy in terms of old-, new-, and non-speciesist.

Again uniquely, *Speciesism* shows that the standard Singer–Regan definition of speciesism encompasses only the most obvious and severe form of speciesism: old speciesism. In

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[106] *See Id.*
[107] *Id.* at 64.
[108] *Id.*
[109] *See Id.*
[110] *See* DUNAYER, *supra* note 2, at 9.
[111] *See Id.* at 77, 98.
[112] *See Id.* at 124, 134.

the book's opening chapter, "Speciesism Defined," I argue that this definition is too narrow because it restricts speciesism to prejudice against *all* nonhumans:

> What, exactly, is speciesism? In 1970 psychologist Richard Ryder coined the word *speciesism* in a leaflet of the same name. Although he didn't explicitly define the term, he indicated that speciesists draw a sharp moral distinction between humans and all other animals. They fail to "extend our concern about elementary rights to the non-human animals."
>
> With the 1975 publication of *Animal Liberation*, philosopher Peter Singer brought the concept of speciesism widespread attention. He defined speciesism as
>
> > a prejudice or attitude of bias toward the interests of members of one's own species and against those of members of other species.
>
> That definition falls short. Consider a comparable definition of racism:
>
> > a prejudice or attitude of bias toward the interests of members of one's own race and against those of members of other races.
>
> Yes, bias toward whites and against all other races is racist. However, bias toward whites and against *any number* of other races also is racist. All of the following are racist: prejudice against only Semites; prejudice against only Africans, Native Americans, and Australian Aborigines; prejudice against everyone *except* whites and Asians. Analogously, bias toward humans and against any number of other species (say, all rats and mice) is speciesist. So is bias toward humans and *toward* any other species (e.g., chimpanzees and gorillas).
>
> Like Singer, philosopher Tom Regan defines speciesism as giving "privileged moral status" to all humans and no nonhumans. Again, it's also speciesist to morally privilege all humans and only *some* nonhumans. To me, the speciesism of privileging mammals and birds is as obvious as the racism of privileging Europeans and Asians or the sexism of privileging men and exceptionally masculine women.
>
> According to Singer and Regan, someone is not speciesist if they give full moral consideration to *any* nonhumans—for example, those who most resemble humans in appearance, observed behavior, and apparent cognition. Giving full moral consideration to whites and mulattos, but not blacks, extends equality to some nonwhites but still is racist. Giving full moral consideration to men and only exceptionally masculine women extends equality to some women but still is sexist. Likewise, giving full moral consideration to humans and only some nonhumans—such as other apes—extends equality to some nonhumans but still is speciesist.[113]

[113] *Id.* at 1-2, 3.

In the same chapter, I show that the standard Singer–Regan definition of speciesism is too narrow in another important way: it limits speciesism to bias based solely on species membership, excluding bias based on species-typical characteristics:

> In a 2003 article, Singer defined speciesism more narrowly than in *Animal Liberation*:
>
> > the idea that it is justifiable to give preference to beings simply on the grounds that they are members of the species *Homo sapiens*.
>
> By "preference" Singer means greater moral consideration. This definition of speciesism is more inadequate than his earlier one. Now, in addition to limiting speciesism to bias toward only one species (our own), Singer limits it to bias *simply* on the grounds of species membership.
>
> Again, consider a comparable definition of racism:
>
> > the idea that it is justifiable to give preference to certain individuals simply on the grounds that they are white.
>
> Isn't it racist to give greater moral consideration to whites on *any* grounds, such as their generally having lighter skin or a higher standard of living than nonwhites?
>
> A parallel definition of sexism might help:
>
> > the idea that it is justifiable to give preference to certain individuals simply on the grounds that they are male.
>
> It's sexist to give men greater moral consideration than women on *any* grounds, such as men's generally being more muscular or scoring higher on tests of spatial orientation. Likewise, it's speciesist to give humans greater moral consideration than nonhumans on *any* grounds, such as humans' generally possessing written language and engaging in more tool use.
>
> Also like Singer, Regan further defines speciesism as "assigning greater weight to the interests of human beings just because they are human." This bears repeating: It's racist to give greater weight to the interests of whites than nonwhites, sexist to give greater weight to the interests of males than females, and speciesist to give greater weight to the interests of humans than nonhumans for *any* reason.
>
> According to Singer, it isn't speciesist to believe that "there are morally relevant differences between human beings and other animals that entitle us to give more weight to the interests of humans." It *is* speciesist. There are no such

> differences, just as there are no differences between whites and nonwhites or males and females that entitle us to give more weight to the interests of whites or males.
>
> To warrant full and equal moral consideration, someone need only be sentient. . . .[114]

More recently Singer has stated, "The term 'speciesism' refers to discrimination on the basis of species, not to discrimination on the basis of cognitive capacities."[115] That definition denies the fact that cognitive criteria themselves can be based on species. If discrimination is based on the actual or presumed absence of cognitive capacities *typical of a particular species*, then such discrimination is species-biased. In *Speciesism* I note that Singer has described his criteria for equal moral consideration as "the characteristics that normal humans have."[116] I also note that he advocates rights only for animals as self-aware as a normal human beyond earliest infancy. "Why a normal *human*?" I object. "Why not a normal vulture or tortoise?"[117] Singer claims that his cognitive criteria aren't speciesist because they don't require membership in the human species.[118] However, they're clearly human-biased (species-based) and therefore correctly termed "speciesist."

In sum, in *Speciesism* I redefine speciesism to include bias based on species-typical characteristics (not just species membership) and bias against any number of species. My broadened definition is in no way indebted to Francione's work. In fact, Francione uses the standard Singer–Regan definition, which limits speciesism to discrimination against *all* nonhuman beings based solely on species membership. He writes, "[T]here is nothing morally significant per se about species membership that justifies speciesism, or the exclusion of animals from the moral community and their treatment as our resources."[119]

"Speciesism Defined" concludes with this summary definition of speciesism:

> a failure, in attitude or practice, to accord any nonhuman being equal consideration and respect.[120]

I consider Perz's criticisms of that summary definition his only valid criticisms of *Speciesism*. Perz correctly remarks that the definition excludes speciesism against humans.[121] I don't regard prejudice against all humans as a serious problem. For good reason, the focus of *Speciesism* (and all other animal rights books) is human discrimination against nonhumans. Even so, I agree with Perz that a strictly accurate summary definition should allow for bias against the human species. Perz also criticizes my summary definition for not mentioning species.[122] That flaw is more serious. Why didn't I write something like "a failure, *based on species*, . . ."? I was concerned

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[114] *Id.* at 2-3, 4.
[115] Peter Singer, quoted in Rosamund Raha, *Animal Liberation: An Interview with Professor Peter Singer*, THE VEGAN 18, 19 (Autumn 2006).
[116] Peter Singer, quoted in DUNAYER, *supra* note 2, at 91.
[117] DUNAYER, *supra* note 2, at 81 (emphasis in original).
[118] *See* PETER SINGER, ANIMAL LIBERATION 21 (2d ed. 1990).
[119] FRANCIONE, *supra* note 16, at 127. Throughout *Introduction to Animal Rights* Francione uses the word *animals* to mean nonhuman animals.
[120] DUNAYER, *supra* note 2, at 5.
[121] *See* Perz, *supra* note 1, at 50.
[122] *See Id.*

that people would interpret "based on species" in the standard, overly narrow way: based on species *membership*. I wanted the definition to be able to stand alone without explanation. Nevertheless, I again agree with Perz: without some reference to species the definition is too broad, especially when divorced from its context, the discussion in *Speciesism*. As Perz points out, a human can fail to accord a nonhuman being equal consideration and respect for reasons other than species bias. He gives the example of a human's harming a nonhuman in a "fit of anger."[123]

However, Perz's discussion of my summary definition is unfair and deceptive in its failure to acknowledge several highly relevant facts. First, while criticizing the definition for omitting speciesism against humans—an omission that he says could arguably be termed "speciesist"[124]—Perz doesn't acknowledge that Francione's definition (like Ryder's, Singer's, and Regan's) entails the same omission. Perz doesn't discuss, or even provide, Francione's definition, even though the stated purpose of his piece is to compare *Speciesism* and Francione's work.[125]

Second, Perz doesn't acknowledge that my summary definition doesn't accurately reflect my own argument in *Speciesism* (presented above). In the chapter that ends with the summary definition, I continually speak in terms of species. I also allow for bias against humans, stating outright that the term *speciesism* should encompass any species-based discrimination: "Philosopher Paola Cavalieri comments that *speciesism* could 'be used to describe any form of discrimination based on species.' For the reasons I've given, that's how *speciesism* should be used. Unfortunately, Cavalieri adopts the standard Singer–Regan definition."[126]

Third, Perz doesn't acknowledge that I've publicly provided a corrected summary definition since *Speciesism*'s publication. Having realized the definition's two flaws soon after the book was published, I started using a revised definition. For example, in a 2005 article I wrote, "What is speciesism? A failure, on the basis of species, to accord anyone equal consideration."[127] On the basis of species. Anyone (i.e., any sentient being). The two flaws have been corrected. Perz cites that article.[128] The corrected definition appears in the article's opening paragraph. Yet, Perz argues against my older summary definition as if my newer one didn't exist.

Finally, Perz proposes a different (unwieldy) summary definition without acknowledging that it summarizes my own argument in *Speciesism* (see above):

> [P]erhaps a better definition of speciesism than Dunayer's is "a failure, in attitude or practice, to accord any *sentient* being equal moral consideration of interests and respect due to that being's species or having characteristics that are generally associated with a particular species."[129]

Perz gives no indication that I make the argument reflected by that definition. In keeping with his determinedly negative treatment of *Speciesism*, he avoids saying anything positive about the definition chapter.

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[123] *Id.*
[124] *Id.*
[125] *See Id.* at 49 n. 1.
[126] DUNAYER, *supra* note 2, at 3.
[127] Joan Dunayer, *Reply to a Self-Proclaimed Speciesist*, VEGAN VOICE 14 (Sept.-Nov. 2005).
[128] *See* Perz, *supra* note 1, at 64 n. 93.
[129] *Id.* at 50 (emphasis in original).

Speciesism significantly develops and refines the concept of speciesism. To my knowledge, no other work explains the inadequacies of the standard Singer–Regan (and Francione) definition of speciesism. The book expands that definition to include bias against any number of species as well as bias toward animals (human or nonhuman) who possess characteristics typical of a particular species, especially the human species. *Speciesism*'s distinction between old and new speciesism also illuminates speciesism in an original way.

Whereas Francione's work is couched largely in terms of nonhumans' property status, mine is couched in terms of speciesism, the underlying cause of nonhumans' property status and all other species-based injustice. In each of Francione's books, the word *speciesism* appears a few times at most.[130] In contrast, speciesism-versus-nonspeciesism is the central theme of both my books, with *nonspeciesism* signifying moral and legal equality for all sentient beings.

C. Legal Equality for All Sentient Beings

Speciesism's discussion of nonhuman rights also represents progress beyond Francione's work. Like Francione,[131] I advocate freeing all nonhuman beings from property status—that is, emancipating them from enslavement.[132] Although Francione extensively analyzes nonhumans' *current* legal status,[133] he doesn't discuss nonhuman *emancipation* in legal terms.

In *Speciesism*'s "Nonspeciesist Law" chapter, I describe how nonhuman emancipation might be obtained through U.S. law.[134] A constitutional amendment or Supreme Court ruling could declare all nonhuman beings to be constitutional persons. Almost certainly, partial emancipations would precede such full emancipation: multiple constitutional amendments and/or Supreme Court rulings would confer legal personhood on progressively more nonhumans. Most likely, judicial emancipations will begin with one or a few species, such as chimpanzees or all nonhuman apes. All successful sentience-based cases for particular species or other taxonomic groups could serve as precedents for a Supreme Court ruling that constitutional personhood rightly encompasses all sentient beings. So could cases (e.g., *Superintendent of Belchertown v. Saikewicz* and *Youngberg v. Romeo*)[135] in which judges have asserted the rights of humans who are sentient but lack the type of intelligence characteristic of humans. Ideally, however, a constitutional amendment would secure personhood for all sentient beings.

Francione states, "I do not think that according animals constitutional rights is a particularly helpful framework in which to address the overall problem of animal exploitation. . . ."[136] In contrast, I emphasize the importance of constitutional personhood for nonhuman beings: "In the United States, constitutional personhood seems the most likely means of nonhuman emancipation. In fact, I'm not aware of any way, within the current U.S. legal system, that nonhumans could be freed from property status *without* becoming constitutional persons."[137]

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[130] *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 17 (1995); FRANCIONE, *supra* note 22, at 13, 48, 159; FRANCIONE, *supra* note 16, at xxix, 127, 161, 173-74, 191 n. 19.
[131] *See generally* FRANCIONE, *supra* note 16.
[132] *See* DUNAYER, *supra* note 2, at 17, 124, 136, 138, 149.
[133] *See generally* FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (*supra* note 130).
[134] *See* DUNAYER, *supra* note 2, at 136-39.
[135] *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *Youngberg v. Romeo*, 457 U.S. 307 (1982).
[136] FRANCIONE, *supra* note 16, at 221 n. 3.
[137] DUNAYER, *supra* note 2, at 139 (emphasis in original).

In *Animal Equality* I wrote, "Sentience entitles nonhuman animals to legal rights,"[138] "Justice requires that *person* include all sentient beings,"[139] and "Equitable laws would redefine *person* and *individual* to include nonhuman animals or replace those terms with *animal* or *sentient being*."[140] In *Speciesism* I elaborate and defend my view that all sentient beings should have legal rights.

Further, I argue that all sentient beings should have *equal* legal protection, all applicable rights afforded by legal personhood.[141] In contrast, Francione does not advocate equal legal protection for all sentient beings. All that he advocates for every nonhuman being is freedom from property status. In *Introduction to Animal Rights* he states, "My position is simple: we are obligated to extend to animals only *one* right—the right not to be treated as the property of humans."[142] Several pages later he repeats that contention: "I argue that animals have only one right—a right not to be treated as property or resources."[143] He doesn't say "*at least* one right." He says "*only* one right."

Does Francione equate that one right (freedom from property status) with full and equal legal protection? No. With reference to humans he writes, "The right not to be treated as the property of others is *basic* in that it is different from any other rights we might have because it is the grounding for those other rights. . . ."[144] Different from other rights. The grounding for those rights. Clearly, Francione doesn't think that the right not to be property automatically entails all other applicable rights. By "other rights" does he mean rights relevant only to humans—for example, civil liberties such as the right to vote or petition? Again no. He includes among "other rights" rights vitally important to nonhumans, such as a right "of liberty."[145] Francione does not indicate that all sentient beings should have all applicable rights. With regard to all nonhuman beings, he advocates only one right: the right not to be property.

Francione distinguishes between the right not to be property and *equal* rights. In a 2004 email to me, he expressed his view that sentience suffices for "the right not to be property," but "cognitive and genetic similarities between humans and great apes might justify according equal rights to great apes."[146] Several months later, after he granted me permission to quote those words in *Speciesism*, I confirmed my understanding of them. I emailed Francione, "In the email quote you say that all sentient beings are entitled not to be property, but nonhuman great apes might be entitled to *more* than that ('equal rights')."[147] Francione let that interpretation stand.[148]

When he speaks of "equal rights" for *some* nonhuman beings (such as nonhuman great apes), what does Francione mean? As he repeatedly makes clear, he does not advocate that any nonhumans have the *same* rights as humans.[149] It would be foolish to propose that bonobos, chimpanzees, or any other nonhumans have rights, such as freedom of speech, that are relevant

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[138] DUNAYER, *supra* note 12, at xvii.
[139] *Id.* at 175.
[140] *Id.* at 171.
[141] *See* DUNAYER, *supra* note 2, at 139-49.
[142] FRANCIONE, *supra* note 16, at xxxi (emphasis in original).
[143] *Id.* at xxxiv.
[144] *Id.* at xxviii (emphasis in original).
[145] *Id.*
[146] Personal email communication from Gary L. Francione to the author (Feb. 29, 2004), on file with the author.
[147] Personal email communication from the author to Gary L. Francione (May 13, 2004) (emphasis in original), on file with the author.
[148] My email exchange with Francione concluded with an email (*Id.*) in which I thanked him for permission to quote him and confirmed my understanding of his words. If I had misinterpreted him, he easily could have corrected me.
[149] *See, e.g.*, FRANCIONE, *supra* note 16, at xxxi, 221 n. 3.

only to humans. Therefore, by "equal rights" Francione must mean equal protection. This, then, is his indicated position: All nonhuman beings should be spared property status, and additional rights might be appropriate for *some*. That is, we're obligated to accord all sentient beings the right not to be property, but we're not obligated to accord all sentient beings "equal rights." I disagree with Francione. In my view we *are* obligated to accord all sentient beings equal rights in the sense of equal protection. All sentient beings deserve all applicable human rights. As I comment in *Speciesism*, "I can't think of any human right that applies to nonhuman great apes but doesn't also apply to all other sentient beings. A ladybug can't benefit from freedom of religion or a right to petition, but neither can an orangutan."[150]

In *Introduction to Animal Rights* Francione asserts that all sentient beings should receive equal moral consideration.[151] Yet, he doesn't advocate equal legal protection for all sentient beings. *Speciesism* makes the case that equal consideration requires equal legal protection. Equal legal protection inscribes equal consideration into law.[152]

"[T]he rights view challenges the very conception of animals as legal property," Tom Regan wrote in 1983.[153] I strongly agree with that groundbreaking statement. However, in *Introduction to Animal Rights* Francione essentially reduces nonhuman rights to *only* the right not to be property. In that respect I consider his book a step backward rather than forward.

Apart from the right not to be property, Francione doesn't specify any legal rights for any nonhuman animals. As expressed by Perz, Francione "is silent on the question of what other rights they may or may not have."[154] Silence regarding what rights nonhumans should have is, to say the least, a major omission in any animal rights theory.

In contrast to Francione, I outline what legal rights all nonhuman beings should have: all applicable rights conferred by constitutional personhood, including rights to life, liberty, and property.[155]

Humans needlessly kill nonhuman beings for their flesh, skin, and other body parts. Viewing nonhumans as pests, potential threats, or competitors for resources, they kill "nuisance" geese and bears, snakes and alligators who aren't attacking, and wasps and rats who make their homes where humans do. Humans kill nonhumans for profit or fun, in anger or contempt, and out of revulsion or mere annoyance. Full nonhuman personhood would prohibit all such unjustifiable killing, which would constitute murder.

Along with a legal right to life, nonhuman beings should have a right to liberty. Otherwise humans can, with impunity, deny them physical freedom—for example, trap them or confine them to enclosed areas. Unless nonhumans have a right to liberty, humans also can violate their bodily integrity, as they do when they take milk from a cow or venom from a snake. Like humans, nonhumans need legal protection against maiming, battery, torture, sexual assault, and other bodily harm by humans.

Equitable law wouldn't permit humans to take what nonhumans produce (eggs, honey, milk…), destroy what nonhumans build (nests, burrows, hives…), or radically alter the natural habitats where nonhumans live (rainforests, marshlands, lakes…). Nonhuman beings need property rights. They should legally own the products of their bodies, the products of their

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[150] DUNAYER, *supra* note 2, at 124.
[151] *See* FRANCIONE, *supra* note 16, at xxv-xxvi.
[152] *See* DUNAYER, *supra* note 2, 140-49.
[153] TOM REGAN, THE CASE FOR ANIMAL RIGHTS 394 (1983).
[154] Perz, *supra* note 32.
[155] *See* DUNAYER, *supra* note 2, at 139-47.

labors, and their home territories. Eggs should belong to the layer, honey to the bee colony, and a beaver dam to its builders and their descendants. All nonhuman beings living in a particular area of land or water should have a legal right to that environment, their communal property. The law should prohibit humans from appropriating or intentionally damaging that property.

Francione dismisses the idea of a nonhuman right to property. He places a "right to own property" among rights, such as a "right to vote" and a "right to an education," appropriate only for humans.[156]

Francione doesn't categorically oppose human home-building in "areas now occupied exclusively by nonhumans."[157] In *Speciesism* I point out that such building violates the principle of equal consideration. It gives greater weight to the non-vital interests of relatively few humans (those who would profit or otherwise benefit from the new housing) than to the vital interests of many more nonhumans (those who would be displaced, injured, killed, or otherwise seriously harmed).[158]

According to Francione, it might be justifiable to displace field mice, but not humans, from their current homes. Humans might value a particular piece of land more than the resident mice do, he argues.[159] I object, "It's much easier for humans to appreciate human needs and desires than nonhuman ones, so they shouldn't presume to judge how much field mice value their habitat. Also, the extent to which mice consciously value their habitat doesn't equate to how much they *need* that habitat."[160] Whites similarly rationalized the displacement of Native Americans, I comment. "Like Native Americans, the field mice were there first."[161] Francione indicates that the mice could be trapped and moved to other land.[162] In addition to permanently depriving the mice of their home territory, removal through trapping would temporarily deprive them of liberty. Francione intends his example to illustrate fair treatment. Instead it illustrates injustice. It shows that the right not to be property doesn't suffice. Mice and other nonhuman beings need rights equal to those of humans. As I argue in *Speciesism*, if humans can own territory but nonhumans can't, humans will win all territory conflicts.[163] I conclude that nonhumans need a right to their home territory.[164]

In other ways as well, Francione rejects equal legal protection for nonhumans. He poses this question: Would nonhuman rights require that a human who kills a nonhuman be punished as if the victim were human? Francione answers, "No, of course not."[165] If we abolish the property status of nonhumans and accord them moral value, he says, a human who wrongfully harms a nonhuman needn't receive the same penalty as that imposed for comparable harm to a human.[166] I write in *Speciesism*, "In my view, according *equal* moral value to nonhumans does require that comparable harm to humans and nonhumans carry equivalent penalty. Like human

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[156] FRANCIONE, *supra* note 16, at xxxi.
[157] Gary L. Francione, *Wildlife and Animal Rights*, in ETHICS AND WILDLIFE 65-81, 76 (Priscilla Cohn ed., 1999).
[158] *See* DUNAYER, *supra* note 2, at 143-46.
[159] *See* Francione, *supra* note 157, at 77.
[160] DUNAYER, *supra* note 2, at 144-45 (emphasis in original).
[161] *Id.* at 145.
[162] *See* Francione, *supra* note 157, at 77.
[163] *See* DUNAYER, *supra* note 2, at 145.
[164] *See Id.* at 146-47.
[165] FRANCIONE, *supra* note 16, at 184.
[166] *See Id.*

equality, animal equality doesn't mean much if it doesn't include equality under the law. Nonhumans should share, in full, all applicable protections that the law affords to humans."[167]

In contrast to Francione's work, then, *Speciesism* argues that all sentient beings are entitled to *equal* legal protection: all applicable rights accorded by constitutional personhood (or its equivalent). Also in contrast to Francione's work, *Speciesism* describes how nonhuman personhood might be obtained through U.S. law and outlines the legal rights that nonhuman beings should possess. Although Francione's work has analyzed nonhumans' current property status in considerable detail, it doesn't show the way forward in legal terms. *Speciesism* does.

IV. CONCLUSION

Readers of *Speciesism* will see that the book advances animal rights theory in ways other than those discussed here. *Speciesism* "brilliantly expands on the limited views of many animal rights philosophers," ethicist Michael W. Fox comments.[168] *Speciesism* expands on some aspects of Francione's theory and takes exception to others.

Using omission, distortion, and outright falsehood, Perz has charged me with appropriating and misrepresenting Francione's work. To the contrary, I've properly credited and critiqued that work. According to Perz, I "mischaracterize and dispute some of Francione's conclusions, claiming that they contradict the animal rights theory that Francione developed in the first place. . . ."[169] As I've shown, it is Perz who mischaracterizes. I do find contradictions within Francione's theory, and I do dispute some of Francione's conclusions. Francione has developed one version of animal rights theory: his version. Perz may regard that version as perfect. I don't. As I've explained, I think that Francione's theory has some serious flaws and gaps. For example, his "abolitionist" guidelines allow for "welfarist" actions, and his presented view of nonhuman rights is overly reductive, largely limited to nonhumans' right not to be property.

In Perz's opinion, *Speciesism*'s critique of Francione's work "does not do non-human animals any favors."[170] I strongly believe that the critique represents progress toward animal equality. The aspects of Francione's theory to which I object are those that I find inegalitarian, intellectually unsound, or both. Perz states, "[B]oth prior to and after Francione's work, publications by other authors on the subject of 'animal rights' fall far short of being consistent with what rights theory actually requires. . . ."[171] In this response to Perz, I've argued that *Speciesism* advances animal rights theory beyond Francione's theory. In my view, any attempt to limit animal rights theory to the theory of one individual—especially by unjust, deceptive means—harms nonhuman animals. For animal rights theory to thrive, new proponents must continually be welcome and receive a fair hearing. In addition to espousing justice, we must demonstrate it in our own work and conduct. Animals, both nonhuman and human, deserve nothing less.

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[167] DUNAYER, *supra* note 2, at 147 (emphasis in original).
[168] Michael W. Fox, quoted in *Id.* at back cover.
[169] Perz, *supra* note 1, at 49.
[170] *Id.* at 49 n. 2.
[171] *Id.*

DETERMINING THE VALUE OF COMPANION ANIMALS IN WRONGFUL HARM OR DEATH CLAIMS: A SURVEY OF U.S. DECISIONS AND LEGISLATIVE PROPOSAL IN FLORIDA TO AUTHORIZE RECOVERY FOR LOSS OF COMPANIONSHIP

MARCELLA S. ROUKAS*

"He is the friend and companion of his master, accompanying him on his walks; his servant aiding him in his hunting; the playmate of his children, an inmate of his home, protecting it against all assailants." In his well-known tribute to the dog, United States Senator Vest characterizes him as "the one absolutely unselfish friend a man may have in this selfish world, the one that never deserts him, never fails him, the one that never proves ungrateful or treacherous." [1]

INTRODUCTION

It is not unusual in the United States to find a companion[2] animal being treated as a family member.[3] Such treatment can be attributed to Americans forming strong bonds with their companion animals, or even having a companion animal in lieu of children.[4] Where the latter takes place, a human guardian may become extremely devastated when their companion animal is harmed or killed in a wrongful manner.[5] The human guardian's assessed value for their companion animal may be priceless while the law finds a worth that is void of any sentimental meaning.

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[1] State v. Harriman, 75 Me. 562, 565 (Me. 1884). (Appleton, J., dissenting).

[2] The writer purposely refrains from using the word pet since its connotations are negative.

[3] Carol Marie Cropper, Strides in Pet Care Come at Price Owners Will Pay, N.Y. Times, April, 5, 1998, § 1 at 16. (A 1995 report by the American Animal Hospital Association found that 70 percent of former and current pet owners surveyed thought of their pets as children. Asked what one companion they would want on a deserted island, 53 percent listed a dog or cat); See generally Steven M. Wise, Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of Companion Animals, 4 Animal L. 33 (1998).

[4] Carol Marie Cropper, Strides in Pet Care Come at Price Owners Will Pay, N.Y. Times, April, 5, 1998, § 1 at 16. (Quoting Sally Prewett, on why she obtained a kidney transplant for her cat: "I don't have any children. I'm single. These cats are like my kids. I just can't imagine not doing it").

[5] Sandra B. Barker & Randolph T. Barker, The Human-Canine Bond: Closer Than Family Ties?, 10 J. Mental Heath Counseling 46, 54 (Jan. 1988). (During the 1980's, U.S. mental health practitioners began to take notice of the demand for counseling services in loss of companion animal cases).

Domestic and captured wild animals are recognized as personal property at common law.[6] As a result, the valuation of damages for the loss of a companion animal is measured as personal property and often times the fair market value.[7] Such an inflexible approach to valuing companion animals fails to distinguish between personal property such as a chair and a beloved pet.[8] Needless to say, awarding damages for the fair market value of the companion animal serves as little or no deterrence for the tortfeasor. This is especially true in cases where the companion animal is not a pedigree or lacks special training.[9] The writing in this article covers Florida decisions that have authorized the human guardian to plead and recover the "unique value" (cases involving intrinsic damages) for their companion animal.[10]

Those decisions reflect a shift in the court's view of companion animals, and acknowledge public policy concerns for the guardian of a companion animal.[11] Florida is currently a jurisdiction that allows recovery of intentional infliction of emotional distress, mental pain and suffering, and/or punitive damages where the tortfeasor has engaged in an intentional harm and/or gross negligence involving a companion animal.[12] In addition, the writing proposes Florida Legislation that would permit a plaintiff to recover for "loss of companionship" in

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[6] See David S. Favre & Murray Loring, Animal Law, (Quorum Books 1983). (Owners of non-human animals are afforded all the property protections offered by the law, but owners may disregard these protections since non-human animals do not have legal rights).

[7] See Peter Barton & Frances Hill, How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat, 34 N.Y.L. Sch. L. Rev. 411 (1989). (As a general rule, the measure of damages for tortious injury or killing of an animal is the fair market value of the animal, and this standard applies to inanimate property as well); See Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L. J. 531 (1998); See Derek W. St. Pierre, The Transition from Property to People: The Road to Recognition of Rights for Non-Human Animals, 9 Hastings Women's L. J. 255 (1998); See Gary L. Francione, Animals As Property, 2 Animal L. I. (1996).

[8] Compare…Steven M. Wise, Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of Companion Animals, 4 Animal L. 33 (1998). ("If the economic value of companion animals was important to their human companions, as is normally the case with sofas, chairs, and other inanimate property, small animal veterinarians would close their doors, because human companions would never bring their companion animals for treatment. Instead, they would abandon them.").

[9] David Favre, How Much Is That Doggie in the Window: Valuation for a Lost Pet, TortSource, Vol. 7, No. 3 at 1&4, (spring 2005). ("[S]ome pets win awards and command high-dollar breeding and offspring fees"); See Mitchell v. Union Pacific R.R. Co., 188 F. Supp. at 869, (S.D. Cal. 1960). (Upheld a jury verdict of $5,000 since the award was based on evidence that the dog could do special tricks and appeared at many charity events as a result of the special tricks. The income potential determined by the plaintiff's experts was considered to be proper evidence in assessing damages).

[10] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 9, Riff v. Welleby's Veterinary Medical Center, et al, (17th Cir. 2006) (No. 02-012991-08). Citing to La Porte v. Associated Independents, Inc., 163 So. 2d at 267 (1964). (Upheld award of $2,000 compensatory damages and $1,000 in punitive damages for the malicious killing of dog where garbage man threw garbage can on top of leashed dog resulting in its death. The Florida Supreme Court held that "the affection of a master for his dog is a very real thing and the malicious destruction of the pet provides an element of damage for which the "owner" should recover, irrespective of the value of the animal…"); See also Bluestone v. Bergstrom, No. 00CC00796 (Cal. Sup. Ct. Orange Co. 2003). (Court upheld a judgment of $39,000, an award that applied special/unique value damages). (Provided by Fred Kray, Esq.).

[11] Jankowski v. Preiser Animal Hospital, LTD., 157 Ill. App. 3d at 818 (1987). (Dismissed a cause of action based on loss of companionship, but found that "the actual value to the owner may include some element of sentimental value in order to avoid limiting plaintiff to merely nominal damages.").

[12] See Levine v. Knowles, 197 So. 2d 329 (3rd DCA 1967); La Porte v. Associated Independents, 163 So. 2d 267 (Fla. S. Ct. 1964); Johnson v. Wander, 592 So. 2d 1225 (Fla. S. Ct. 1992); Knowles Animal Hospital v. Wills, 360 So. 2d 37 (Fla. S. Ct. 1978); and Wertman v. Tipping, 166 So. 2d 666 (Fla. App. 1st Dist, 1964).

actions involving intentional or grossly negligent acts that result in serious injury or death of a companion animal.[13]

The writing is organized in the following manner: Section II covers the legal roots concerning the classification of companion animals; Section III gives a succinct overview of companion animal valuation; Section IV gives a succinct overview of the social and psychological value human guardians of companion animals place on their companion animals; Section V surveys Florida case law; Using all of the material that precedes it, Section VI proposes legislation in Florida that would authorize the owner of a companion animal to recover "loss of companionship" where their companion animal is seriously injured or killed due to intentional or grossly negligent acts; Section VII concludes on the material discussed throughout the writing

II. THE LEGAL CLASSIFICATION OF COMPANION ANIMALS

The U.S. legal framework on the law of property is a creature of the common law.[14] According to common law, animals are considered personal property.[15]

> The concept of animals as property is not, however, an original creation of the common law. Its lineage lays in antiquity. Steven Wise, in several articles dealing with, among other things, the history of the legal status of animals, notes that the present view of animals as property is based on the ancient Stoic view of the world. In this vision, the world was created for the benefit of humans who crown the natural hierarchy.[16]

To illustrate this view, Steven Wise, in Rattling the Cage, astutely points out how Greek philosophers such as Aristotle, in his Politics, said "that all nonhuman animals were created for (Great Chain of Being) the sake of humans".[17] Nevertheless, Greek philosophers such as Plato, a Pythagorean, elevated the moral status of animals, and practiced vegetarianism.[18] Religious philosophy also played a crucial role in defining modern views concerning the property status of

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[13] RESTATEMENT (SECOND) OF TORTS, Sec. 903, ("Compensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him. Comment: a. Where there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would occupy had no tort been committed.").

[14] Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L. J. 531at 533 (1998). (Citing to Blackstone, Holmes and Pound, William Blackstone, Commentaries on the Law of England, II, 15-19, 20-21, 384-387, 401-05 (1969); Oliver Wendell Holmes, Jr., The Common Law, 206-46 (1881)); (Roscoe Pound, The Spirit of the Common Law, 185-87, 197-200 (1921)).

[15] See Rebecca J. Huss, Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals, 86 Marq. L. Rev. 47 at 69 (2002) citing to Gary L. Francione, Animals, Property, and the Law, Philadelphia: Temple University Press, (1995). (The first U.S. judicial decision to authorize a property right in dogs was recorded in 1871); See generally Steven M. Wise, The Legal Thinghood of Nonhuman Animals, 23 B.C. Envtl. Aff. L. Rev. 471 (1996).

[16] See Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L. J. 531at 534 (1998) (Citing to Steven M. Wise, The Legal Thinghood of Nonhuman Animals, 23 Envtl. Aff. 471, 475 (1996); Steven M. Wise, How Nonhuman Animals Were Trapped in a Nonexistent Universe, 1 Animal L. (1995).

[17] *See generally* Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals *(2000).*

[18] Martha C. Nussbaum, Animal Rights: The Need for a Theoretical Basis, 114 Harv. L. Rev. 1506 at 1514 (2001).

animals.[19] According to traditional Christian theology, treating animals as mere property stems from belief systems that maintain humans as having a superior status in the world, and that animals are not legitimately the subject of such moral rights.[20] Interestingly, these religious belief systems were not only used to oppress animals, but applied to support slavery and the subjugation of women.[21]

> In the Seventeenth Century, Africans brought into the U.S. were bought and sold as chattel. During this same period, women, once married, became the property of their husbands. Possibly the biggest barrier to the exertion of rights by either group was their status as property. Similarly, the subordination of non-human animals stems from a refusal to recognize that animals have interests of their own.[22]

As such, American jurisprudence has failed to recognize companion animals as having their own interests by maintaining the legal classification of animals as property.[23]

However, progress concerning the legal status of companion animals is occurring outside the US., in locations such as France, where a decision to alter their 300 year old civil code will result in the recognition of companion animals as "protected property/living sentient beings."[24] In analyzing the U.S. legal framework concerning the legal status of animals, it is important to discuss how the common law defined the property rights to these animals because of their mobility.[25]

The two categorizations for animals under the common law are wild and domestic.[26] If the animal is considered to be a "wild animal" a property right held by an individual would only exist upon capture or taming.[27] If the wild animal escaped, the property right held by the individual would disappear as well.[28] However, the holder of a property right to a domestic

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[19] Rebecca J. Huss, Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals, 86 Marq. L. Rev. 47 at 69 (2002). (Discussion on Judaism and how humans have dominion over animals and Christianity on human superiority due to animals lacking morality).

[20] Id at 55; (citing to Andrew Linzey, Animal Rights: A Christian Assessment of Man's Treatment of Animals, 20 (1976)).

[21] See generally Derek W. St Pierre, The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals, 9 Hastings Women's L. J. 255 (1998). (Analyzing the classification of a living being as property and how at one point this effective tool of oppression created slavery and married women's lack of rights).

[22] *Id.* at 256.

[23] This statement strictly reflects the author's opinion based on readings of legal scholars on animal rights and the law.

[24] Animal Liberation Front Article on the New French Civil Code: Available at: http://www.animalliberationfront.us/News/Apr-May05/FrenchCode.htm (last visited April 5, 2006). (quoting Justice Minister Dominique Perben, "Compared to 1804, men and animals now live together in a way that is completely different from two centuries ago." The change to the civil code- which is likely to go into law by the end of the year—will create for animals a third kind of property, alongside movable and immovable goods).

[25] U.C.C. § 2-105 (2005); (The Sale of Goods is governed by the Uniform Commercial Code (UCC), rather than the common law, and animals are considered as movable goods).
See Rebecca J. Huss, Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals, 86 Marq. L. Rev. 47 at 69 (2002).

[26] *Id.* at 69.

[27] *Id.* at 69.

[28] *Id.* at 69.

animal would not lose this property right if the animal escaped.[29] Where the animal is categorized as a companion animal, a subcategory of domestic animals, a holder of this property right has more rights to the animal, but may have more duties under statutory law concerning the treatment and care of the companion animal.[30]

The property status concerning companion animals has been under scrutiny where strained definitions of property such as "animate, constitutive, sentimental, sentient or personhood" have arisen on behalf of companion animals.[31]

Nevertheless, the property status concerning companion animals in the United States remains intact. However, legal decisions and legislative action have improved their status by providing human guardians of companion animals with a greater valuation of their companion animal with damages in excess of the fair market value for the companion animal in question.[32]

III. VALUATION OF COMPANION ANIMALS

Working under the assumption that a wrongful injury or death to a pet has occurred, the question of appropriate valuation (economic and non-economic value) arises.[33] In an attempt to place a pet owner in the position prior to wrongful harm or loss of her companion animal, damages are calculated based on the fair market value of the companion animal at the time of its death.[34] "Because of these property-based notions of animals, tort law applied personal property concepts to the valuation of animals."[35] Various courts agree that the following factors are appropriate to consider in adequately compensating the owner, in excess of the fair market value: the "age" of the animal; the general "health" of the animal; the specific "breed" of the animal; the special "training" of the animal; the "usefulness" of the animal; and the "special traits or characteristics of value" of the animal.[36]

Companion animals with champion blood lines or popular purebreds can cost hundreds, and even thousands of dollars. However, a majority of companion animals are mixed breeds that have little or no calculated value, but the owners would tend to disagree with the courts, which is evidenced by acts such as owners paying hundreds and thousands for veterinary bills.[37]

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[29] *Id.* at 69.
[30] *Id.*
[31] See Barbara J. Gislason, Veterinary Malpractice: Leading the Evolution of Animal Law, , TortSource, Vol. 7, No. 3 at 1, (Spring 2005).
[32] Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. ENVTL. L. J. 531 (1998); David Favre, How Much Is That Doggie in the Window: Valuation for a Lost Pet, TortSource, Vol. 7, No. 3 at 1&4, (Spring 2005). ("One objective measure of a pet's value to a person is the amount of money an owner is willing to spend for veterinary care. A cat with little or no market value may require surgery that can cost hundreds or thousands of dollars, and many owners are willing to pay such amounts.").
[33] David Favre, Overview of Damages for Injury to Animals- Pet Losses, Michigan State University - Detroit College of Law (2003).
[34] See generally Elaine T. Byszewski, Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship, 9 Animal L. 215 (2003).
[35] See generally Margit Livingston, The Calculus of Animal Valuation: Crafting a Viable Remedy, 82 NEB. L. REV. 783 (2003).
[36] *Id.* at 218.
[37] This opinion is the editor's beliefs based on assessing the purebred market in United States and conversations with top breeders in Florida. This opinion is the editor's view on veterinary costs and the owner's willingness to pay, which was reached by discussions with veterinarians in Florida and elsewhere.

Notwithstanding an owner's willingness to pay exorbitant amounts for treatment, only veterinary care that is reasonable and not in excess of the fair market value of the companion animal is used as a measure for the recovery of normal and foreseeable consequential damages arising from harm to the animal.[38] If the market value of the animal cannot be determined, courts have engaged in assessing the animal's value (pecuniary value) to the owner.[39] "In some cases, human guardians of companion animals have been able to plead and prove damages resulting from the sentimental loss experienced" upon their companion animal's wrongful death.[40]

Where the companion animal is a victim of reckless or intentional actions by a wrongdoer, some courts have also authorized recovery for punitive damages.[41] "In assessing the appropriateness of punitive damage awards, some courts seemingly use a test of proportionality, and examine whether the amount of punitive damages is proportional to the amount of actual damages awarded."[42] Punitive damages compensate a human guardian of a companion animal for injury to his/her companion animal, and punish the tortfeasor for his/her behavior.[43]
The following factors are taken into consideration by the courts when determining an award for punitive damages: degree of malice; amount needed to punish the defendant; wealth of the defendant; sentimental value of the companion animal; and degree of pain and suffering displayed by the human guardian of the companion animal.[44] Nevertheless, the courts assessment of compensatory damages has generally been low, and in turn results in a low recovery rate for courts deciding to apply punitive damages.[45]

The recovery of "mental pain and suffering" is considered within the broad policy and practical conflicts on the issue within each jurisdiction.[46] American jurisprudence has a history of being unwilling to award damages for "mental pain and suffering."[47] The strongest arguments for this reluctance lies in the court's assumption that the floodgates may open, fraud may occur or issues of proof, the questionability of who the defendant may be liable to, the fact that these damages are not tangible, and unpredictable liability for the defendant based on peculiar claims of value to the owner.[48]

"Some animal advocates believe that the concept of "loss of companionship" for the death of a companion animal has the potential to evolve into a separate cause of action for non-economic

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[38] *Id.* at 218.
[39] *Id.* at 218. (Citing to Brosseau v. Rosenthal, 443 N.Y.S. 2d 285 (N.Y. Civ. Ct. 1980); (Jankoski v. Prieser Animal Hosp., 510 N.E. 2d 1084 (Ill. App. 1987). (Case law authorizing elements of sentimental value of the companion animal to the owner).
[40] Margit Livingston, The Calculus of Animal Valuation: Crafting a Viable Remedy, 82 NEB. L. REV. 783 (2003). (Citing to Laporte v. Associated Independent's, Inc., 163 So. 2d 267, 269 (Fla. 1964) (authorizing damages for the affection of an owner for her companion animal); (Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E. 2d 1084, 1087 (Ill. App. Ct. 1987) (authorizing damages to include elements of sentimental value for the companion animal).
[41] *Id.* at 791.
[42] *Id.* at 791 (citing to Porras v. Craig, 675 S.W. 2d 503 (Tex. 1984) (where a companion animal has a negligible legal value, plaintiffs may not receive compensatory nor punitive damages).
[43] William C. Root, "Man's Best Friend: "Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury, 47 VILL. L. REV. 423 at 424 (2002).
[44] *Id.* at 424.
[45] *Id*. at 791.
[46] See generally David Favre, Overview of Damages for Injury to Animals- Pet Losses, Michigan State University - Detroit College of Law (2003).
[47] *Id*. at Favre (2003).
[48] *Id*. at Favre (2003).

damages."[49] However, courts have rejected these claims as an independent cause of action.[50] The basis for rejection stems from the concept of animals maintaining the property status or "state wrongful death statutes prevent recovery of emotional distress and loss of companionship for the loss of a child or spouse."[51] Courts that have taken the stance of not allowing the recovery for non-economic damages have based decisions on science, public policy, and legal reasoning from centuries that are not in tune with the modern times.[52]

Historically, the common law was reluctant to claims for emotional distress and loss of companionship, even in the case of humans.[53] Nevertheless, not all decisions within the U.S. legal framework entertain such an archaic view of awarding damages only where a physical impact is present or an insignificant recovery of fair market value. In particular, the Florida case law below will shed light on how harm to companion animals is measured and when recovery is authorized. Some of the decisions are in favor of increasing the value of companion animals, while other decisions have perpetuated their property status. Learning from such decisions, a legislative proposal for the state of Florida is presented to allow recovery for owners of companions animals under "loss of companionship."

IV. THE SOCIAL/PSYCHOLOGICAL SIGNIFICANCE OF COMPANION ANIMALS

The domestication of animals began almost 14,000 years ago.[54] Egyptians held burial ceremonies where their beloved pet was placed right next to his master.[55] When a dog died, the Egyptian owners of the companion animal practiced a ritual of shaving their entire bodies and heads.[56] Today in the United States, more than sixty percent of households include pets.[57] In caring for and pampering their pets, Americans spent over $28.5 billion in 2001.[58] Modern social science has discovered that after the loss of a pet, pet owners experience similar or greater stress

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[49] Elaine T. Byszewski, Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship, 9 ANIMAL L. 215 at 223 (2003).
[50] *Id.* at 223.
[51] *Id*.
[52] Steven M. Wise, Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of Companion Animals, 4 ANIMAL L. 33 at 62 (1998).
[53] *Id*. at 62.
[54] Margaret Sery Young, The Evolution of Domestic Pets and Companion Animals, 15 Veterinary Clinics No. Am. Small Animal Practice 297, 302-03 (1985); Sonia S. Waisman & Barbara R. Newell, Recovery of "Non-Economic" Damages for the Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend, Animal Law (2001). (Both articles address the time period for domestication, but there seems to be a discrepancy of 2000 years with respect to beginning of domestication of animals).
[55] Lynn A. Epstein, Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classficiation, SOUTHERN ILLINOIS UNIVERSITY L. J. 32 at 33 (Fall 2001).
[56] Sonia S. Waisman & Barbara R. Newell, Recovery of "Non-Economic" Damages for the Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend, Animal Law (2001).(Citing to State v. Wallace, 271 S.E. 2d 760, 761 (N.C. App. 1980) (referring to Herodotus in An Account of Egypt (5th Century) (dogs regarded as sacred)).
[57] American Pet Products Manufacturers Association, Inc. 2000-2001APPMA National Pet Owners Survey 2 (2001).
[58] Rebecca J. Huss, Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals, 86 MARQ. L. REV. 47 at 69 (2002). (Citing to Azell Murphy Cavann, Animal Magnetism- Doggone it! Americans Have a Soft Spot for Their Pets, Boston Herald, June 27, 2001, at 56.

levels as to when a family member dies.[59] Counseling for loss of animal companions became an important human service by the 1980's.[60] In response, a number of North American veterinary schools provided animal bereavement support hotlines.[61] Studies indicate that the reason why guardians of companion animals experience this extreme level of sadness is a result of the strong and unique bond developed with their companion animal.[62]

From childhood to geriatric stages in life, the ownership of a companion animal has served as a benefit to society. Children who owned a companion animal and were victims of child abuse, reported that the animal was sometimes their only friend, and in turn had better coping skills as adults through owning a companion animal.[63] Studies of pet ownership and mental health have indicated lower levels of depression in a nursing home following a pet therapy session.[64] Individuals with disabilities who at one point could not handle everyday tasks are now able to accomplish so much with their service dog.[65]

The list concerning how companion animals have benefited society can continue, and interestingly, the list on how owners reciprocate their love for their animals is well documented.[66] Like children, companion animals are being dropped off at doggie day care to spend their day socializing, playing, and getting the attention they would not derive from their owners who are busy at work.[67] In addition, some Americans send their companion animals to receive behavioral assistance in an effort to correct problems and create a more rewarding life for themselves and their pets.[68] Furthermore, the protection of animals is seen in criminal anti-

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[59] See generally Margit Livingston, The Calculus of Animal Valuation: Crafting a Viable Remedy, 82 NEB. L. REV. 783 (2003). (Citing to Boris M. Levinson, Grief at the Loss of a Pet, in Pet Loss and Human Bereavement, 51-64 (William J. et al. eds., 1984) (cites to several studies)).

[60] Sonia S. Waisman & Barbara R. Newell, Recovery of "Non-Economic" Damages for the Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend, Animal Law (2001). (Citing to Sandra B. Barker & Randolph T. Barker, The Human-Canine Bond: Closer Than Family Ties?, 10 J. Mental Health Counseling 46, 54 (Jan. 1988).

[61] Barker at 54.

[62] See Betty J. Carmack, The Effects on Family Members and Functioning After the Death of a Pet, In Pets and Family 149 (Marvin B. Sussman ed., 1985) (this article contains information on animal-human bonds).

[63] Sandra B. Barker, Therapeutic Aspects of the Human-Companion Animal Interaction, 16 Psychiatric Times, at http://www.psychiatric times.com/p990243.html (1999).

[64] Brickel, C. M. (1984). Depression in the Nursing Home: A Pilot Study Using Pet-Facilitated Psychotherapy, In R.K. Anderson, B.L. Hart, & L.A. Hart (Eds.), The Pet Connection (pp. 407-415): Minnesota: University of Minnesota, Center to Study Human-Animal Relationships and Environments.

[65] Service Animal Information from the Civil Rights Division of the U.S. Dept. of Justice and the National Association of Attorneys General, at http://www.usdoj.gov/crt/ada/animal.htm ("The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability").

[66] The editor is reaching a conclusion based on the numerous services provided for animals in United States, as discussed in the writing.

[67] Nationwide service called Happy Tails Dog Spa at: http://www.happytailsdogspa.com/daycare.php ("Each playgroup goes outdoors for a scheduled bathroom break in the morning before heading off to play[t]ime. After several hours of romping, sniffing and lounging, all dogs take a well-deserved nap between noon and 2:00 p.m. During this time, dogs receive requested snacks or medications. After naptime, the dogs are back outside for another bathroom break, with possible ball throwing or "swimming," depending on the weather").

[68] Animal Behavior Associates at: http://faculty.washington.edu/jcha/abainfo8.htm ("The field of domestic and companion animal behavior research has been a rapidly expanding one in recent years. Successful treatment of companion animal behavior problems today requires a strong background in the evolution and genetics of the species or breed, the practical application of modern learning theory, the latest research findings, and the application of these findings to clinical situations").

cruelty statutes that regard certain crimes against animals as a felony offense. Fla. Stat. § 828.12, (2006).

Another example of how owners love their pets beyond the living is the creation of a pet trust. [69] Recently, the Florida Bar Journal featured a co-authored article that discusses how a Florida statute provides for the creation of an enforceable trust with for a pet to be acknowledged as a primary beneficiary.[70] These are just some of the ways in which owners of companion animals value their animals. The idea of companion animals being calculated at the fair market value in the legal system does not add up to the value American society places on these creatures.

V. FLORIDA DECISIONS ON DAMAGES FOR HARM TO COMPANION ANIMALS

Florida is given special acknowledgement for its relatively long history of recognizing that companion animals are more valuable to an owner than the mechanical fair market value. Cases such as Wertman v. Tipping, set the wheels in motion for companion animals when the court affirmed a verdict of $1000, for a purebred dog.[71] The court declined in only applying the fair market value and held that recovery could include special or pecuniary value to the owner.[72] Two year later, The Florida Supreme Court decided Laporte v. Associated Indpendents, Inc., and concluded: "(T)he affection of a master for his dog is a very real thing and…the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal."[73] The facts in Laporte, involved a defendant garbage man who laughed after he crushed plaintiffs' dog to death after throwing a garbage can on the tethered dog.[74] The Court held that plaintiff's were entitled to recover mental suffering as an element of damages since the act was malicious.[75]

In Levine v. Knowles, the court found that plaintiff was entitled to proceed with a claim for punitive damages when the veterinarian intentionally cremated the plaintiff's pet to destroy evidence of veterinary malpractice.[76] In a landmark verdict, the court in Knowles Animal Hospital v. Wills, upheld a jury award of $13,000, when an animal hospital left plaintiff's dog on a heating pad to burn for two days![77] The court found gross negligence and authorized an award for plaintiff's pain in suffering.[78] Finally in Johnson v. Wander, the Florida Supreme Court

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[69] Darin I. Zenov & Barbara Ruiz-Gonzalez, Trusts for Pets, The FL Bar J. at 22 (Dec. 2005). (F.S. § 737.116, (2004).

[70] *Id*. (a trust may be established for the pet's lifetime to care and maintain its existence. The trust does not violate the Rule Against Perpetuities (RAP), and in the case of several animals, it ceases to exist upon the death of the last animal involved in the trust. The settlor can appoint a trust protector who has the power to enforce the trust and ensure proper care and maintenance of the animal).

[71] Wertman v. Tipping, 166 So. 2d 666 (Fla. Dist. Ct. App. 1964).

[72] *Id*. at 666.

[73] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 9, Riff v. Welleby'sVeterinary Medical Center, et al, (17th Cir. 2006) (No. 02-012991-08). (Citing to La Porte v. Associated Independents, Inc., 163 So. 2d 267, 269 (Fla. S. Ct. 1964)).

[74] *Id*. at 267.

[75] *Id*. at 267. (Compensatory damages at $2000 and punitive damages at $1000).

[76] Levine v. Knowles, 197 So. 2d 329 (3rd DCA 1967). (Court concluded: "owner has the same right of action to recover compensatory damages for the intrinsic value, if any, of a dead dog wrongfully destroyed").

[77] Knowles v. Animal Hosp. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978). (Plaintiff's dog endured severe burns and disfigurement.

[78] *Id*. at 37.

reversed the trial court's decision to not allow claims for punitive damages and emotional distress after veterinarian had left plaintiff's dog endured severe burns after dog was left on a heating pad.[79] Apparently, burning companion animals is not uncommon for veterinarians in Florida.[80] The decision in Kennedy v. Byas, appears to be one of the strongest limitations for owner's of companion animals.[81] In that decision the court concluded:

> One area that was identified as having the gravity of emotional injury and lack of countervailing policy concerns to justify exceptions to the impact rule involves familial relationships, such as injury to a child as a result of malpractice. See Welker. We decline to extend this exception to malpractice cases involving animals. As we stated in Bennet v. Bennet, 655 So. 2d 109, 110 (Fla. 1st DCA 1995), "While a dog may be considered by many to be a member of the family, under Florida law animals are considered to be personal property." In making this point we have not overlooked the decision of the Florida Supreme Court in La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964).[82]

The court further concluded:

> We acknowledge there is a split of authority on whether damages for emotional distress may be collected for the negligent provision of veterinary services. See Jay M. Zitter, Annotation, Recovery of Damages for Emotional Distress Due to Treatment of Pets, 91 A.L.R. 5th 545, §§ 3 and 4. We find ourselves in agreement, however, with the New York courts which recognize that while pet owners may consider pets as part of the family, allowing recovery for these types of cases would place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for individuals. Johnson v. Douglas, 187 Misc. 2d 509, 723 N.Y.S. 2d 627 (N.Y. Supp. Ct.), aff'd, 289 A.D. 2d 202, 734 N.Y.S. 2d 847 (N.Y. App. Div. 2001). We decline to carve out an exception to the impact rule for cases involving veterinary malpractice.[83]

The Kennedy court's decision to side with the New York courts indicates a shift in the wrong direction for owners of companion animals. As such, effective tools like legislation for companion animals will statutorily erode the split of authorities discussed above, and protect a Floridian's right to recover damages when their companion animal is wrongfully harmed or killed.

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[79] Johnson v. Wander, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978).
[80] In light of the two cases with similar fact patterns and the departure from the standard of care exercised by a reasonable veterinarian, the editor has reached an opinion on veterinarians in this jurisdiction.
[81] Kennedy v. Byas, 867 So. 2d 1195 (Fla. Dist. Ct. App. 2004).
[82] Id at 1195. (Bennet v. Bennet, is a custody dispute case concerning a dog. The court reversed the trial's court ruling for the former wife that allowed her to have visitation rights to the dog).
[83] Id at 1195.

VI. LEGISLATIVE PROPOSAL IN FLORIDA FOR LOSS OF COMPANIONSHIP REGARDING COMPANION ANIMALS
Florida's Chloe Act of 2006

Florida is governed by the rules announced in the cases above. However, this does not mean that courts in general are comfortable with a callous description of a companion animal as personal property.[84] An illustration of this belief is a case decided by the Wisconsin Supreme Court where they concluded:

> "Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion animal is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately describes the relationship between a human and a dog.[85]

In this writing, I propose a companion animal bill modeled after progressive legislation in Tennessee and Colorado.[86] The bill is named after my beloved dog, Chloe. See Text of Legislative Proposal labeled "B." As a work in progress, the bill can be accomplished through strong lobbying, sponsorship from a Florida Legislator, and solidarity efforts by South Florida animal advocates. The time has come for Florida law to acknowledge society's changing view of companion animals, and adequately compensate owners of companion animals for "loss of companionship," in cases of wrongful injury or death. Companion animals have impacted the lives of their owners in such a way that their value is unique and should be reflected at law.[87]

VII. CONCLUSION

Society's growing attachment and appreciation for companion animals is ever-present. It is time for the legal system to acknowledge the significance of such relationships that are valued beyond the worth of the animal's fair market value. Florida's case law demonstrates that there is some level of awareness concerning a companion animal's intrinsic value. However, legislation must be presented to ensure that tort victims are given their day in court and adequately compensated. Tennessee's T-Bo Act, has already paved the way for companion animal owners to recover statutorily.[88] Florida should follow suit by enacting their own legislation for companion animal owners to recover intrinsic damages such as loss of companionship. The decision to enact

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[84] Elaine T. Byszewski, Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship, 9 ANIMAL L. 215 (2003). (Rabideau v. City of Racine, 627 N.W. 2d 795, 798 (Wis. 2001).

[85] Elaine T. Byszewski, Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship, 9 ANIMAL L. 215 at 224 (2003). (Citing to Rabideau v. City of Racine, 627 N.W. 2d 795, 798 (Wis. 2001).

[86] Colorado proposed an exceptional bill that authorized non-economic damages capped at one hundred thousand dollars. The bill acknowledged a modern view of animals in the following language: "[c]ompanion dogs and cats are often treated as members of a family, and an injury to or the death of a companion dog or cat is psychologically significant and often devastating to the owner." The bill even provided liability without an exemption for veterinarians who practiced in a negligent manner resulting in the killing of a companion animal.

[87] The editor bases this opinion from conversation's with loving and responsible pet owners. In addition, this opinion is personally influenced by the editor's love and admiration of her Brussells Griffon, Petit Brabancon, named Chloe.

[88] Tenn. Code Ann. § 44-17-403 (2000); 2000 Tenn. Pub. Acts, Ch. 762, § 1.

this legislation would not be a departure from other laws that regard animals highly in this state. Careful consideration to issues such as over-flowing the docket system, and fraud can be monitored and assessed prior to making this proposal a reality. However, this should not bar recovery for owners of companion animals to receive adequate compensation as a result of their loss. The decision to enact such legislation in Florida would uphold the goal of damages in tort law, which seeks to make their victims whole again.

APPENDIX PART "B"

LIABILITY FOR DEATH OF COMPANION ANIMAL

SUMMARY:

The Florida statute provides that a pet owner may seek non-economic damages up to $25,000 for the death of his or her companion against the person who is liable for causing the death or injuries that led to the animal's death. The person causing the pet's death must have done so intentionally or, if done in a grossly negligent manner, the tort must have occurred either on the owner or pet caretaker's property or while in the control and supervision of the caretaker. These damages are not for the intentional infliction of emotional distress of the owner or other civil claims, but rather for the direct loss of companionship, love and affection of the pet." The Florida statute applies to any person who tortures, needlessly torments, seriously injures or kills a companion animal dog or cat in a grossly negligent manner and to any veterinarian or veterinary assistant whose gross negligence "causes injury or death to a companion animal."[89] Florida's judicial history acknowledges the individual and social value companion animals have on an owner and their family members since these animals become part of the family. Finally, the bill provides for burial expenses, attorneys fees and court costs. The overall intent of the statute is to deter tortfeasors from harming or killing companion animals. Equally important, the statute seeks to adequately compensate owners of companion animals and family members in the household where the companion animal resides or resided.

DEFINITIONS:

(1) C*ompanion animal* shall mean a cat or dog. The drafter acknowledges that other animals are kept as pets, but declines to include any other animals aside from cats and dogs for the purpose of passing the statute with ease.
(2) *Caretaker* shall mean a person owning, having possession, keeping, or having custody of, a companion animal.
(3) *Person* shall mean any individual, corporation, partnership, association, or legal entity. Exception: acts involving rescue efforts to free a companion animal from experimentation by individuals or legal entities, whereupon destruction of the companion animal is necessary to end its suffering as a result of prior experimentation are not applicable to this statute. Individuals or legal entities that harm such animals may be liable under separate laws established under state or federal law.

[89] The majority of this bill is modeled after Colorado's legislative proposal for companion animals in 2003. Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. (Jan. 31, 2003).

(4) *Veterinarian* shall mean a person who is licensed to engage in the practice of veterinary medicine under F.S. ch. 474 and is accredited by the United States Department of Agriculture.

(5) *Intentional or Grossly Negligent Acts:* The following acts shall be deemed as intentional or grossly negligent acts towards animals (Cruelty Statutes- see Florida Statutes, 828.12, 828.13 and 828.16):

(a) Any person who unnecessarily overdrives, tortures, torments, deprives of necessary sustenance or shelter, or mutilates or kills any companion animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any companion animal in a cruel or inhuman manner shall be liable in civil damages in accordance with this Act.

(b) Any person who intentionally commits an act to any companion animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done shall be liable in civil damages in accordance with this Act.

(c) Any person, who acts intentionally or in a grossly negligent manner by impounding or confining a companion animal in any place and fails to supply the same during such confinement with a sufficient quantity of good and wholesome food and water, shall be liable in civil damages in accordance with this statute.

Statute in Full:

(a)(1) If a person's companion animal is killed or sustains injuries which result in death caused by the unlawful and intentional, or grossly negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to twenty-five thousand dollars ($25,000) in non-economic damages; provided, that if such death is caused by the grossly negligent act of another, the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker. Florida's bill applies to any person who tortures, needlessly torments, seriously injures or kills a companion animal dog or cat in a grossly negligent manner and to any veterinarian or veterinary assistant whose negligence "causes injury or death to a companion dog or cat."[90] Florida's judicial history acknowledges the individual and social value companion animals have on an owner. In addition to such recovery, the bill provides for burial expenses, attorneys fees and court costs.

(2) If an unlawful act resulted in the death or permanent disability of a person's guide dog, then the value of the guide dog shall include, but shall not necessarily be limited to, both the cost of the guide dog as well as the cost of any specialized training the guide dog received.

(b) Limits for noneconomic damages set out in subsection (a) shall not apply to causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet.

[90] The majority of this bill is modeled after Colorado's legislative proposal for companion animals in 2003. Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. (Jan. 31, 2003).

(c) Noneconomic damages awarded pursuant to this section shall be limited to compensation for the loss of the reasonably expected society, companionship, love and affection of the pet.

(d) This section shall not apply to any not-for-profit entity or governmental agency, or its employees, negligently causing the death of a pet while acting on the behalf of public health or animal welfare; to any killing of a dog that has been or was killing or worrying livestock as in § 44-17-203; nor shall this section be construed to authorize any award of noneconomic damages in an action for professional negligence against a licensed veterinarian, unless the professional's acts rise to the level of gross negligence.

(e) Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article _____, section ___ (___) of the state constitution; except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

"LIVE ANIMALS": TOWARDS PROTECTION FOR PETS AND LIVESTOCK IN CONTRACTS FOR CARRIAGE

ERIN SHELEY*

> In October of 1997, the Calk family flew on American Airlines from Newark, NJ, to Los Angeles, CA. Upon arrival, Mr. Calk went to pick up Jed, the family's golden retriever, but was told that Jed was "not ready yet." When Mr. Calk went back 20 minutes later to retrieve him, Jed was not breathing and was covered in urine, feces and vomit. Jed died on the way to the emergency vet. An autopsy revealed that he had died of suffocation due to lack of oxygen.[1]

The plight of pets on air carriers became a national news item in the late nineties, when a series of tragedies like Jed's made headlines across the country. For a loving pet owner, air travel is perhaps the paradigmatic situation of helplessness—aside from the veterinarian (who is, at least, a trained medical professional with an intimate knowledge of animals)—few individuals can wield as complete, and potentially devastating, control over a pet as a baggage handler. And in no other situation is the discrepancy in human valuation of animals quite so dramatic: to the Calks, for example, Jed was a family member; to American Airlines he was—as a matter of official policy—a piece of luggage, and valued as such. Yet as heartbreaking as the deaths of pets are, they are merely the tip of the iceberg of animal suffering throughout the arteries of transportation in America.

The food industry processes roughly 8 billion living creatures per year behind the cement walls of factory farms across the country. A great many of these animals are moved *en masse* from farm to slaughter in un-air-conditioned trucks, without food or water for up to a day and a half. The most powerful protection ever provided by federal law for food animals was the 1877 "28-Hour Law," which regulated the conditions under which livestock were transported. Perhaps because, before the age of factory farms, the train seemed like the worst part of a food animal's existence, or perhaps simply because of the early understanding of the scope of the Commerce Power, transportation was the particular locus of humane federal policymaking. Though we have, unfortunately, moved far from this goal now, the issue of transportation is still a unique one in animal law. In the case of pets as well as of food animals, transportation creates a sphere in which relations with a third party (the carrier) affect the owner-animal relationship. Because carriage involves a contract between owner and carrier, the rigid principles of contract law usually govern claims for damages, instead of the more expansive standards of valuation available in animal tort claims over harm to pets. And, though pets fare better in practice than food animals due to the concerns of their owners for their wellbeing, the statutory protections for animals in transit are somewhat weak in both cases.

In this Article, I will begin by reviewing the current treatment of animals in transportation, with an emphasis on the polar extreme cases of pets and food animals, and will describe the relevant common law and statutory regulation of the field. I will then suggest ways in which, through common law contract adjudication, the current legal system can better protect

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[1] *Legislators Lobby For Safer Air Travel For Pets*, WORLD AIRLINE NEWS, March 3, 2003.

animals in transportation, even in the absence of further statutory protections. I will argue that courts should make use of two well-established doctrines of contractual interpretation to arrive at more humane results for animals. First, with respect to all animals protected by the Animal Welfare Act (most mammals except for food animals), courts should render contracts for carriage under cruel conditions unenforceable as against public policy. In this manner, run-of-the-mill contractual disputes between self-interested parties could result in greater enforcement of the regulations promulgated under the AWA. Second, with respect to pets in air travel, the doctrine of unconscionability should fill the gap left by the Safe Air Travel for Animals Act to render unenforceable contractual terms limiting carriers' liability to nominal sums when animals suffer for their negligence.

I. REALITIES FOR ANIMALS IN TRANSPORTATION: A COMPARISON OF PETS AND FOOD ANIMALS

A. PETS AND THE "FRIENDLY SKIES"

Tragedies like Jed's make good news pieces and thus attract a great deal of attention. They are far from the paradigmatic examples of animals in transportation, however: the billions of farm animals who suffer and perish each year and who receive no legal protection while being transported (and little at any other stage of their lives) eclipse, on the numbers anyways, the handful of pets that die on airplanes each year. Most disturbing about the airline context, however, is the negligible value it ascribes not only to living creatures, but to the feelings their family members have for them. In 1999, for example, TWA flight attendants rebuffed Gordon Anzalone's frequent and panicked attempts to check on his eight-year-old boxer Enzo, who was trapped in the cargo hold during a delay in boiling heat in St. Louis, Missouri. When he saw Enzo again he was dead of heat stroke, wheeled out on a cart by an airline employee. "There was no blanket over him, and fluids were oozing out of every cavity," Anzalone told Court TV, "My wife just collapsed."[2] Anzalone sued TWA for $100,000, but the airline went bankrupt before his case went to trial.

Due to the new reporting requirement of the Safe Air Travel for Animals Act (discussed in detail in Part IIIc of this Article), we now have data on the numbers of pets killed or injured on airlines for the last ten months. Previously, statistics provided by the Air Transport Association (ATA) suggested that 500,000 pets are transported per year, out of which about 5,000—1%—are killed, injured or lost.[3] With the new data published by the Federal Aviation Administration (FAA) we know that in the last ten months 25 pets have died, 18 been injured, and five been lost on major U.S. carriers.[4] The discrepancy between these numbers and the 5,000-per-year figure originally computed by the ATA raises the question of under-reporting. Appendix A to this article breaks down these incidents by month, and by carrier.

The worst record by far (assuming all airlines are honestly reporting) is that of Continental Airlines. While the average number of animal deaths (out of airlines reporting *any* incidents at all—and thus excluding those who didn't report deaths) was 1.7 and the average number of animal injuries was 1.3 for the ten-month period, Continental's numbers were seven

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[2] Kate Stamell, *New Law Requires Airlines to Disclose Information on Pet Deaths*, June 17, 2005, *at* http://www.courttv.com/people/2005/0616/pets_ctv.html.

[3] Betsy Wade, *Animals by Air: It's Beastly*, N.Y. TIMES, April 23, 2000.

[4] AVIATION CONSUMER PROTECTION DIVISION, U.S. DEPARTMENT OF TRANSPORTATION, AIR TRAVEL CONSUMER REPORTS (2005-2006) *available at* http://airconsumer.ost.dot.gov/reports/index.htm.

and six respectively.[5] The runner up for deaths was American Airlines, with five, though American did not report any injuries.[6] In all seven of the deaths on Continental planes, the reports submitted to the FAA by Continental concluded that "no corrective action [was] necessary" on the part of the airlines to the owners because "Continental policy was followed." Most of the incidents were attributed to pre-existing conditions worsened by the "stress" of travel, leaving open the question of whether "Continental policy" could be modified to lessen such stress. In one particularly unusual case, a black chow dog managed to let herself out of her kennel inside of the baggage hold during the flight. When the hold was opened, she jumped down to the runway and roamed the Houston tarmac for an hour before employees caught her. She died of heat exhaustion the next morning. In this instance the only corrective action Continental deemed necessary was to "continue and reinforce" its policy of requiring cable ties on kennel doors.[7] In sum, though pet deaths in transportation may get a disproportionate amount of attention relative to those of farm animals, it can fairly be said that the airline industry's attitude towards its non-human passengers is perhaps unwarrantedly sanguine.

B. ROAD TO PERDITION: THE TRANSPORTATION OF FOOD ANIMALS

Michael Fox describes "factory farming" as "the subjugation of life to the industrial system; the subordination of individual rights and autonomy to goals of efficiency and productivity; the maintenance and propagation of life under wholly unnatural conditions; the dependence of life on drugs, vaccines, and technology."[8] This language is dramatic, but hardly an exaggeration—in the typical factory farm, animals do not have enough space even to turn around; certain animals, like pigs and chickens, "are housed in massive confinement buildings that resemble factory warehouses, and most of these animals never see the outdoors until they are sent to slaughter."[9] And this relegation of living animals to the status of inanimate objects extends to transportation as well. Food animals who, with the increasing centralization of slaughter facilities, endure longer and longer transports, are denied food, water, and protection from extreme temperatures while in transit.[10] The animal activist group Compassion Over Killing (COK) once documented the 35-hour long transportation of 283 pigs by truck, from Kansas City, Missouri to Modesto, California. According to COK, the driver said he would not let the animals out for the entirety of the trip.[11] Investigators also allegedly observed dead animals left for more than 30 hours on the truck with the live animals, 95-degree temperatures, ammonia accumulation resulting in coughing and foaming at the mouth, and "numerous injuries including scratches, bruises, abrasions, and bleeding lacerations on their bodies, legs and ears."

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[5] *Id.*
[6] *Id.*
[7] Continental Airlines, *Animal Incident Report to the U.S. Department of Transportation, June 1-30, 2005*, July 15, 2005, *available at* http://airconsumer.ost.dot.gov/reports/2005/august/Continental.doc.
[8] MATTHEW FOX, INHUMANE SOCIETY 43 (1990).
[9] GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 10 (2000).
[10] C. Weeks & C. Nicol, *Poultry Handling and Transport, in* LIVESTOCK HANDLING AND TRANSPORT 363-84 (Temple Grandin ed., 2000); MICHIGAN STATE UNIVERSITY COLLEGE OF LAW ANIMAL LEGAL & HISTORICAL CENTER, TWENTY-EIGHT HOUR LAW OF 1877, (2005) *at* www.animallaw.info/statutes/stusfd49usc80502.htm.
[11] THE HUMANE SOCIETY OF THE UNITED STATES, *Loophole on Wheels: Trucks and the 28-Hour Law, at* http://www.hsus.org/farm_animals/farm_animals_news/trucks_and_the_28-hour_law.html.

Unfortunately, ad hoc investigations like those done by COK represent the bulk of the studies of the effects of transportation on farm animals.[12] The science that does exist, unsurprisingly, shows the detrimental effects of crowded transportation conditions. Jersey bull calves were found to have higher heart rates when free to move around than when kept in wood crates.[13] Carcass bruising on livestock was found to increase with increased packing density.[14] Furthermore, studies in the United Kingdom have shown that 3% of broiler chickens have broken bones before they are stunned, and around 1% arrive dead at the processing factory, from injuries presumably acquired either while being packed into transport crates or transported.[15] Of the birds that arrive dead at the factory, 35% were determined to have died of injuries sustained directly during catching or transportation, and 40% to have died of "stress or suffocation." This is unsurprising given the nature of their transport conditions: the chickens are packed into crates in loads of 3000 birds per truck.[16] The injuries most commonly reported include dislocated and broken hips, wings, and legs, in addition to internal hemorrhaging.[17] It should be noted that transporting chickens has actually become less common in the United States, where broiler operations are "vertically integrated": rearing sheds, feed mills, and processing plants are increasingly contained in a single facility.[18]

In the American dairy industry, meanwhile, newborn calves are sometimes transported before they are old enough to walk, resulting in high numbers of deaths.[19] Pigs and poultry, who have been selectively bred for extremely large muscles, often perish during transportation through sheer genetic weakness.[20] Even horses suffer through negligent transportation—double-deck cattle trucks, which generally provide enough room for cattle, are dangerous to tall horses whose heads can hit the ceiling when the vehicle stops abruptly or passes over a bump in the road.[21] Transportation conditions are perhaps worst when animals undergo international journeys. Australia exports seven million sheep a year to the Persian Gulf—in one five-year period it was calculated that more than a million died in transit. The Saudi Agricultural Ministry reported that one shipload of 68,000 sheep was rejected at Damman and, when it docked later in Kuwait, there were only 21,000 left alive on board. Allegations of cruel handling on these journeys include stories of sick sheep being thrown overboard alive to feed the sharks. Andrew Johnson describes this trade, from Australia and New Zealand, as the most brutal in the world:

> On the journey to the Middle East, they are packed three to the square meter for an eighteen-day voyage, and after unloading they are kept in holding yards before going to

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[12] UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL WELFARE ISSUES COMPENDIUM (1997).
[13] D.B. Stephens & J. N. Toner, *Husbandry Influences on Some Physiological Parameters of Emotional Responses in Calves*, 1 APPL. ANIM. ETHOL. 233-243 (1975).
[14] G.A. Eldridge et al., *Responses of Cattle to Different Space Allowances, Pen Sizes and Road Conditions to Transport*, 28 AUST. J. EXPT. AGRIC. 155-159 (1988).
[15] N.G. Gregory & L.J. Wilkins, *Broken Bones in Chickens: Effect of Stunning and Processing in Broilers*, 31 BRITISH POULTRY SCIENCE 53-58 (1990).
[16] ANDREW JOHNSON, FACTORY FARMING 135 (1991).
[17] I.J.H. Duncan, *The Assessment of Welfare During the Handling and Transport of Broilers, in* PROCEEDINGS OF THE THIRD EUROPEAN SYMPOSIUM ON POULTRY WELFARE 79-91 (J.M. Faure & A.D. Mills eds., 1989); N.G. Gregory & L.J. Wilkins, *Skeletal Damage and Bone Defects During Catching and Processing, in* BONE BIOLOGY AND SKELETAL DISORDERS IN POULTRY (C.C. Whitehead ed., 1992).
[18] *Id*.
[19] ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE 335 (Marc Bekoff ed., 1998).
[20] *Id*.
[21] *Id*.

> the slaughterhouse. Substantial mortality occurs at every stage of the journey: in 1983 15,000 sheep died of exposure in an Australian feedlot, and in 1981 over 12,000 died on board the *Persia* due to mechanical breakdowns. And when the *Farid Fares* caught fire and sank off South Australia in 1980, more than 40,000 sheep were either drowned or burnt alive.[22]

Johnson notes that in 1973, after more than 4,000 out of 30,000 sheep perished on their way to Iran, New Zealand banned live exports.[23] The ban was reversed in 1985, after successful lobbying by farmers. Meanwhile, a select committee of the Australian Senate proposed that the trade in live sheep be replaced by refrigerated carcasses, "particularly in view of the fact that when it gets to the Arab states most of the meat is frozen immediately after slaughter."[24]

II. ANIMALS AS "GOODS" UNDER THE COMMON LAW OF CONTRACT FOR CARRIAGE

As stated, animal transportation is governed for the most part by the common law of contract for carriage. The field of contract law is generally characterized by a particularly stingy treatment of the value of animal life. Animals may be classed as "goods" under the Uniform Commercial Code and similar state statutes, and court disputes over treating animals as "goods" or "products" are often relevant to whether product liability analysis applies to "defective" animals. [25] For example, in *Sease v. Taylor's Pets*, a skunk bought from a pet store was considered a product under Oregon commercial law.[26] By contrast, in *Anderson v. Farmers Hybrid Co.,* an Illinois appellate court held that diseased pigs were *not* "products" in the commercial sense because animals are not "of a fixed nature at the time [they] leave the seller's control."[27] Of course, a more capacious understanding of animal nature is in no way a richer valuation of the animal life in and of itself. It is merely a means of shifting the costs of harm to the animal from the seller to the buyer, due to the animals' participation "in a constant interaction with the environment around them," and the likelihood of this interaction damaging them and thus harming the buyer's property interest.[28] Contract law for the carriage of animals—generally non-companion animals—has been a point of interest in the international law context as well. The Hague Rules governing international shipping—which the United States enacted as the Carriage of Goods by Sea Act (COGSA) in 1936—exempted carriers from liability for harm to live animals, presumably on a logic similar to that of the court in *Anderson*.[29] The Hague Rules, however, have since been supplanted internationally by the Hamburg Rules, which the United States has not ratified.[30] Under the Hamburg Rules carriers can be held liable for harm to animal "goods" attributable to their negligence, though not if the harm is attributable to "special

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[22] Fox, *supra* note 2, at 136.
[23] *Id*.
[24] *Id*. at 219.
[25] 689 SONIA WEISMAN ET AL., ANIMAL LAW § 4(4)(B) (2d ed., 2002) (citing Embryo Progeny Assocs. v. Lovana Farms, Inc., 416 S.E.2d 833 (Ga. Ct. App. 1992) (cattle and other animals considered "goods" under UCC); Key v. Bagen, 221 S.E. 2d 234 (Ga. Ct. App. 1975) (sale of a horse); Young & Cooper, Inc. v. Vestring, 521 P. 2d 281 (Kan. 1994) (sale of cattle)).
[26] 700 P.2d 1054 (Or. Ct. App. 1985).
[27] 408 N.E. 2d 1194, 199 (Ill. App. Ct. 1980).
[28] *Id.*
[29] 46 U.S.C. § 1301 (c).
[30] United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, 17 I.L.M. 603 (hereinafter Hamburg Rules).

risks" inherent in shipping animals, and if the carrier has complied with any special instructions provided by the shipper.[31] Critics have argued that the United States' failure to ratify the Hamburg Rules, and decision to retain COGSA unchanged since 1936, have made our laws on international shipping—including their application to animals—incompatible with those of our major trading partners.[32]

The valuation of animals has been a hotly contested topic in all areas of the law, but has gained a bit more traction in tort law. Courts have occasionally recognized claims of intentional infliction of emotional distress by owners who have lost their pets to acts of malicious cruelty by others, though they have been more reluctant to allow claims for negligent infliction of emotional distress.[33] The predominant rule, which allows owners to recover only market value for harm to their animals, has been widely criticized.[34] In perhaps the most detailed exposition of the subject, Steve Wise has attacked the market valuation of companion animals in tort claims, concluding:

> By definition and common experience, companion animals have no economic value to their owners. This has been known to the common law for hundreds of years. Instead, the value of companion animals…lies in their bi-directional relationship…[a pet's] human companion suffers an injury that is of the same kind, if not necessarily of the same degree, that she would suffer from the wrongful killing of any other family member.[35]

Also arguing for a more capacious valuation, Geordie Duckler has noted that animals are "inherently unique and irreplaceable" and "relatively unusual" compared to most items in the stream of commerce, and have "a relatively serious impact on human communities."[36] Duckler makes out a moral claim for the special treatment of companion animals in particular: "our companion animals are…a conceptually and biologically distinct category of pet. We own companion animals for different intellectual reasons than we own other animals, even though the

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[31] *Id*. art. 1, § 5; art. 5, §5.
[32] *See, e.g.*, Michael Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L 609 (1996).
[33] *Compare* Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001) *and* La Porte v. Associated Independents, Inc., 163 So. 2d 267 (Fla. 1964) *with* Rabideau v. City of Racine, 243 Wis. 2d 486, 627 N.W.2d 795 (Wis. 2001).
[34] Most of the scholarship has focused on standards of valuation for companion animals in particular. *See, e.g.*, Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L REV. 1059 (1995); Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783 (2004); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L. J. 31 (2001); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481 (2003); William C. Root, *Note: "Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423 (2002); Lisa Kirk, *Note and Comment: Recognizing Man's Best Friend: An Evaluation of Damages Awarded When A Companion Pet is Wrongfully Killed*, 25 WHITTIER L. REV. 115 (2003); *Comment: Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and their Owners*, 2002 WIS. L. REV. 735 (2002). *But see* Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: the Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227 (2006) (arguing that the current regime of market valuation results in "low and predictable costs of veterinary services" and that allowing non-economic damages in "pet litigation" would be "unsound public policy").
[35] Steven Wise, 4 ANIMAL LAW 33, 93 (1998).
[36] Geordie Duckler, 8 ANIMAL LAW 199, 203-04 (2002).

general theme of "ownership" nevertheless applies.[37] Duckler notes that, just as human life has been "converted into dollars" for the purposes of tort liability, similar considerations of companionship could govern compensation for the loss of pets.

A version of Duckler's argument is implicit in the well-publicized outrage over courts' failure to find a distinction between animal passengers on airplanes and other baggage that is checked to the cargo hold. Yet it is important to note that these transportation cases offer two potential grounds for liability: not only tort but contract as well. In *Deiro v. American Airlines*, seven greyhounds perished and two were injured after the airlines allegedly left them on a baggage cart with only one side open in 100-degree heat at Dallas-Fort Worth, without ventilation, shelter or water. The court applied federal common law governing carriers and upheld the airline's limit of liability to the $750 for lost luggage stipulated by the contract of carriage (the airline ticket).[38] The court barely engaged potential grounds for distinction between the animals and other baggage, focusing on the fact that "[t]he notice is clearly marked and although it does not set out the rate schedule, it lets the shipper know that there is a need to pay more for shipment when the value of the *baggage* exceeds $750."[39] To the plaintiffs' assertion that a reasonable person would not believe it applied to dogs, the court pointed to additional language in the contract of carriage stating that "Certain live animals (such as cats, dogs and household birds) will be accepted as baggage when confined in a container, subject to American's rules and charges."[40] In other words, the court upheld the validity of an airline turning a living creature into a piece of baggage through the text of a contract, so long as that limitation is "reasonably communicated" to the passenger.[41]

The holding of *Deiro* has been applied to animals in carriage just once since it was decided. In *Gluckman v. American Airlines* the airlines left the plaintiff's two-and-a-half-year-old golden retriever in a non-ventilated baggage compartment in the Phoenix Sky Harbor Airport for over an hour.[42] Temperatures in the compartment reached 140 degrees, and when the plaintiff next saw his dog he "was lying on his side panting; his face and paws were bloody; there was blood all over the crate; and the condition of the cage evidenced panicked effort to escape."[43] The veterinarian determined that Floyd had suffered heat stroke and brain damage, and the plaintiff was forced to put him to sleep. On the way to dismissing the plaintiff's tort claims for emotional distress and loss of companionship, the court also cited *Deiro* for the proposition that the airline's contractual liability was validly limited by the terms of the airline ticket.[44] These cases suggest that courts will follow the federal common law applicable to the shipment of goods, and disallow tort claims for the negligent death of pets, so long as the carriers have been clear in contractually limiting their liability.

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[37] *Id*. at 208.
[38] Civil No. 84-848-JU (D. Or. Aug. 21, 1985), *aff'd*, 816 F.2d 1360 (9th Cir. 1987).
[39] *Id*. (emphasis added).
[40] *Id*.
[41] It is striking that *Deiro* has come to be cited, not as an animal law case, but for the broader federal common law test as to whether a carrier has clearly limited liability for negligent transport of goods. The two-pronged test—the physical characteristics of the contract and the circumstances surrounding its purchase—has been applied primarily to physical objects such as jewelry, helicopter blades, and cameras. *See, e.g.*, Hill Constr. Corp. v. American Airlines, 996 F.2d 1315, 1317 (1st Cir. 1993); Casas v. Am. Airlines, Inc., 304 F.3d 517, 521 (5th Cir. 2002); Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 928 (5th Cir. 1997).
[42] 844 F. Supp. 151 (S.D.N.Y 1994).
[43] *Id*. at 154.
[44] *Id*. at 161.

III. LEGISLATIVE INROADS

This treatment of animals in transportation at common law forms the backdrop for a modest scheme of statutory protections. The most robust regulations of animal transportation derive from the Animal Welfare Act, but do not apply to food animals. Indeed the only statute on the books concerning the transportation of food animals, the 28-Hour Law, has been rendered virtually nugatory by the failure of the USDA to apply it to trucks, in addition to trains. Finally, the Safe Air Travel for Animals Act attempts to provide extra protections for the privileged class of pets, but it too is weak in fundamental ways.

A. RIGHTS FOR "DUMB ANIMALS"? FOOD ANIMALS AND THE 28-HOUR LAW

It is curious to note that livestock originally received greater statutory protection while being transported than in their daily lives at slaughterhouses. The 28-Hour Law attempts to mandate humane conditions for animals being transported by common carriers—excluding air or water transport.[45] Passed in 1872 and signed into law by Ulysses S. Grant, the law prevents carriers from confining animals for more than 28 consecutive hours without unloading them for feeding, water, and rest, although it allows sheep, specifically, to be confined for an additional eight hours if the confinement ends at nighttime.[46] When unloaded, the law specifies that animals be placed into "pens equipped for feeding, water, and rest" for at least 5 consecutive hours.[47]

There is no question that the 28-Hour Law was prompted by concern for the animals themselves. During congressional floor debate, Senator Allen Greenbery Thurman (D-OH) proclaimed, "I have witnessed with my own eyes the torture of these beasts until I turned away because I could not look at it any longer."[48] Senator Lot Myrrick Morrill stated, "[W]hen we know what takes place on the great highways of commerce, I think it a very provident thing, and one of very high expediency, that the Government of the United States should interpose its authority, and at least in some way give an admonition which shall teach men that even dumb animals have rights which are not to be violated."[49] And the language of the statute itself underscores this purpose when specifying that the animals "shall be unloaded in humane way."[50] When compared with the exemption of animals living in factory farms from the provisions of the Animal Welfare Act (AWA), the impetus behind the 28-Hour Law seems to be a legitimate prioritization of the suffering of farm animals. This interest in humanity, however, sits uncomfortably with the statutory provision that an owner may request in writing that the 28-hour period be extended to 36 hours, as though the duty of the carrier with respect to the remaining eight hours belongs to the owner, rather than the animal himself.

This schizophrenic sense of duty was developed in the case law construing the statute. In noting that the Act does not change normal common law duties of carriers to shippers under state law, some state courts have held that a carrier's exceeding the 28-hour limit *does* constitute

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[45] 49 USCS § 80502 (a)(1).
[46] *Id*. § 80502 (a)(2).
[47] *Id*. § 80502(b)(2).
[48] Attachment 5, Cong. Globe, 42nd Cong., 2d. Sess. 4236 (1872).
[49] *Id*. at 4228.
[50] 49 USCS § 80502 (b).

negligence per se for the purposes of state tort claims.[51] So, while the statute itself provides for a civil penalty to be enforced by the U.S. Attorney General, those individuals most likely to agitate for enforcement—shippers whose livestock were injured or killed in transit—can simply collect their compensation in states which accept this federal standard as proof of *negligence*. This pattern decreases the likelihood that the only party with an interest in the *animal's* suffering—the U.S. government—will ever become involved. Yet it also serves as a model of how self-interested parties to a contract can provide additional teeth for animal welfare statutes, simply by using them to their own ends.

Further, courts have consistently found the statute to prohibit shippers and carriers from contracting out of the duties it imposes.[52] This reaffirms some notion of duty accruing to the animals themselves—though whether this qualifies as the "right" contemplated by Senator Morrill is a matter of philosophical debate beyond the scope of this article. Courts have also flushed out the meaning of the watering, feeding, and resting provisions of the statute with an eye towards the interests of the animals in humane treatment. A powerful example is *Southern Pac. Co. v. Stewart*, in which the court held that a railroad violated the 28-Hour Law by unloading the animals into open corrals in sand without shade or covering, because—since the weather was very hot—such pens could not be considered properly equipped for the "resting" of animals.[53] Other cases have interpreted "rest" to require that each animal, simultaneously, have space to lie down in, regardless of whether or not he chooses to do so.[54]

All of this sounds like relatively robust protection, at least as compared to the near total license enjoyed by the owners of factory farms. Yet it is quite obvious that the cases enforcing the 28-Hour Law disappear after the 1930's. The reason is the eventual institutionalization of the truck as a vehicle for transporting livestock; the Department of Agriculture (USDA) has not interpreted the 28-Hour Law's application to "vehicle or vessel" to include transportation via truck, and has thus issued no regulations in the field.[55] In other words, nothing prevents trucking companies from transporting animals for periods long exceeding 28 hours, which makes circumstances like those of the pigs described in the preceding section perfectly legal.

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[51] Lynn v. Mellon, 24 Ala App 144, 131 So. 458 (1930). *See also* Gilliland v. Southern R. Co., 85 SC 26, 67 SE 20 (1910)(To the extent that this act fixes duties and liabilities of carrier and shipper it displaces any state law on the subject).

[52] *See, e.g.*, Webster v. Union P.R. Co., 200 F. 597 (D.C. Colo. 1912) (holding that a contract between a shipper and a carrier stipulating that carrier will confine cattle for longer than 28 hours is void and non-enforceable in an action between the two, and would not provide a defense for carrier against government action); Southern R. Co. v. Proctor, 3 Ala. App., 57 So. 513 (Ala. Ct. App. 1911) (holding that a carrier cannot avoid liability for failing to feed and water animals); Cleveland, C.C. & S.L.R. Co. v. Hayes, 181 Ind. 87, 104 N.E. 581 (Ind. 1914) (holding that requirements of the Act cannot be waived by shipper except as specified in the Act); International & G.N.R. Co. v. Landa & Storey, 183 S.W. 384 (Tex. Civ. App. 1916).

[53] 233 F. 956 (9th Cir. 1916), *reversed on other grounds* 248 U.S. 446 (1919). *See also* St. Louis & S.F.R. Co. v. Piburn, 30 Okla. 262, 120 P. 923 (Okla. 1911) (holding that mere physical unloading of sheep is not enough to comply with the Act unless the carrier provides reasonable facilities for feeding, watering, and rest); Erie R. Co. v. United States, 200 F. 406 (2nd. Cir. 1912) (where all cars are too small to allow all cattle to lie down at the same time, the carrier must unload for rest).

[54] United States v. New York C. & H.R.R. Co., 191 F. 938 (W.D.N.Y. 1911); United States v. Powell, 65 F.2d 793 (4th Cir. 1933); Northern Pac. R. Co. v. Finch, 225 F. 676 (D. N.D. 1915).

[55] 9 C.F.R. § 89.1-89.5 (promulgated in 28 Fed. Reg. 5967, June 13, 1963).

B. THE ROAD LESS TRAVELED: LIMITED PROTECTIONS UNDER THE ANIMAL WELFARE ACT

> The Animal Welfare Act is the most sweeping federal legislation enacted in defense of animals. [56] To the dismay of animal advocates, it specifically exempts from its protection: [H]orses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management or production efficiency or for improving the quality of food or fiber.[57]

It does, however, protect animals transported by circuses, pet dealers, research facilities or carriers such as airlines or shipping lines. Amongst other things, the Act instructs the Secretary of Agriculture to promulgate standards for "humane handling, care, treatment, and transportation of animals."[58] These regulations, codified at 9 C.F.A. § 3.16-42, divide animals into six groups, with varying levels of protection afforded each: 1.) Dogs and cats, 2.) Rabbits, 3.) Hamsters and guinea pigs, 4.) Nonhuman primates, 5.) Marine mammals, and 6.) All other warm-blooded animals.

The regulations protecting transportation of dogs and cats are, unsurprisingly given the sacred nature of such companion animals in our society, quite complex. Amongst other things, carriers must not accept these pets for transport more than four hours before scheduled departure time[59]; they may only accept them with instructions for feeding and watering for a 24-hour period[60]; their holding area must meet certain temperature requirements.[61] The enclosure in which the animals are transported must not have dangerous protrusions, must be clean, and must be marked "on top and on one or more sides with the words 'Live Animals' in letters at least 1 inch high."[62] Further regulations stipulate that the cargo area of the vessel in which the animals are being transported be "heated or cooled as necessary to maintain an ambient temperature and humidity that ensures the health and well-being of the dogs or cats, and that this area must be kept clean.[63] Generally speaking, these existing regulations—if obeyed—seem adequate to prevent negligent deaths like Jed's. The challenge, of course, is enforcement, and ensuring adequate consequences for carriers who violate these regulations.

The regulations concerning the transportation of mammals other than dogs, cats, primates, and the prototypical research animals are substantially similar to those covering dogs and cats. The same four-hour rule exists before departure, as does the same requirement for "Live Animal" (or "Wild Animal") labeling of enclosures, and the code specifies that the enclosures "shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely and to make normal postural adjustments" with the provision that "certain species may be restricted in their movements according to professionally acceptable standards when such freedom of movement would constitute a danger" to themselves or others.[64] As with cats and dogs, the code specifies that the animals must be given water at least every 12

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[56] 7 U.S.C. § 2131.
[57] *Id.* § 2132(G).
[58] *Id.* § 2143(a)(1).
[59] 9 C.F.A. § 3.13(a).
[60] *Id.* § 3.13(c)(3).
[61] *Id.* § 3.18(b)-(d).
[62] *Id.* § 3.14 (a)(6).
[63] *Id.* § 3.15(d).
[64] *Id.* §§ 3.136-3.138.

hours and food at least once every 24 hours. [65] On paper, then, the protections for the favored and disfavored species (excepting, of course, the invisible class of food animals) are basically equivalent.

Despite these strong paper protections, it is difficult to tell how effectively they are enforced. A Lexis search of all sections of the Code described above reveals just one unreported case involving an enforcement action related to the transportation of animals. In *Hodgins v. Department of Agriculture*, the owners of a kennel that sells dogs and cats to research facilities appealed a $325 fine and a cease and desist order imposed by the Secretary of Agriculture for a violation of a variety of Animal Welfare Act violations discovered by the Animal and Plan Health Inspection Service, an arm of the Department of Agriculture. [66] The transportation-related violation involved the Hodgins' moving animals in a van containing trash and a can of brake fluid, in contravention of 9 C.F.R. § 3.15(g) (specifying that the cargo space be kept clean) and § 3.15(h) (prohibiting the transport of dogs and cats with "any material, substance (e.g., dry ice) or device in a manner that may reasonably be expected to harm the dogs and cats or cause inhumane conditions.)"

An administrative law judge had originally ruled that the Kennels had committed sixty-one violations of the AWA and imposed a $16,000 fine. On appeal to the Sixth Circuit, however, the court found that "the record did not contain substantial evidence for the majority of the Secretary's findings, particularly with respect to the willfulness of the alleged violations" and remanded.[67] In addition, the court awarded the Hodgins $155,384.99 in attorneys' fees. On remand, the secretary concluded there was sufficient evidence for fifteen violations of the AWA and imposed a $325 fine, as well as a cease and desist order. The Hodgins appealed even these minor penalties, but this time around the Sixth Circuit found that they were "not unwarranted" and affirmed the administrative judgment.[68]

Despite the paucity of cases based upon enforcement actions, the regulations of transportation imposed by the Animal Welfare Act may be used to protect animals in other, unique ways. In *Hagan v. Feld Entertainment*, a former employee of the Ringling Brothers and Barnum & Bailey Circus brought a claim for wrongful termination against his employers.[69] Hagan, a lion handler, was accompanying the circus across the Mojave Dessert in California in the middle of July. Despite the searing heat and Hagan's repeated requests, the Train Master refused to stop the train so that Hagan could water the lions because the circus was behind schedule. The lions went without drinking water, and without being watered down, from 8:30 am to 2:45 pm. When Hagan was finally able to access the lions he discovered that:

> a two-year-old lion named Clyde was unresponsive and was lying in the fetal position with his tongue hanging out, eyes rolled back in his head, and barely breathing. When Hagan placed his hands on Clyde in an attempt to help him, he realized that Clyde's body was extremely hot. As Hagan attempted to help Clyde, the lion died. After sitting and crying with Clyde's body for a period of time, Hagan [contacted] Ringling Bros.'

[65] *Id*. § 3.139.
[66] 33 Fed. Appx. 784 (6th Cir. 2002).
[67] *Id*. at 786.
[68] *Id*. at 788.
[69] 365 F. Supp 2d 700 (E.D. Va. 2005).

> Operations Manager, John Griggs ("Griggs"), who told him to move Clyde's body to the meat truck and to not say a word about it to anyone.[70]

Afterwards Hagan was ordered to clean up Clyde's car before USDA inspectors arrived, and told not to say a word about the incident to the inspectors or anyone else.[71] But he continued to talk openly about Clyde and, a week after the incident, was terminated.[72]

On reviewing a motion to dismiss Hagan's suit for wrongful termination in violation of public policy, the federal district court found that the Animal Welfare Act and its USDA regulations constituted "an important policy concern, the welfare of animals in commerce" and thus formed a sufficient basis for the plaintiff's claim under the California law against discharge that violates a "fundamental public policy." In applying the elements of the California claim to the facts of the case, the court notes that "The Act clearly benefits society at large rather than the personal interests of the plaintiff. The Act is designed to insure that the nation's animals in interstate commerce are treated in a safe and humane manner. Society as a whole, rather than an individual such as the plaintiff, benefits from the humane handling of animals."[73]

The *Hagan* case raises two important facts about the federal regulations on transporting animals. The first is that they can easily be evaded, as Hagan's employers initially succeeded in doing. The second is that they can form the basis for claims between private parties, beyond just enforcement actions. This second point should not be underestimated: where "public policy" forms an element of a state common law claim, the AWA and its regulations provide a clearly-established source of such policy. In this manner, disputes between self-interested private parties can actually serve to impose liability on carriers of animals for violations that the USDA inspectors miss. Even when the actors are Holmes "bad men," animals may benefit, and in the best cases like Hagan's, these claims may provide a means for the individuals closest to the animals to act on their behalf without risking their own financial well-being. In Part IV of this Article I will discuss the implications of this notion for the construction of contracts for carriage.

C. When Pigs Fly? Boris' Legacy for Pets on Airlines

In contrast to the diminished public (and, by proxy, legislative) interest in the transportation of food animals, recent years have seen an increased scrutiny in the airlines' handling of pets on their planes. In April 2000, 49 USCS § 41721—the "Safe Air Travel for Animals" Act—was signed into law. As is often the case, this initiative was sparked by a human interest story in the media. On Christmas Eve of 1996, a basenji-boxer mix named Boris escaped from baggage handlers at LaGuardia airport, leaving behind only a bloody travel crate. Boris' owner, Barbara Listenik, has said that when she asked the baggage attendant what they would do to help her find him, "he handed me a baggage claim form and said, 'Contact Atlanta - that's where our hub is and that's all that we can do.'"[74] After six and a half weeks spent roaming the suburbs of Queens, Boris was found with an injured face, and ill from dehydration, malnutrition,

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[70] *Id*. at 704 (citations omitted).
[71] *Id.* at 705.
[72] *Id*.
[73] *Id*. at 710-11.
[74] Denise Flaim, *What Boris Did for "Flying" Pets*, NEWSDAY, March 6, 2006, *available at* http://www.newsday.com/mynews/ny-lspets4652535mar06,0,6719040.column.

and an infection. The airlines compensated Listenik only for her plane ticket and Boris' crate, despite the fact that Boris required surgery and Listenik spent $3600 in vet bills to save him.[75]

In response to Listenik's lobbying efforts, Senator Frank Lautenburg (D-NJ) and Representatives Robert Menendez (D-NJ) and Peter DeFazio (D-OR) sponsored "Boris' Bill," some parts of which became § 41721. The Act imposed two new obligations on airlines in their handling of live animals. First, it created scheme whereby airlines must submit a monthly report on "any incidents involving the loss, injury, or death of an animal during air transport" to the Secretary of Transportation. This information will then be shared with the Secretary of Agriculture and published in the Department of Transportation's monthly *Travel Consumer Report*.[76] Second, it stated that the Department of Transportation would work with airlines "to improve the training of employees with respect to the air transport of animals and the notification of passengers of the conditions under which the air transport of animals is conducted."[77]

With the exception of training employees to transport animals, all of these new protections work to facilitate the right to contract. Both the availability of animal-related data in *Travel Consumer Report*, and the enhanced training of employees to "notif[y] passengers of the conditions under which the air transport of animals is conducted" serve to perfect information for the passenger entering into a contract of carriage. By contrast, it is important to consider the provisions, originally included in the bill, that were omitted from the final statute. The first would have doubled the amount a passenger could recover for the loss of a pet *over that provided for ordinary baggage.*[78] Another would have required that airplanes being retrofitted for fire prevention also be retrofitted to improve ventilation and temperature control in the cargo holds, in order to increase the safety of transported animals.[79] Unlike the provisions that made it into law, neither of these related to the ability to form a contract. In fact, the improvement of conditions in cargo holds would protect animals directly, without any asserted interest on the part of their owners.

Because pets like Boris can garner national media attention through an identifiable human interest—the love many Americans feel for their own pets—companion animals enjoy more meaningful legal protections than livestock and other food animals. Yet, when it comes to contracts for carriage, the protections provided by Boris' Law for companion animals involve a *weaker* conception of duty towards the animal himself than did the 28-Hour Law of the nineteenth century. While a 28-hour train-ride culminating in slaughter is doubtless less desirable to a living creature than a five-hour plane flight culminating in reunion with an owner, most of the protections of the former *could not be contracted out of.* Meanwhile, for Boris' Law to have made any difference to Boris himself, his owner would have had to: a.) have read the monthly publication of the Department of Transportation regularly enough to form a judgment about the relative safety of various airlines, and either b.) have been able to afford to choose the "safest" airline without regard to cost or availability of flight or c.) have decided to leave Boris at home. Given the unlikelihood of this narrative unfolding in actuality, it is likely that Boris would find himself in precisely the same plight even with his law in place. The protections that could have helped him directly—i.e., a mandate for better temperature control in the hold, or at least an

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[75] *Legislators Lobby For Safer Air Travel For Pets*, WORLD AIRLINE NEWS, March 3, 2003
[76] 49 USCS § 41721(a), (c)-(d).
[77] § 41721(b).
[78] THE HUMANE SOCIETY OF THE UNITED STATES, *The Safe Air Travel for Animals Act, at* http://www.hsus.org/pets/pet_care/caring_for_pets_when_you_travel/traveling_by_air_with_pets/the_safe_air_travel_for_animals_act.html.
[79] *Id*.

increased monetary incentive for the airline to provide such a feature on its own—were left on the drafting room floor. In fact, the allusion of increased transparency occasioned by Boris' Law might actually entrench an airline's ability to *escape* liability for the death of pets through its negligence: as *Deiro* demonstrated, the better informed a party to a contract, the more likely a suspect term to be upheld.

The new reporting policy has not been in place long enough to judge its efficacy in preventing harm to animals during flight. Over the limited range of months for which data is available, the numbers of deaths and injuries *have* declined, but this also corresponds to the movement from summer to winter and the presumably decreased likelihood of deaths by heat exhaustion, so it is difficult to ascribe much value to the trend. The bottom line here is that, while the statutory laws regulating transportation of pets offer much more protection than those regulating the morally invisible class of food animals, *both* of these schemes—at least within those spheres in which they apply in practice—fall short of the conception of innate animal moral worth embodied in the protections of the 28-Hour Law.

IV. MOVING FORWARD: SOME SUGGESTIONS FOR JURISPRUDENTIAL AND LEGISLATIVE CHANGE

A. "UNSAVORY AGREEMENTS" AND CREATIVITY IN THE COMMON LAW OF CONTRACTS

Justice Holmes famously declared that "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."[80] This principle, when applied in the context of contracts, suggests a useful mechanism through which protections for animals may be enforced, even by parties acting in support of their own self-interests. For the whole universe of reasons that contract disputes arise, it will very frequently be in one party's interest for a contract to be declared invalid, even if his motivations have nothing to do with animal welfare. Thus, two traditional common law doctrines for the invalidation of contracts—unconscionability and voidness as against public policy—both of which are long-recognized and respected, may be utilized by judges to give extra protection to animals. Because in most cases contractual relations govern the transportation of animals, these doctrines have particular power in this area.

1. INVALIDATION AS AGAINST PUBLIC POLICY

While parties are generally free to "contract as if no one is watching," courts sometimes find that the interest in freedom of contract is outweighed by another interest and will refuse to enforce the agreement or some part of it.[81] Farnsworth notes that the two primary motivations for such refusal are 1.) to sanction undesirable conduct by the parties or others[82] and 2.) a belief that enforcement would cause courts to uphold an unsavory agreement.[83] Critical to the animal law context is the fact that "these considerations turn on reluctance to aid the promisee rather than on

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[80] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
[81] 326 E. ALLAN FARNSWORTH, CONTRACTS § 5.1 (3rd ed., 1999).
[82] Sirkin v. Fourteenth St. Store, 108 N.Y.S. 830 (N.Y. App. Div. 1908) ("I think nothing will be more effective in stopping the growth and spread of this corrupting and now criminal custom [of commercial bribery] than a decision that the courts will refuse their aid to a guilty vendor or vendee").
[83] Bank of the United States v. Owens, 27 U.S. 527 (1829) ("no court of justice can in its nature be made the handmaid of inequity").

solicitude for the promisor."[84] To cite an imaginary animal law contractual dispute, a court might not find that a shipper, who placed his pigs in a carrier's un-air-conditioned vessel on a July day, deserves to be compensated for his loss after they suffocate to death, if he agreed to a waiver of liability. However, the court might find it "unsavory" to uphold the carrier's limitation of liability if he also finds that the cruel conditions in which the animals were traveling violate public policy.

The great utility of this doctrine for our purposes stems from the freedom courts have in deciding what constitutes a contravention of public policy. As Farnsworth puts it, "In some cases, the conduct that renders the agreement unenforceable is also a crime, but this is not necessarily or even usually so."[85] This means two things. First, the existing prohibitions under the AWA and state animal welfare laws constitute solid public policy which courts may invalidate contracts for contravening. If one of the primary weaknesses of these laws is low enforcement—through blinking on the part of regulators, scarcity of prosecutorial or administrative resources, and so forth—contractual disputes could generate a class of private attorneys general: contractual parties looking out for their own pocketbooks.

The second, albeit more tenuous, consequence of this doctrine is that courts have a long-standing power in the common law to develop public policies of their own. Just a few examples include the policy against impairment of family relationships,[86] the policy against gambling,[87] the policies against restraint of trade and on alienation of property,[88] the policies against encouraging litigation or interfering with the judicial process, and the policy against improperly influencing legislators and other government officials.[89] In *Tunkl v. Regents of University of California*, the California Supreme Court held unenforceable a standardized release from liability for negligence that was a condition of admission to a research hospital.[90] The court's opinion cited a series of factors in its articulation of public policy: the hospital was "a business of a type generally thought suitable for public regulation,"; medical care was "of great importance to" the public; the hospital "held itself out as "willing to perform this service for any member of the public," it had "a decisive advantage of bargaining strength," and its "standardized adhesion contract" made no provision for insurance against negligence through "payment of additional reasonable fees," and finally, the plaintiff's "person or property" was under the hospital's "control…subject to the risk of carelessness."[91]

It is clear that many of these factors might also apply, for example, to the case of a pet-owner turning her dog over to American Airlines. In particular, the relevance of the "importance" of the matter "to the public" resonates with the broad public support for animal welfare that receives no legislative expression.[92] The major difference between this hypothetical and *Tunkl* is the factor of the availability of additional insurance, the existence of which cut in

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[84] FARNSWORTH, *supra* note 82, at 323.
[85] *Id.*
[86] *See* FARNSWORTH, *supra* note 82, at 337-43.
[87] *See id.* at 326n.4.
[88] *See id.* at 331-37.
[89] *See id.* at 327n.7.
[90] 383 P.2d 441, 445-46 (Cal. 1963).
[91] FARNSWORTH, *supra* note 82, at 329.
[92] For example, a recent Ohio State University Study of 1,800 Ohioans found that 92% of respondents agreed or strongly agreed with the proposition that "it is important that farm animals are well cared for." 81% agreed or strongly agreed that "the well-being of farm animals is just as important as the well-being of pets." Jeff S. Sharp & Andrew Rauch, *Ohioans' Attitudes About Animal Welfare*, 1 OHIO SURVEY OF FOOD, AGRICULTURAL, AND ENVIRONMENTAL ISSUES (2004).

favor of enforcing the contracts for carriage in *Deiro* and *Gluckman*. Beyond the structural similarities between animal carriage and the *Tunkl* case in particular, however, *all* of these judge-made doctrines demonstrate the flexibility courts have under the common law of contracts to obtain equitable results with respect to the interests of third parties and society in general. That said, there is no question that the force of the doctrine is weaker in cases lacking actual legislation as a source for generating policy. Courts that have followed *Tunkl* "have often given weight to a public interest evidenced by state regulation."[93] Even more significantly, judge-made doctrines can, of course, be pre-empted by legislation. The policy against restraint of trade, for example, has been pre-empted by federal antitrust laws. In the transportation context, it seems likely that any attempt to invalidate contracts for the carriage of farm animals for contravening a public policy against cruelty to animals would be defeated by the explicit exemption of farm animals from the Animal Welfare Act. One might also argue that Congress' decision to strike from the Safe Air Travel for Animals Act the proposed distinction between pets and luggage for the purposes of damages evinces a public policy *against* requiring higher damages.

Despite these weaknesses, the mere use of this doctrine to provide teeth to under-enforced protection laws seems promising; and it provides, at minimum, a source for judicial innovations in the field. The only case to date that has declared a contract for carriage of an animal void as against public policy is *Klicker v. Northwest Airlines*.[94] In that case, the Ninth Circuit voided a contractual term limiting Northwest's liability for the death of the plaintiffs' golden retriever, Sir Michael Robert. The court cited the judge-made rule preventing carriers from contracting out of all liability for negligence: "Carriers may partially limit their liability for injury, loss, or destruction of baggage on a 'released valuation' basis, whereby in exchange for a low carriage rate, the passenger-shipper is deemed to release the carrier from liability beyond a stated amount. The released valuation limitations bind the passenger-shipper to the restriction on liability, however, only if he has notice of the rate structure and is given the opportunity to pay the higher rate in order to obtain greater protection."[95] In this case, the plaintiffs were not offered the opportunity to pay a higher rate, and so the contractual term limiting the airline's liability was declared invalid.

While *Klicker* follows a policy forbidding total limitations on liability for harm to baggage generally, it is worth considering how the case—or another case in which the plaintiffs *did* have the opportunity to pay a higher rate and chose not to—might have turned out if the court relied upon the public policy embodied in the USDA's regulations of animal transportation. It is conceivable that a judge could invalidate an airline's contracting out of full liability for actions that violate those standards for humane care. Such a scenario would still entail the problem of determining the animal's *actual* value, but at least the pet-owners would then have the more flexible field of tort law open to them. And to make a brief aside: another question this discussion leaves open is how, in the context of farm animals, the Humane Slaughter Act might be utilized as a source of public policy in contract disputes. The nature of the contracts involved in the slaughter of animals exceeds the transportation focus of this Article, but it seems a field ripe for inquiry, and a potential source of indirect enforcement for the notoriously under-enforced Act.

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[93] *See, e.g.*, Emory Univ. v. Porubiansky, 282 S.E.2d 903 (Ga. 1981) (since "practice of dentistry is a profession licensed and controlled by the state" it contravenes public policy to allow a dentist "to relieve himself by contract of the duty to exercise reasonable care").
[94] 563 F.2d 1310 (9th Cir. 1977).
[95] *Id*. at 1315.

En balance, the utilization of the common law invalidation of contracts as against public policy has a number of striking virtues. In the first place, it utilizes the self-interest of parties in having their contracts upheld as a motivation for adhering to humane procedures in the transportation of animals. In the second place, it allows judges to make principled, limited in-roads in the realm of animal protection without spinning into the stratosphere of judicial legislation: laws that protect [some] animals from inhumane transportation are already on the books, and even an avowed textualist cannot object to their citation as legitimate sources of public policy.

2. UNCONSCIONABILITY

Another doctrine of which courts should make greater use in policing contracts for carriage of animals is that of unconscionability, which is well-suited to deal, at least, with the transportation of pets. The Uniform Commercial Code (UCC) states that: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result."[96] Although this section technically only applies to "goods," courts have extended it to other sorts of contracts.[97] The standard definition of unconscionability, which the Code itself leaves open-ended, is that it must "include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[98] The ubiquitous hazy process of giving content to the word "unreasonable" provides space for courts to take into account societal conceptions of what constitutes a fair balance of "favorability" between the parties. A contractual term that makes no distinction between the living, mutual bond between an owner and his pet, and the practical interest in one's suitcase, could be argued to be unconscionably weighted against the legitimate interests of the owner.

In determining unconscionability, the cases refer to the "absence of meaningful choice" factor as "procedural" and the "unreasonably favorable" factor as "substantive" unconscionability. Farnsworth notes that "Most cases of unconscionability involve a combination [of the two], and it is generally agreed that if more of one is present then less of the other is required."[99] Though the definition of procedural unconscionability includes situations with inequality in bargaining power, the Supreme Court has held that standard contracts of adhesion such as cruise line tickets are not unenforceable, simply because individual terms were not negotiated: "Common sense dictates that a [ticket] will be a form contract the terms of which are not subject to negotiation and that an individual purchasing the ticket will not have bargaining parity with the cruise line."[100] Where the specific terms of an adhesion contract are not clear, however, courts have found them unenforceable, as in the well-known case of *Wallis v. Princess Cruises*.[101] Taken together, these cases make it clear that an airline ticket that limits

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[96] Uniform Commercial Code § 2-302(1), Unconscionable Contract or Clause.
[97] FARNSWORTH, *supra* note 82, at 308.
[98] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).
[99] FARNSWORTH, *supra* note 82, at 312.
[100] Carnival Cruise Lines v. Shute, 499, U.S. 585, 593 (1991).
[101] 306 F.3d 827, 834 (9th Cir. 2002) (holding that a contract clause on a passenger's that simply refers to the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1976 (Athens Convention)" does not "reasonably communicate" a liability limitation).

liability for negligent death of a pet will not be deemed unconscionable on procedural grounds alone. Yet this leaves open the possibility that, with a sufficiently strong finding of substantive unconscionability, the inequality of bargaining power in an adhesion contract of carriage may provide at least the minimum procedural unconscionability for a court to invalidate the liability term. Furthermore, there is a theoretical possibility of "exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone."[102] Either way, the key lies in how a court determines substantive unconscionability.

Clauses, like those applicable to liability for harm to pets on airplanes, that limit remedies available to a buyer of goods are generally enforceable.[103] However, "a clause limiting or excluding liability for consequential damages is unenforceable if the limitation or exclusion is unconscionable and such a limitation for personal injury due to consumer goods is prima facie unconscionable."[104] Thus, it *still remains open* to courts to decide whether the limitation of damages for a negligently-transported pet's death is an unconscionable limitation or exclusion. To a certain extent, this cycles back to the earlier question of valuing pets: whether or not such a limitation is unconscionable could end up turning on the market value of the dog relative to the limit of liability for baggage, as market value is still the prevailing standard of valuation (though in cases like *Deiro*, which involved economically valuable pets, even that would be a vast improvement). But courts should also consider that—like the *per se* unconscionability of a limitation for personal injury—a limitation of liability where a living creature is involved is uniquely suspect, insofar as it *provides no incentives for the airline to handle such a creature any differently than they would a suitcase*. Supporters of animal protections are charged with sentimentality and anthropomorphism, but the reality of the tragedy of a beloved pet suffocating to death in 140 degree temperatures, in contrast with the pitiful valuation imposed by airline tickets, is a prime candidate for the flexible, human judgments embedded in the unconscionability doctrine.

V. THE HIGH ROAD AND THE LOW: CONCLUDING THOUGHTS

> "He felt as if everything in him was *falling,* as if he had been filled full of a heavy liquid that all wanted to flow one way, and all the others were leaning as he was leaning, away from this queer heaviness that was trying to pull them over….[T]hey all got used to it, just as they got used to seeing the country turn like a slow wheel, and just as they got used to the long cruel screams of the engine, and the steady iron noise beneath them which made the cold darkness so fearsome, and the hunger and the thirst and the continual standing up, and the moving on and on and on as if they would never stop."
>
> "*Didn't* they ever stop?" [a calf] asked.
>
> "Once in a great while," she replied. "Each time they did," she said, "he thought, 'Oh, now *at last! At last* we can get out and stretch our tired legs and lie down! *At last* we'll be given food and water!' But they never let them out. And they never gave them food or

[102] Gillman v. Chase Manhattan Bank, 534 N.E. 2d 824, 829 (N.Y. 1998).
[103] *See, e.g.*, Martin Rispens & Son v. Hall Farms, 621 N.E. 2d 1078, 1087 (Ind. 1993) ("Indiana courts have rejected claims that contractual limitations of remedy are substantively unconscionable.")
[104] FARNSWORTH, *supra* note 82, at 316.

> water. They never even cleaned up under them. They had to stand in their manure and in the water they made."[105]

This excerpt from James Agee's short story "A Mother's Tale" presents a cow's narrative of his journey to the slaughterhouse in a train, related second-hand by another cow to her calves. Critics of the animal welfare movement would doubtlessly criticize this passage for ascribing human capacities of inquiry and sentimentality to cattle, and they would be right in some senses. Yet what Agee tries to capture, through those unique narrative tools by which humans communicate, is the added terror experienced by animals in transportation that comes precisely *because* of their inability to understand their unnatural surroundings with anything like human cognition. They are plunged into a world of human creation, without the human ability to contemplate, at least, a potential end to their suffering, or a potential reason for it.

Humans have already officially recognized this terror and this suffering: Congress attempted to mitigate it, at least a little, by way of the 28-Hour Law. At a time when the nation was in the throes of the Industrial Revolution, it was still within the moral grasp of our law-makers to consider the difference that a couple of hours of sunlight and grass might make to living creatures trapped in the endless night of livestock transportation. Congress recognized it again by passing the Animal Welfare Act—yet with the new understanding that, in the context of food animals, as Lewis Petrinovich says, "[h]igh technology makes it unnecessary (and impossible) to pay attention to individual animals…with the total emphasis on increased productivity at the lowest cost possible."[106] It is important, as a society, to be clear about the balance we are striking. The 28-Hour Act demonstrates that it is far from an established human value that efficient food consumption *must* outweigh animal welfare: our society has made a conscious decision to compromise *existing* ethical values, once it has become so much more profitable to do so.

This is hardly a novel argument in the world of animal law—activists make it at every turn, when urging legislation that seems to reflect mere common sense. For example, a truck should be considered a "vehicle" for the purposes of a law intended to impose humane conditions on the meat industry. The word "animal" should not exclude the 8 billion cows, pigs, and chickens that collectively suffer more than any other class of animals in our society for the purposes of the "Animal Welfare Act." And it should not be too much to ask to make airlines take greater care with our pets than with our suitcases. These arguments have continued to fail when put to legislatures but, as this Article has argued, perhaps they have the opportunity to gain unique traction in the field of transportation, due to the contractual relationships that govern it. In the absence of the legislative protections so greatly needed, it is possible that—at least in some cases, at least for a few creatures—the common law may be able to provide some relief. And it may do so simply through traditional judicial tools and articulation of the simple values of compassion that have existed in our society all along. For all of the others we should not give up on the task of challenging the statutory gaps, and arguing for mercy.

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[105] James Agee, *A Mother's Tale*, THE COLLECTED SHORT PROSE OF JAMES AGEE (ed. Robert Fitzgerald, 1969).
[106] LEWIS PETRINOVICH, DARWINIAN DOMINATION 356 (1999).

Appendix A: Animal Incident Reports on U.S. Airlines: May 2005-2006[107]

A. Incidents by Month

Month	Deaths	Injuries	Lost
May 2005	4	5	1
June 2005	5	4	1
July 2005	2	3	0
August 2005	4	4	1
September 2005	1	0	0
October 2005	5	0	0
November 2005	1	1	0
December 2005	0	0	1
January 2006	1	1	0
February 2006	0	0	1

B. Incidents by Carrier

Airline	Deaths	Injuries	Lost
Alaska Airlines	1	3	1
American Airlines	5	0	0
Comair	0	1	0
Continental	7	6	0
Delta	2	0	2
Frontier	0	1	0
Hawaiian	1	3	0
Horizon	2	1	0
Midwest	1	0	0
Northwest	0	2	1
Skywest	1	0	0
United	3	0	0
US Airways	1	1	1

[107] Source: AVIATION CONSUMER PROTECTION DIVISION, U.S. DEPARTMENT OF TRANSPORTATION, AIR TRAVEL CONSUMER REPORTS (2005-2006) *available at* http://airconsumer.ost.dot.gov/reports/index.htm.

ANIMAL LOVERS AND TREE HUGGERS ARE THE NEW COLD-BLOODED CRIMINALS?: EXAMINING THE FLAWS OF ECOTERRORISM BILLS

DARA LOVITZ*

INTRODUCTION

Sometime between the beginning of the world and the last decade of the twentieth century, animal lovers and tree huggers lost their societal statuses as peaceful, benevolent, left wing activists.[1] Subsequent to this loss of identity (that is, the identity which was given to them by others), they somehow became the target of a vicious campaign that baptized them as the country's most threatening and violent domestic terrorists.[2] Quite a transformation – from gentle pacifist to violent criminal in one single bound. Although the exact reason for this conversion in characterization is unknown, the political history surrounding the shift suggests that some acts of animal liberation, tree sit-ins, and other protests against facilities that exploit, abuse, and/or threaten animals or natural resources, began to threaten the financial integrity of some major corporations.[3] Having bankrolled some political think tanks to lobby for their interests, these corporations were ultimately successful in securing legislation that would protect their dollars.[4] Such legislation came in the form of "ecoterrorism bills."

Part I of this article seeks to define the term "ecoterrorism" and explore the term's origin in both popular and political lexicons. The part will explain how the term "ecoterrorism" was created and defined by those who felt threatened by the progress of animal rights and environmental activists, which in itself reveals the problematic nature of such a subjective label. Part I also explores the history of the concept of ecoterrorism. The part will examine how increased financial support from certain corporations helped lay a solid foundation for the introduction of ecoterrorism bills[5] in the aftermath of the horrific events of September 11, 2001.[6]

Part II examines the general linguistic rubric of various states' ecoterrorism bills. The linguistic terms that are highlighted will be the focus of the later discussion on what renders the bills unconstitutionally vague and overbroad. The remainder of the part highlights Pennsylvania's HB 213, which includes a unique immunity section.

Part III of the article, offers a critique of attaching the suffix "terrorism" to the activities of so-called "ecoterrorists." As per the exploration of the opposition to Pennsylvania's ecoterrorism bill, opponents of ecoterrorism bills have voiced condemnations similar to those of

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[1] As Dr. Thomas Fuller said, "He that plants trees loves others beside himself."

[2] United States Department of Justice, *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises.* Washington, DC, August 1993.

[3] Steven Best, Ph.D., *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals* (New York Lantern Books 2004), p.313.

[4] *Id.*

[5] *Id.*

[6] S. Res. 165 § 1(b)(1)(A), (D), 107th Cong. (2001), LEXIS 2001 S. Res. 165.

the author, while some opponents even conceded a preference for the term "eco-intimidation."[7] Part III illuminates the sickening irony of the use of the term "terrorism" to describe acts of loving-kindness towards animals while many of those who support such usage are the ones who themselves engage in acts of animal mutilation including: tail docking, teeth cutting, debeaking, castration, confinement, scalding, mutilating, chemical poisoning, skinning, and dismembering.[8]

The majority of ecoterrorism bills infringe on activists' First Amendment rights. Part IV examines the ways in which the overbroad and vague language of ecoterrorism bills places unacceptable limitations on speech activities that fall within the ambit of constitutionally protected speech. The part discusses how, by their very nature, ecoterrorism bills are nothing short of bonafide viewpoint discrimination. The article concludes this part with an assessment of the political nature of the passage of such unconstitutional bills.

I. SO-CALLED "ECOTERRORISM" EXPLAINED

A. SOME DEFINITIONS

As explained, *infra*, there is not one clear definition of "terrorism." Terrorism generally has been considered the systematic threatening or intimidating of one individual or group to another, usually characterized by an act of destruction or violence.[9] Terrorist acts are generally those that harm unarmed civilians who, except by way of their unfortunate location in the world, otherwise have little to do with the politics that inspire the acts.[10]

There are various definitions of "ecoterrorism" including "threats and acts of violence (both against people and against property), sabotage, vandalism, property damage and intimidation committed in the name of environmentalism" and "crimes committed against companies or government agencies and intended to prevent or to interfere with activities allegedly harmful to the environment."[11] Relevant to the discussion of the government's target of animal rights and environmental activists is the FBI's Domestic Terrorism Section's definition:

> The use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented, subnational group for environmental-political reasons, or aimed at an audience beyond the target, often of a symbolic nature.[12]

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[7] *See* Heidi Prescott's testimony in opposition to Pennsylvania's ecoterrorism bill, HB 213. (Richard Fellinger, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - Bill would allow some protesters to be labeled as 'eco-terrorists,' June 07, 2005).

[8] *Terrorists or Freedom Fighters*, at p.93.

[9] Combination of various definitions from Merriam-Webster, American Heritage Dictionary, Wordnet, etc.

[10] See Barr and McBride, *Military Justice for al Queda*, Wash. Post, Outlook Section, Nov. 18, 2001 (defining terrorism as "unprovoked surprise attacks out of uniform with the clear intent to target unarmed civilians"); Professor Caleb Carr, *Wrong Definition of War*, WASH. POST, July 28, 2004, at A19. "Certainly terrorism must include the deliberate victimization of civilians for political purposes as a principal feature--anything else would be a logical absurdity."

[10] The first definition comes from http://en.wikipedia.org/wiki/Ecoterrorism. The second definition is from the Encyclopaedia Britannica.

[12] http://www.fbi.gov/congress/congress04/lewis051804.htm

Most of the traditional definitions apparently do not include acts by animal rights activists although the Animal and Ecological Terrorism Act, a bill proposed by the American Legislative Exchange Council (ALEC) in Texas, begins with a summary which explains that the act is designed to penalize persons who are found to encourage, finance, assist, or engage in politically motivated acts of animal or ecological terrorism.[13] In its foreward, this particular bill delineates numerous acts that it has labeled as ecoterrorist such as arsons set at the University of Washington Center for Urban Horticulture by the Environmental Liberation Front and the release of 10,000 minks from a farm near Sultan, Washington by the Animal Liberation Front.[14]

Despite the linguistical nature of the prefix "eco" and the preliminary definitions, the term "ecoterrorism" is understood by proponents of ecoterrorism bills as well as opponents thereof, that the term describes both animal and environmental activists alike. Indeed, at the Hearing before the Subcommittee on Crime of the Committee on the Judiciary, Ron Arnold, author of the book: *Ecoterror—The Violent Agenda to Save Nature*, clarified in no uncertain terms:

> I am stating that there is no difference between ecoterrorism and animal rights terrorism, and there evidently has been some dispute about that difference. The perpetrators are, in large part, the same people; and the solidarity of action between them is openly declared.[15]

B. WHEN/WHERE THE CONCEPT OF ECOTERRORISM ORIGINATED

Governmental efforts to combat ecoterrorism arguably began in 1992 with the passage of the Animal Enterprise Protection Act, which directed a joint study "on the extent and effects of domestic and international terrorism on enterprises using animals for food or fiber production, agriculture, research, or testing . . ."[16] In compliance with this mandate, the Criminal Division of the Department of Justice and the Animal and Plant Health Inspection Service of the Department of Agriculture (APHIS) issued a report which documented "animal rights extremism in the United States and abroad."[17] The report provided information as to the transition from animal

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[13] Animal and Ecological Terrorism in America pamphlet, issued by American Legislative Exchange Council, on Sept. 1, 2003. http://www.alec.org/meSWFiles/pdf/AnimalandEcologicalTerrorisminAmerica.pdf#search=%22%22animal%20and%20ecological%20terrorism%22%20ALEC%22

[14] *Id.* at pp. 5-6.

[15] June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

[15] United States Department of Justice, *Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises.* Washington, DC, August 1993.

[16] http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm21.pdf. The Report begins with the following quote from Tim Daley, British Animal Liberation Front Leader:

> In a war you have to take up arms and people will get killed, and I can support that kind of action by petrol bombing and bombs under cars, and probably at a later stage, the shooting of vivisectors on their doorsteps. It's a war, and there's no other way you can stop vivisectors.

welfare to "animal rights extremism" and provided charts detailing the types of enterprises that have been "victimized" by animal rights "extremists," the number of times each was "victimized, the types of activity, e.g., threats, vandalism, etc., and the number of incidents in each state."[18]

Six years later, in 1998[19], the increasing intolerance of animal rights and environmental activism continued at the June 9, 1998 Hearing before the House of Representatives entitled, *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS.*[20] The organizing committee, the House of Representatives Subcommittee on Crime Committee on the Judiciary, was led by Chairman of the subcommittee, Bill McCollum, a Republican Congressman who is perhaps most famous for his role as one of the House Managers of President Clinton's impeachment trial.[21] At the Hearing, various conservative politicians including Representatives Stephen E. Buyer, Steve Chabot, Asa Hutchinson and Howard Coble, convened to "consider the growing and extremely disturbing problem of violent acts" by "radical" animal rights and environmental organizations, otherwise referred to as "ecoterrorism."[22] In addition to the unanimously Republican politicians, all of the presenters were either so-called victims of what they called "ecoterrorism" or open opponents thereof. Speakers included Bruce Vincent, business manager of his family company, Vincent Logging, and President of Alliance for America, an umbrella group for several hundred farming, ranching, mining, logging, fishing and private property grassroots groups; Cathi Peterson, a skidder operator for the logging industry and former Forest Service employee; Ron Arnold, author of the book, *Ecoterror – The Violent Agenda to Save Nature*; and Barry Clausen, a former licensed private investigator who spent a year pretending to support the activities of the environmental group Earth First! and author of the book, *Walking on the Edge—How I Infiltrated Earth First!*[23] Notably absent from the Hearing was testimony from any environmental or animal rights activist groups.

Although the 1990s proved to be the starting point for the campaign against environmental and animal rights activism, criminalization of environmental and animal rights activism appeared to have begun near the dawn of the twenty-first century. The devastating terrorist attacks on September 11, 2001, prompted the government to take a more serious look at the state of security of the United States. Less than one month after the attacks, Senator Pat Roberts sponsored a resolution to establish "a Select Committee on Homeland Security and

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[17] http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm21.pdf.

[19] The prevalence of conservative opinions on both the radio and internet helped keep the opponents of animal and environmental rights strong between 1992 and 1998. Sheldon Rampton and John Stauber, *Banana Republicans: How the Right Wing Is Turning America Into a One-Party State*), Summary of the chapter entitled "The Echo Chamber." http://www.sourcewatch.org/index.php?title=Banana_Republicans:_The_Echo_Chamber ("The number of talk-radio stations in the United States jumped from 200 in 1986 to more than 1,000 eight years later, mostly featuring conservative hosts and heavily Republican audiences. Conservatives have also used the Internet effectively as part of an integrated communications strategy, which, like direct mail, blurs the boundaries between news, commentary, advertising and partisan advocacy.")

[19] June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

[21] http://en.wikipedia.org/wiki/Bill_McCollum

[22] June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session. At p.7.

[23] June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session.

Terrorism" with stated purposes including assisting "the Senate in coordinating and prioritizing Federal reforms . . . to detect, deter, and manage the consequences of terrorism . . . ; and to make such recommendations, including recommendations for new legislation and amendments to existing laws . . . . "[24] The result of this resolution was the October 26, 2001 passage of the USA Patriot Act, which was essentially designed to "deter and punish terrorist acts in the United States and around the world."[25] In its efforts to do so, however, the Patriot Act created a new legal category of "domestic terrorism," broadly defined as, "activities that . . . . appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion. . . ."[26]

The Patriot Act provides the framework for various ecoterrorism state bills designed to criminalize constitutionally protected speech activity when said activity is performed by environmentalists or animal rights activists.[27] Paralleling the wording of the Patriot Act, state ecoterrorism bills penalize individuals who "intimidate," "deter," "disrupt" or "obstruct" facilities that are involved in the exploitation of animals or natural resources.[28] The connection between the government's response to the 9/11 attacks and the rise of ecoterrorism bills is most apparent in consideration of Republican Congressman Don Young's statement on the day of the 9/11 attacks that "There's a strong possibility that [ecoterrorists] could be one of the groups [responsible for the attacks]."[29]

Congressman Young's statement should not come as a surprise after the political animosity towards animal rights and environmental activists had time to brew in the preceding decade and had gained sufficient support to inspire post-Patriot Act ecoterrorism bills. The political nature of the bills cannot be denied in consideration of other criminal acts that do not, according to lawmakers, rise to the highest level of domestic "terrorism," such as those of the anti-abortion movement. Indeed, despite the fact that anti-abortion efforts, which are specifically designed to "intimidate," "deter," and "disrupt" the daily procedures at abortion clinics, have resulted in horrific murders, ecoterrorism state bills target only those acts that interfere with industries involved in the exploitation of natural resources or animals.

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[24] S. Res. 165 § 1(b)(1)(A), (D), 107th Cong. (2001), LEXIS 2001 S. Res. 165.
[25] HR 3162 RDS, 107th Congress, 1st Session, IN THE SENATE OF THE UNITED STATES, October 24, 2001
[26] *Id.*
[27] Ethan Carson Eddy credits the Model Animal and Ecological Terrorist Act, promoted by the U.S. Sportsmen's Alliance and ALEC, for providing states with the ecoterrorism bills' linguistic structure. 22 Pace Envt. L. Rev. 261, 263-264 (2005).
[28] *See fn 29.*
[29] Case Note: THE USA PATRIOT ACT: ADDING BITE TO THE FIGHT AGAINST ANIMAL RIGHTS TERRORISM? Fall, 2002, 34 Rutgers L. J. 187, Denise R. Case (citing Paul Clarke, Proceeding with Caution: In the Wake of September 11, Environmental Direct-action Groups Change their Tactics, 13 E 14 (2002). "Congressman Young soon joined his colleagues in condemning Osama bin Laden, but the targets of his original accusations are not entirely at ease.")

II. ECOTERRORISM BILLS ACROSS THE UNITED STATES[30]

As of this writing, at least thirty states[31] have passed into law some form of an ecoterrorism bill.[32] Some bills clearly proscribe "terrorist" activity against facilities that involve natural resources or animals[33] while some target acts by animal liberationists, specifically proscribing the taking of animals from an animal facility.[34] Usually containing at least one of the aforementioned proscriptions, some bills also contain specific prohibitions against the unauthorized possession or taking of documents, information, or data by any and all means, including video and photography.[35]

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[30] This article focuses on bills that have already been signed into law. The author would be remiss in neglecting to mention, however, the bill that is pending as of the time of this writing called the Animal Enterprise Terrorism Act, which contains amendments to the Animal Enterprise Protection Act, 18 U.S.C. §43. The amendments, S.1926, introduced by Senator James Inhofe (R-OK), and H.R. 4239, introduced by Rep. Thomas Petri (R-WI), seek to amend the Animal Enterprise Terrorism Act by, inter alia, expanding the class of criminal behavior from "physical disruption" to activity "damaging" or "disrupting" an animal enterprise and expanding the class of criminal behavior to include threatening conduct. The proposed bill is riddled with the same flaws as the ecoterrorism bills that are the subject of this article.

[31] Alabama, Code of Ala. § 13A-11-150 et seq.; Arizona, A.R.S. §13-2301 et seq. (fits into larger racketeering statute but specifically defines "animal facility"); Arkansas, A.C.A. §5-62-201 et seq.; California, Cal. Pen Code §602, enacted through S.993, 2003-04 Reg. Sess. (Cal 2003); Florida, Fla. Stat. §828.40 et seq; Georgia, O.C.G.A. §4-11-30; Idaho, Idaho Code §§18-7040, 22-5001; Illinois, 720 ILCS 215/1 et seq.; Iowa, Iowa Code §717A.1 et seq.; Kansas, KSA §47-1825 et seq.; Kentucky, KRS §437.410 et seq; Louisiana, La. R.S. 14:228 et seq, La. R. S. 14:102.9; Maine, LD 1789; Maryland, Md. CRIMINAL LAW Code Ann. §6-208; Minnesota, Minn. Stat. §§346.56, 604.13; Mississippi, Miss. Code Ann. §69-29-301 et seq; Missouri, §§578.405 R.S. Mo. et seq., 578.414 R.S.Mo. et seq; Montana, Mont Code Ann. §81-30-101; New Hampshire, N.H. Rev. Stat. Ann. §644:8-e; New York, N.Y. Agric. & Mkts. Law §378; North Dakota, N.D. Cent. Code §12.1-21.2-01; Ohio, Ohio Rev. Code Ann.§§2909.21, 2923.31; Oklahoma, Okla Stat. tit. 2, §5-104 et seq., Okla. Stat. tit. 21, §1680; Oregon, H.R. 3518, 72nd Leg. Assem.; Pennsylvania, HB 213, 18 Pa. Cons. Stat. §3311, 42 Pa. Cons. Stat. §8319; South Carolina, S.C. Code Ann. §47-21-20; South Dakota, S.D. Codified Laws §40-38-1; Tennessee, Tenn. Code Ann. §39-14-801 et seq.; Utah, HB 322, Utah Code Ann. §§76-6-110, 76-6-206, 76-10-2401, 76-10-2401; Washington, Wash. Rev. Code §§4.24.570, 9.08.080; Note that the author purposefully excluded Colorado, C.R.S. 35-31-201; Hawaii, HRS §141-8 and West Virginia, HB2744 (2001 W.Va. Acts, Ch. 7), statutes that only proscribe the taking or tampering of agricultural crops.

[32] The first ecoterror bills to have passed were seemingly that of Minnesota (1988) and Louisiana (1989), however Minnesota's statute (346.56) appears to be less broad, in that it applies only to the "release" of animals and does not provide criminal penalties (only a right of the owner to sue for damages).

[33] *See, e.g.*, Arkansas, A.C.A. §5-62-201 et seq; California, Cal Pen Code §602, enacted through S.993, 2003-04 Reg. Sess. (Cal. 2003); Washington, Title 4, Ch. 4.24, §4.24.580 et seq.; Mississippi, Miss. Code Ann. §69-29-301 et seq; Florida, Fla. Stat. §828.40 et seq.; Ohio, Ohio Rev. Code Ann.§§2909.21, 2923.31; South Dakota, S.D. Codified Laws §40-38-1.

[34] *See e.g.* Missouri, §578.407 R.S. Mo. ("No person shall: (1) Release, steal or otherwise intentionally cause the . . . . loss of any animal . . . . from an animal facility and not authorized by that facility…"); Minnesota, Minn. Stat. §346.56 (" A person who without permission releases an animal lawfully confined for science, research, commerce, or education is liable: (1) to the owner of the animal for damages . . . ."); Louisiana, La. R. S. §14:228.1 ("It shall be unlawful for any person to intentionally and without permission, release any animal, bird, or aquatic species which has been lawfully confined for agriculture, science, research, commerce, public programming, protective custody, or education. . ."); *see also* [34] Alabama, Code of Ala. § 13A-11-150 et seq ; New York, N.Y. Agric. & Mkts. Law §378, Idaho, Idaho Code §§18-7040, 22-5001; Illinois, 720 ILCS 215/1 et seq.; Iowa, Iowa Code §717A.1 et seq.; ; South Carolina, S.C. Code Ann. §47-21-20.

[35] *See e.g.*, .Kansas, KSA §47-1827(c) ("No person shall, without the effective consent of the owner . . . . . (4) enter an animal facility to take pictures by photograph, video camera or by any other means. . . ."); ; Illinois, 720 ILCS 215/4 ("It shall be unlawful for any person, ... (4) to enter an animal facility with an intent to . . . . obtain unauthorized possession of records, data, materials, equipment, or animals; (5) by theft or deception knowingly to

This article will focus on the bills that proscribe acts that clearly fall within the ambit of the First Amendment and therefore are arguably unenforceable.[36] Many of the ecoterrorism bills employ the same linguistic rubric with regard to anticipated activities of animal rights and animal welfare activists:

> No person shall, without the effective consent of the owner of an animal facility . . . . disrupt or damage the enterprise conducted at the animal facility.[37]

The obvious pivotal word that creates a First Amendment concern is the vague and overbroad term, "disrupt."[38] In Section III, A of this article, *infra*, the author will discuss the First Amendment concerns of the ecoterrorism bills at length.

One state's ecoterrorism bill presents unique language that distinguishes it from its counterparts. Pennsylvania's ecoterrorism bill includes a phrase that, if applied properly, would protect against First Amendment restrictions. The bill had passed the House by a wide margin in March 2005 and gained considerable support after members of the Animal Liberation Front caused almost $40,000 in damage to a local peony farmer who wanted to house 500 monkeys for research laboratories.[39] Various special-interest groups lobbied for the bill such as the pharmaceutical industry, biotech industry, Pennsylvania Farm Bureau, and Pennsylvania Forestry Association.[40] In April 2006, Pennsylvania's Governor Ed Rendell signed into law HB 213, which is entitled "Ecoterrorism" and provides in pertinent part:

> §3311. Ecoterrorism
>
> (a) General rule – A person is guilty of ecoterrorism if the person commits a specified offense against property intending to do any of the following:

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obtain control . . . . over records, data, materials, equipment, or animals of any animal facility. . . . ."); *see also* ; Idaho, Idaho Code §§18-7040; Alabama, Code of Ala. § 13A-11-150 et seq; North Dakota, N.D. Cent. Code §12.1-21.2-01.

[36] It should be noted that to date, it does not appear that any individual has been prosecuted under these state offenses, which causes one to doubt their utility and even further question the true intent of the drafters.

[37] *See e.g.*,O.C.G.A. 4-11-32(a)(1)("A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.")*;*Miss. Code Ann. §69-29-305 ("A person shall not, without the effective consent of the owner, acquire or otherwise control over an animal facility or other property from an animal facility with the intent to deprive the owner of the facility, animal or property and to disrupt or damage the enterprise conducted at the animal facility."); *see also* Arkansas, A.C.A. §5-62-201 et seq; Kentucky, KRS §437.410 et seq; Florida, Fla. Stat. §828.40 et seq; .; Iowa, Iowa Code §717A.1 et seq.

[38] A handful of states that have analogous prescriptions use terms other than "disrupt," such as "obstruct" (South Dakota, S.D. Codified Laws §40-38-1 and Ohio, Ohio Rev. Code Ann.§§2909.21, 2923.31). This term is obviously vague and overbroad as well, but for purposes of focus, the author chooses to narrow in on the term "disrupt" as more statutes employ this term over other broad and vague terms.

[39] Online news article by Alison Hawkes, "Fighting 'ecoterrorism'", The Intelligencer - 2005 Copyright Calkins Media, Inc.

[40] http://pittsburgh.indymedia.org/?PHPSESSID=64b062986e8237d2c94b73190a833473

> (1) Intimidate or coerce[41] an individual lawfully:
> (i) Participating in an activity involving animals, plants or activity involving natural resources; or
> (ii) Using an animal, plant or natural resource facility.
> (2) Prevent or obstruct an individual from lawfully:
> (i) Participating in an activity involving animals, plants, or an activity involving natural resources; or
> (ii) Using an animal, plant or natural resource facility . . . . .
>
> (c.1) Immunity – A person who exercises the right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania on public property or with the permission of the landowners where the person is peaceably demonstrating or peaceably pursuing his constitutional rights shall be immune from prosecution for these actions under this section or from civil liability under 42 Pa. C.S. §8319 (relating to ecoterrorism).[42]

The above immunity section is what makes this ecoterrorism bill unique among the other bills across the country.[43] It clearly expresses legislative concern that First Amendment rights should not otherwise be abridged by the enactment of the law. Nonetheless, the immunity provision did not satisfy animal rights and environmental activist groups in Pennsylvania, and some objected by way of formal letters, [44] while others objected by testifying at the June 6, 2005 Senate Judiciary Committee meeting.[45]

Obvious concerns of animal rights and welfare groups were that their otherwise legal acts, such as certain protests, shutting down puppy mills and rescuing pigeons injured in shoots, would be considered criminally prosecutable under the broad terms of the Act.[46] Other concerns

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[41] These terms are verbatim lifted from the Patriot Act. HR 3162 RDS, 107th Congress, 1st Session, IN THE SENATE OF THE UNITED STATES, October 24, 2001

[42] 18 Pa. C.S.A. §3311.

[43] *See fn 29.*

[44] E.g., The Sierra Club, Animal Agricultural Alliance, and Citizens for Consumer Justice submitted written testimony. Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

[45] E.g., Humane Society of the United States, American Civil Liberties Union, Pennsylvania Legislative Animal Network, P.N.C., Inc., Gaia Defense League, Coalition for Animals Rights and Animal Welfare, etc. - Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

[46] Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing); *see also* Richard Fellinger, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - , Bill would allow some protesters to be labeled as 'eco-terrorists,' June 07, 2005.

voiced by activists were with the offensive nomenclature chosen for the Act; Heidi Prescott, Senior Vice President of the Humane Society of the United States, advocated changing the term "eco-terrorism" to "eco-intimidation."[47] Larry Frankel, of the American Civil Liberties Union, pointed out that the bill discriminates based on viewpoint and carries the risk of zealous and uncontrolled prosecution that could likely result from the passage of the bill,[48] both constitutional issues of which will be discussed at length in Section III, A, *infra.* Along with concerns of infringement on previously legal animal rights and environmental activities, there is an additional concern about fair notice: there is little doubt that when the Commonwealth attempts to enforce this law, and a defendant seeks to invoke the immunity exemption, the modifying adverbs "peaceably" might be up for judicial interpretation and analysis which can lead to unpredictable results. Despite the arguments in opposition to it, HB 213 was signed into law in April 2006.[49]

III. THE ILL-CHOSEN TERM "--TERRORISM"

A. FLAWED FOUNDATION

Antoine de Saint-Exupery wisely declared that "language is the source of misunderstandings."[50] The flaws in the English language are most obvious in consideration of the term at issue: "ecoterrorism." How can there be any accuracy in such a term when the foundational subject, "terrorism," is so egregiously misunderstood?

The term "terrorism" is over two centuries old[51] and was purportedly coined by the government during the French Revolution.[52] Federal law alone now contains at least nineteen definitions or descriptions of "terrorism"[53] and a terrorism analyst has documented at least 109 definitions of the term.[54] No single definition has been universally accepted[55] and, as such, member states of the U.N. Security Council are permitted to define the term based on their own respective domestic legislative purposes.[56] As far as national security concerns go, terrorism is

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[47] Richard Fellinger, Evening Sun, Harrisburg Bureau, Animal rights, research advocates spar over proposed eco-terror bill - , Bill would allow some protesters to be labeled as 'eco-terrorists,' June 07, 2005.

[48] Eric A. Failing, Report prepared by Pennsylvania Legislative Services, Subject: Senate Judiciary Committee Meeting from 6-6-05, HARRISBURG - (6/06/05, 10:00 a.m., Room 8E-B East Wing).

[49] http://www.state.pa.us/papower/cwp/view.asp?Q=451790&A=11 - April 14, 2006

[50] *Le Petit Prince* (1943); ; North Dakota, N.D. Cent. Code §12.1-21.2-01; ; Oregon, H.R. 3518, 72nd Leg. Assem.;

[51] Frank Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1, 6 N.20 (2002), *citing* MICHAEL CONNOR, TERRORISM: ITS GOALS, ITS TARGETS, ITS METHODS, THE SOLUTIONS 1 (1987).

[52] David B. Kopel & Joseph Olson, Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation, 21 Okla. City U. L. Rev. 247, 251 (1996). (explaining that the term "terrorist" was first defined as, "In the French Revolution, an adherent or supporter of the Jacobins, who advocated and practised methods of partisan repression and bloodshed in the propagation of the principles of democracy and equality." The New Shorter Oxford English Dictionary 3258 (1993)).

[53] Nicholas J. Perry, The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. Legis. 249, 255 (2004).

[54] Alex Schimd & Albert J. Jongman, Political Terrorism 119-52 (1983).

[55] Lucien J. Dhooge, A PREVIOUSLY UNIMAGINABLE RISK POTENTIAL: SEPTEMBER 11 AND THE INSURANCE INDUSTRY, 40 Am. Bus. L.J. 687, 733 (2003).

[56] Stefan Talmon, NOTE AND COMMENT: THE SECURITY COUNCIL AS WORLD LEGISLATURE, 99 A.J.I.L. 175, 189 (2005); Interestingly, he notes that such "latitude enabled Syria, for example, to adopt the definition of terrorism contained in the Arab Convention for the Suppression of Terrorism, 'which clearly

the new Communism and in fact this replacement of our perceived enemy is ubiquitously reflected in the American lexicon.[57] It has been noted that the definition of "terrorism" has become even more cryptic since the September 11th attacks.[58] Indeed, "[a] new vocabulary emerged from the rubble and debris," including global buzzwords like "evildoers" or the commonly iterated "axis of evil."[59]

Due to its imprecision and ambiguity, the term "terrorism," remarked noted author R.R. Baxter, serves "no operative legal purpose."[60] In fact, in numerous judiciary opinions in which the courts attempted to apply various statutes that define terrorism to actual controversies, the results have been inconsistent and irreconcilable.[61] It is agreed upon that terrorism, however aimlessly defined, is political in nature and designed to inflict fear upon a specific group to advance a political or ideological agenda.[62] It should be no conceptual stretch then to consider that a government's efforts to combat terrorism would also be crafted to serve certain political agendas. Different groups, governmental and otherwise, manipulate the definition of terrorism to include particular targets in order to effectuate a certain political agenda,[63] hence the cliché "one man's terrorist is another man's freedom fighter."[64] The fact that states found a pressing need to craft anti-"terrorism" bills designed specifically to combat activities of two main special interest groups, environmentalists and animal rights/welfarists leads one to the conclusion that the term "terrorism" is haphazardly guided by the speaker's moral compass, sensibilities, and judgment in the murky waters of subjectivity.[65]

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distinguishe[s] between terrorism and legitimate struggle against foreign occupation,' excluding violent acts by groups such as Hamas, the Al Aqsa Martyrs Brigades, and Islamic Jihad (which are seen as fighting the Israeli occupation of Arab territories in Palestine) from the application of the resolution [1373]."), Id.

[57] Popular media, language, and legislation reflect this shift. Jules Lobel, The War on Terrorism and Civil Liberties, 63 U. Pitt. L. Rev. 767, 786 (2002)("The [Patriot] Act threatens to resurrect many of the abuses reminiscent of the Cold War. For example, in 1991 Congress repealed the much-criticized provision of the McCarran-Walter Act, which permitted the government to deny entry to any immigrant because their speech or writings supported Communism. Section 4511 of the [Patriot] Act resurrects this provision but substitutes terrorism for Communism."); see also 35 Geo. Wash. Int'l L. Rev. 411, 423 (2003) THE STEVEN L. CANTOR INTERNATIONAL TAX SYMPOSIUM: ARTICLE: REMARKS OF THE HONORABLE MIA MOTTLEY ATTORNEY GENERAL & MINISTER OF HOME AFFAIRS OF BARBADOS

[58] Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?*19 Am. U. Int'l L. Rev. 1009, 1030 (2004).

[59] Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?* 19 Am. U. Int'l L. Rev. 1009, 1030 (2004).

[60] R.R. Baxter, A Skeptical Look at the Concept of Terrorism, 7 Akron L. Rev. 380, 380 (1973).

[61] Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 Am. Bus. L.J. 687, 732 (2003).

[62] FRANCISCO J. GONZALEZ MAGAZ, *Can good fences make good neighbors?: The Virtues of the Green Line Fence*, 74 Rev. Jur. U.P.R. 173, 201 (2005); Vincent-Joel Proulx, 19 Am. U. Int'l L. Rev. 1009, 1035 (2004).

[63] H.H.A. Cooper, *Terrorism: The Problem of the Problem of Definition*, 26 Chitty's L.J. 105, 106-7 (1978) ("The term 'terrorism' is a judgmental one in that it not only encompasses some event produced by human behavior but seeks to assign a value or quality to that behavior ... . The problem of the definition of terrorism is more than semantic. It is really a cloak for a complexity of problems, psychological, political, legalistic, and practical.")

[64] Matthew H. James, *COMMENT: Keeping the Peace - British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int'l L. 405, 406 (1997).

[65] New York Times columnist William Saffire said it best: "The name you choose to give [hostilities, violence, war] not only reflect your view about the current state of affairs but is also an indication of where you stand on what our policy should be. Labels are the language's shorthand for judgments."); 12.17.06 "On Languages", New York Times Magazine., p.24.

B. WILL THE REAL TERRORIST PLEASE STAND UP?

Despite the humane goal of animal liberationists, they are considered by the FBI to be the most active and threatening domestic terrorists in the United States.[66] There are currently over 700 hate groups in the United States,[67] including neo-Nazi and white supremacist groups, in addition to armed militiamen and snipers, who are all being overlooked now that the FBI is focusing its efforts on the domestic terrorists that cause them the most concern: those whose main goal is to free animals from violent, harmful, and life-threatening exploitation.[68] Accusations of terrorist activity are not directed solely at animal liberationists – these baseless attacks target the gamut of animal rights and animal welfarists, and have even focused on health groups that advocate a vegetarian diet.[69] Thus seemingly no one with any concern for animal welfare is safe from accusations of terrorism.

Because the term "terrorism" is so commonly used and so frequently abused, it can apply to "actions ranging from flying fully loaded passenger planes into buildings to rescuing pigs and chickens from factory farms."[70] Key players in the disparaging categorization of animal rights activists and welfarists are the agricultural industry, in which farm animals including cows, pigs, and chickens are housed in windowless metal warehouses, rotted wire cages, and/or gestation crates;[71] the clothing industry, in which animals such as minks, cows, and sheep, are skinned alive, castrated without anesthetics, and/or eventually killed by anal or genital electrocution;[72] and the scientific industry, in which animals including dogs, mice, and monkeys, are subjected to being forced to inhale cigarette smoke, having probes inserted into their heads, and/or being made sick by deadly viruses.[73] Animal rights activists, welfarists, and liberationists share the special concern for the interests and safety of nonhuman animals, and seek ways to reduce, and ultimately completely abolish, the human-imposed suffering of nonhuman animals.[74] The

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[66] Congressional Testimony of John E. Lewis, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, Before the Senate Judiciary Committee, May 18, 2004 – http://www.fbi.gov/congress/congress04/lewis051804.htm ("During the past several years . . .. . special interest extremism, as characterized by the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and related extremists, has emerged as a serious domestic terrorist threat. . . . In recent years, the Animal Liberation Front and the Earth Liberation Front have become the most active criminal extremist elements in the United States.")

[67] The Southern Poverty Law Center is tracking over 700 hate groups around the nation. http://www.splcenter.org/intel/intpro.jsp

[68] The author recognizes that there are members of the animal liberation movement who apparently thrive in the accusation of terrorism and certainly do not help the author's argument that animal liberationists should not be called terrorists. See, e.g., the following quote attributed to Mike Roselle, of Earth First, "…This is Jihad, pal. There are no innocent bystanders, because in these desperate hours, bystanders are not innocent. We'll broaden our theater of conflict." http://www.envirotruth.org/ecoterrorism.cfm, or the quote by Tim Daley in fn __, *supra.*

[69] Feb. 20, 2004 episode of Dateline, in which Veronica Atkins, the widow of the man who invented the Atkins diet, compared a pro-vegetarian public health advocacy group directly to the Taliban. 22 Pace Envt. L. Rev. 261, fn315 (2005) (citing Patrick Whittle, Vegetarians Chew the Fat Over the Atkins Diet, Herald-Trib. (Sarasota, Fla.), Feb. 23, 2004.)

[70] Best, Steven, Ph.D., Nocella, Anthony J. II, editors, *Terrorists or Freedom Fighters? Reflections on the Liberation of Animals,* (New York Lantern Books 2004), p.361.

[71] http://www.peta.org/actioncenter/food.asp

[72] http://www.peta.org/actioncenter/clothing.asp

[73] http://www.stopanimaltests.com/feat/thelab/index.html

[74] The intersection of beliefs apparently stops there. Gary Francione delineates the various differences in beliefs and goals of various animal-related movements. Gary L. Francione, Abolition of Animal Exploitation: The Journey Will Not Begin While We Are Walking Backwards (2006). http://www.abolitionist-online.com/article-issue05_gary.francione_abolition.of.animal.exploitation.2006.shtml

inaccurate usage of the term "terrorism" to describe acts of animal rights and welfare activism[75] is especially preposterous in consideration of the compassion, empathy, and justice that activists express for all living beings, especially the particular species who remain vulnerable and voiceless in the face of some of the life-threatening and/or otherwise violent acts of various agricultural, industrial, and scientific facilities.[76] Animal liberationists, it has been argued, are the antithesis of the terrorists that the government and industries accuse them of being.[77] One might even remark that it is not animal rights and welfare activists who engage in violent and terrorist activities, but the proponents of the ecoterrorism bills, i.e., the industries and facilities that profit from the exploitation of animals, that do so by engaging in such acts as, branding, tail docking, teeth cutting, debeaking, castration, confinement, scalding, mutilating, chemical poisoning, skinning, and dismembering.[78]

IV. ECOTERRORISM BILLS AND THEIR INHERENT VIOLATIONS OF THE FIRST AMENDMENT

The text of the original Constitution itself provides a remarkable framework for the ideals of our founding fathers. But that text was ratified only with the assurance that the Bill of Rights would attach.[79] Only a rigorous analysis of the people's "unalienable rights" and the laws that seek to restrict those rights can further the principles of freedom that are central to the First Amendment.[80] It is well understood that, in the wide-open marketplace of ideas, only through the unrestricted publication of these ideas can truth prevail.[81]

A. OVERBROAD AND VAGUE ECOTERRORISM BILLS INFRINGE ON THE FREEDOM OF SPEECH THAT IS VITAL TO OUR NATION'S PROGRESS

Freedom of speech in the First Amendment is thus considered by the courts to be "almost absolute" and vital to bring about political, social, and economic change.[82] Freedom of speech is not completely absolute as there are time, place, and manner restrictions, and discrete categories of speech that are condemnable based on their content.[83] These categories include yelling "fire" in a crowded theatre, child pornography, fighting words, and, to a limited extent, libel.[84] Such

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[75] Mark Bernstein, Ph.D. comments on the significance of the connotations of our language: "terrorism" is negative; "liberation" is positive. *Terrorists or Freedom Fighters*, *supra*, p.93. Notably, animal liberationists are called "terrorists" by those who know that distinction.

[76] Indeed, even the individual whom many call the father of the animal liberation movement, Peter Singer, advocates making changes by way of civil disobedience. He wrote, "Nonviolent responses to the frustrations of the democratic process carry less risk of doing damage to the fabric of civil society. Gandhi and Martin Luther King have shown that civil disobedience can be an effective means of demonstrating one's sincerity and commitment to a just cause." Singer, *In Defense of Animals, The Second Wave*, p. 10 (Blackwell 2006).

[77] *Id.* at p.12.

[78] *Id.* at p.31.

[79] *The UWM Post, Inc. v. Univ. of Wisconsin*, 774 F. Supp. 1163, 1181 (E.D. Wisc. 1991).

[80] *Id.*

[81] *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984)(citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[82] *See UWM Post, Inc.*, 774 F. Supp. at 1181; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

[83] *R.A.V.*, 505 U.S. at 400.

[84] *See id.; see also UWM Post Inc.*, 774 F. Supp. at 1169.

expressions of speech are considered to be of such slight social value, and because of their *de minimus* value, their costs to order in society outweigh any benefit that may be otherwise derived from them.[85]

Outside of this realm of low value speech, however, the Court has sanctioned a rigidly speech-protective set of standards and sustains content-based restrictions only in the most exceptional of circumstances.[86] The Constitution's protection of speech is essentially a "pre-commitment" of the government to abstain from inhibiting the free expression of ideas, which thereby ensures the "continued building of our politics and culture."[87] In fact, this pre-commitment is such that it seeks to protect not only expressions with cognitive value, as the marketplace of ideas concept suggests, but also expressions with emotive value.[88] In any case, laws that proscribe any type of speech must err on the side of narrowness, not overbreadth, as the First Amendment should "not permit legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set a large.'"[89]

1. OVERBROAD

In the First Amendment context, criminal statutes must be narrowly drafted so that protected speech is not inhibited.[90] A criminal statute will be deemed facially invalid where it makes unlawful a substantial amount of constitutionally protected conduct even where the statute otherwise has a legitimate application.[91] The governmental purpose for the restriction, albeit legitimate and substantial, "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[92] So while the courts recognize that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," there is no question that when a statute lumps together unprotected speech with protected speech, the statute fails for being overbroad.[93] The Court has so found for fear that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . ."[94] The Court thus sanctioned the 'overbreadth doctrine' in order to prevent the possible chilling of protected expression by state laws.[95]

Ecoterrorism bills fail under the overbreadth doctrine as they widely proscribe forms of speech that are constitutionally protected. The majority of ecoterrorism bills use a proscription similar to, "No person shall . . . disrupt the enterprise conducted at an animal facility." The pivotal term in these bills is "disrupt." The verb "disrupt" has been defined by multiple sources generally as "(1) to interrupt the usual course of a process or activity; (2) to destroy the order or

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[85] *UWM Post Inc.*, 774 F. Supp. at 1169.
[86] *UWM Post Inc.*, 774 F. Supp. at 1174.
[87] *UWM Post Inc.*, 774 F. Supp. at 1174.
[88] *Cohen v. California*, 403 U.S. 15, 26 (1971).
[89] *City of Chi v. Morales*, 527 U.S. 41, 60 (1999).
[90] *See UWM Post, Inc.*, 774 F. Supp. at 1168.
[91] *R.A.V.* , 505 U.S. at 414 ("Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment.").
[92] *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964).
[93] *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).
[94] *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).
[95] *R.A.V.*, 505 U.S. at 402.

orderly progression of something."[96] Activities that could essentially "disrupt" the enterprise conducted at an animal facility could include a person walking by the window with a brightly colored tee-shirt, the wording on which conspicuously described damaging information about the torturous conditions at the animal facility, or a peaceful assembly outside of the facility during which protesters pass out leaflets to passersby, which describe the acts that are taking place within the facility. Both activities can be considered "disruptive" to the enterprise conducted at the facility, but both activities are also typically considered lawful protest activities.[97]

Ecoterrorism bills also fail under the overbreadth doctrine as they proscribe activity that is already otherwise covered in criminal laws and, as already noted, statutes are deemed overbroad where the generalized prohibited activity is already proscribed in narrower statutes already in effect.[98] The states that have passed ecoterrorism bills all have criminal codes that already proscribe most, if not all, of the criminal acts in the ecoterrorism bills, such as penal statutes proscribing harassment, placing another in fear of imminent physical injury, danger or damage to another's real property, vandalism, and criminal trespass.[99] The acts that are not covered by the above list of crimes fail nonetheless for overbreadth as they involve acts of "disruption" or "obstruction."

2. VAGUENESS

A penal statute may be considered unconstitutionally vague for either of two independent reasons: (1) it fails to provide sufficient notice to enable ordinary people to understand what conduct is prohibited; or (2) it may authorize or encourage arbitrary and discriminatory enforcement.[100]

The first void-for-vagueness characteristic of a statute is where the statute requires a person to conform her conduct to an imprecise standard and as a result, "men of common intelligence must necessarily guess at its meaning."[101] A penal statute thus must define the criminal offense with sufficient specificity so that ordinary people can understand exactly what conduct is being proscribed.[102] A penal statute otherwise is at risk of having a double meaning and the citizen could risk acting upon one conception of its requirements and the courts upon

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[96] Encarta World English Dictionary, North American edition. http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861605371; *see also* The American Heritage® Dictionary of the English Language: Fourth Edition. 2000, http://www.bartleby.com/61/55/D0285500.html ("1. To throw into confusion or disorder: *Protesters disrupted the candidate's speech.* 2. To interrupt or impede the progress, movement, or procedure of: *Our efforts in the garden were disrupted by an early frost.* 3. To break or burst; rupture."); Cambridge International Dictionary of English, http://dictionary.cambridge.org/define.asp?key=22586&dict=CALD ("to prevent something, especially a system, process or event, from continuing as usual or as expected").

[97] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987).

[98] *Coates*, 402 U.S. at 614 ("The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited.").

[99] *See, e.g.*, Pennsylvania's criminal codes, 18 Pa. C.S.A. §2701, 18 Pa. C.S.A. §2705, 18 Pa. C.S.A. §2709, 18 Pa. C.S.A. §3301 18 Pa. C.S.A. §3304, 18 Pa. C.S.A. §3307, 18 Pa. C.S.A. §3309.

[100] *City of Chi v. Morales*, 527 U.S. 41, 56 (1999).

[101] *Coates*, 402 U.S. at 614 (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

[102] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

another, resulting in an unfair prosecution.[103] Perhaps the most compelling concern with regard to vague statutes is that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked."[104]

Ecoterrorism bills fail under this fair notice requirement as the language in the bills are not sufficiently specific so as to put a person on notice as to what actions are and are not being proscribed. As mentioned in the overbreadth discussion, *supra*, the use of the verb "disrupt" renders ecoterrorism bills vague as a person of ordinary intelligence would have to speculate as to what is exactly proscribed and what it not. Speech activity can be disruptive sometimes to some business at an animal facility, but not necessarily all the time to every aspect of business at the animal facility. The Supreme Court has struck ordinances for vagueness that are directly analogous in this regard to the ecoterrorism bills.[105] One ordinance, for example, that the Supreme Court struck as unconstitutionally vague was a Cincinnati, Ohio provision, which made it a criminal offense for three or more persons to assemble on any of the city's sidewalks and conduct themselves "in a manner annoying to persons passing by."[106] The Court found that the ordinance was unconstitutionally vague because "[c]onduct that annoys some people does not annoy others."[107] As "annoy" and "disrupt" are synonyms,[108] it can easily be analogized and argued that conduct that is disruptive to some people is not disruptive to others. The ecoterrorism bills thus fail for vagueness as they do not put one on notice as to what is illegally "disruptive" and what is not.

The second reason statutes are found to be impermissibly vague is that the lack of explicit standards for those who have to enforce them might result in arbitrary or discriminatory enforcement.[109] A law will be considered vague where "it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[110]

There is no more pressing concern for animal rights activists and welfarists than the valid fear of arbitrary and discriminatory enforcement. Indeed, vague laws like ecoterrorism bills all but invite discriminatory enforcement against those whose "ideas, ... lifestyle, or . . . . physical appearance [are] resented by the majority of their fellow citizens."[111] Police and other personnel should not be left to make those subjective determinations of who is and is not disrupting conduct at an animal facility lest they should be influenced by public intolerance or animosity towards animal activists, which is clearly prohibited as an abridgement of constitutional freedoms.[112] Indeed, even constitutionally permissible restrictions on speech, such as time, place, and manner restrictions, do not allow limitations on speech unless the speech is "shown likely to produce a clear and present danger of a serious substantive evil that rises far above

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[103] *Connally*, 269 U.S. at 393.
[104] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)(citing *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).
[105] *See, e.g., Coates*; *City of Chi;*; It is interesting to note that Utah's ecoterrorism bill criminalizes conduct "that tends to cause *annoyance*," (emphasis supplied) which clearly does not pass constitutional muster following the precedent set by *Coates*.
[106] *Coates.*
[107] *Coates*, 402 U.S. at 614.
[108] http://thesaurus.reference.com/search?q=annoy&start=11
[109] *Grayned*, 408 U.S. at 108.
[110] *Grayned*, 408 U.S. at 108-109.
[111] *Coates,*, 402 U.S. at 616; *see also fn31 (*quote from Veronica Atkins)
[112] *Coates*, 402 U.S. at 615.

public inconvenience, annoyance, or unrest."[113] To find otherwise would result in the loss of the very distinction that "sets [this country] apart from totalitarian regimes."[114]

B. BONAFIDE VIEWPOINT DISCRIMINATION – ECOTERRORISM BILLS PROMOTE GOVERNMENTAL THOUGHT CONTROL

Aside from the categorical restrictions (yelling fire in a movie theatre, etc.) and time, place, and manner restrictions, the government is not permitted to restrict speech. In fact, the bedrock principle underlying the First Amendment is that the government may never restrict expression because of its message, its ideas, its subject matter, or its content.[115] After all, the essence of the First Amendment principles derives from the Founders' intention, which was

> . . . to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[116]

Suppression of speech, based on its content, "completely undercut[s] the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" and is nothing short of "governmental thought control."[117]

It is well established that when the speaker's views differ from what the government perceives to be the larger societal view, that speaker's ideas deserve paramount constitutional protection.[118] Upon reviewing the legislative purposes of the ecoterrorism bills, [119] there is no question that the viewpoint of animal rights activists widely diverges from that of the legislature. For example, Kentucky's criminal code includes a chapter on "Offenses Against Public Peace -

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[113] *Karlan v. Cincinnati,* 416 U.S. 924, 927 (1974)(citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):
The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

> Accordingly a function of free speech under our system of government is to invite dispute . . . . Speech is often provocative and challenging . . . That is why freedom of speech, though not absolute, [citations omitted], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

[114] *Karlan*, 416 U.S. at 927 (citing *Terminiello,* 416 U.S. at 4)).
[115] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Texas v. Johnson,* 491 U.S. 397, 414 (1989); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, et al.,* 502 U.S. 105, 116 (1991).
[116] *Leathers v. Medlock,* 499 U.S. 439, 448-9 (1991).
[117]*Mosley*, 408 U.S. at 96; *UWM Post, Inc.*, 774 F. Supp. At 1174.
[118] *Simon & Schuster,* 502 U.S. at 118 ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *see also Rosenberger v. Univ. of Virginia,* 515 US. 819, 829 (U.S. 1955); *Texas*, 491 U.S. at 414; *Mosley,* 408 U.S. at 95.
[119] In determining the constitutionality of an ordinance, the courts typically look to the congressional purpose underlying the ordinance. *Aptheker,* 378 U.S. at 508.

Conspiracies -Protection of Animal Facilities."[120] As a justification for the new law, the statute is introduced by the following finding of the General Assembly:

> The General Assembly finds that the caring, rearing, feeding, breeding, and sale of animals and animal products, and the use of animals in research, testing, and education, represents vital segments of the economy of the state, that producers and others involved in the production and sale of animals and animal products and the use of animals in research and education have a vested interest in protecting the health and welfare of animals and the physical and intellectual property rights which they have in animals, and that there has been an increasing number of illegal acts committed against farm animal and research facilities. The General Assembly further finds that these illegal acts threaten the production of agricultural products, and jeopardize crucial scientific, biomedical, or agricultural research, and finally, the General Assembly finds that these illegal acts threaten the public safety by exposing communities to contagious diseases and damage research.[121]

In addition to hosting one of the seemingly longest sentences in the world, Kentucky's legislative finding reveals its viewpoint that using animals for research and testing is beneficial to the state's economy and therefore must be protected from those who disagree with the premise that the wealth of the state is more important than the welfare of those animals.[122] The overbroad statute then criminalizes acts that, *inter alia*, seek to "disrupt" the enterprise "without the consent of the owner."[123] By leafleting near the property with information regarding the

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[120] *KRS § 437.415* (2006)

[121] *KRS § 437.415* (2006) [Findings of the General Assembly; Illinois has a similar statute:

> There has been an increasing number of illegal acts committed against animal research and production facilities involving . . . . criminal trespass and damage to property. These actions not only abridge the property rights of the owner of the facility, they may also damage the public interest by jeopardizing crucial scientific, biomedical, or agricultural research or production. . . . These actions may substantially disrupt or damage publicly funded research and can result in the potential loss of physical and intellectual property. Therefore, it is in the interest of the people of the State of Illinois to protect the welfare of humans and animals as well as productive use of public funds to require regulation to prevent unauthorized possession, alteration, destruction, or transportation of research records, test data, research materials, equipment, research and agricultural production animals. *720 ILCS 215/2* (2006) [Legislative Declaration]

[122] *KRS § 437.415* (2006)

[123] *KRS § 437.420* (2006)[Offenses]

> (1) A person commits an offense if, without the effective consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility, with the intent to deprive the owner of the facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.
>
> (2) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal

physical ramifications for an animal probed by scientists in the name of research, an animal rights activist is potentially disrupting the enterprise without the consent of the owner. On the other hand, if an NRA member is leafleting in the same area regarding that state's restrictions on gun ownership, that activity is not criminally proscribed. Thus it is the viewpoint of the animal rights activist that is being punished.

Even when one considers the portions of the ecoterrorism bills that proscribe the taking of data or animals from the facility, it is clear that the proscription is viewpoint-based. What is otherwise considered a simple theft rises to the level of terrorist activity when the alleged perpetrator is furthering an animal rights cause. Such viewpoint-based discrimination is constitutionally unacceptable as it has been well established that one's speech cannot be suppressed based on the "message on the picket sign."[124]

C. THE CRIMINALIZATION OF PROTECTED SPEECH ACTIVITY IS ROOTED IN MONEY AND POLITICS

Even proponents of ecoterrorism bills have conceded that the bills trample First Amendment rights of animal rights activists and environmentalists,[125] but the paths leading up to the acceptance of these ecoterrorism bills are paved with green: corporations and their professional lobbyist groups are the driving force behind the ecoterrorism bills.[126] Lobbying is often viewed as "the activity of attempting to influence legislation by privately influencing legislators"[127] Interest groups tend to spend more money on hiring a lobbyist – a decent lobbyist will earn between $300,000 and $400,000 a year – than on contributing to campaigns because

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> facility, the person damages or destroys an animal facility or any animal or property in or on an animal facility.
>
> (3) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person enters an animal facility, not then open to the public, with the intent to commit an act prohibited by this section, remains concealed, with the intent to commit an act prohibited by this section, in an animal facility, or enters an animal facility and commits or attempts to commit an act prohibited by this section.
>
> (4) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person enters or remains on an animal facility, and the person had notice that the entry was forbidden, or received notice to depart but failed to do so. For purposes of this subsection "notice" shall mean oral or written communication by the owner or someone with apparent authority to act for the owner, fencing or other enclosure obviously designed to exclude intruders or to contain animals, or a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

[124] *Mosley*, 408 U.S. at 95; *see also Rosenberger*, 515 US. At 829.

[125] Hon. Frank Riggs, June 9, 1998. *ACTS OF ECOTERRORISM BY RADICAL ENVIROMENTAL ORGANIZATIONS*, Hearing before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session. ("Earth First! . . . . condone[s] the use of sit-ins to halt lawful logging practices or, in my office, the normal operation of business. While these protests are certainly within the rights guaranteed to every American under the Constitution, their goal is not public awareness.")

[126] Steven Best, Ph.D., *Terrorists or Freedom Fighters supra*, p. 313.

[127] Ayn Rand, *Capitalism: The Unknown Ideal*, p. 168 (Signet Classics 1967).

lobbying turns out to be a better investment.[128] After all, mindful investment in a Washington lobbyist can yield vast returns in the form of sidelined regulations or reduced taxes.[129] Because lofty political goals are often implicated, lobbying activities can range anywhere from modest social cordialities and pampered lunches to the ascending activities of 'back-scratching', threats, bribes, and blackmail.[130] The culture of lobbying thus is indicative of a "mixed economy – of government by pressure groups."[131]

Corporate lobbyists, in particular, "have so suffused the culture of the city that at times they seem part of the government itself."[132] The strong influence corporations have is evidenced in the finding that in 1990 when Congress passed, and President Bush signed, a substantial deficit-reduction bill, of its approximately $140 billion in tax increases over five years, a mere 11 percent came from corporations; the remaining 89 percent came from individual, taxpaying families.[133]

The model Animal and Ecological Terrorism Act, which provides the Patriot Act framework for state ecoterrorism bills, for instance, was drafted by ALEC, a powerful lobbying organization of which various corporations, including tobacco companies, oil companies, agribusiness trade associations, private corrections facilities, pharmaceutical manufacturers, and the National Rifle Association, are members. [134] The model Animal and Ecological Terrorism Act was subsequently adopted and advanced by the U.S. Sportsmen's Alliance, a front organization for firearms and ammunition manufacturers.[135] For a more detailed picture of the mechanics of these special interests lobbying groups, ALEC membership, for example, earns corporations the right to attend meetings at which their input on new laws is welcome and they are enabled to contact politicians directly.[136] Of ALEC's members are over 2,400 legislators, which is almost one third of all state and federal legislators nationwide.[137] Politicians have very little motivation to resist the arm-twisting of corporation-funded groups like ALEC and, as such, propose and support laws that infringe the rights of those whose interests may be adverse to the financial interests of the ALEC corporations.[138] Thus, the real terrorist in the minds of the legislators becomes the one who inhibits the profits of these corporations.[139]

Sadly, in the debate of how much freedom of speech an animal rights activist is entitled to, the power of inanimate corporate dollars overcomes any compelling concern for the living beings that are at the heart of the otherwise constitutionally protected public discourse.

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[128] Ken Silverstein, *Washington on $10 Million A Day: How Lobbyists Plunder the Nation*, p. 3 (Common Courage Press 1998); *The Lobbyists*, p. xii (The prologue reveals that at the time of the 1992 publication of the book, Thomas Donohue, the chief lobbyist for the American Trucking Associations was paid more than $300,000 per year.).
[129] *The Lobbyists*, at p.4.
[130] *Capitalism*, p. 168.
[131] *Capitalism*, p. 168.
[132] Jeffrey H. Birnbaum, *The Lobbyists: How Influence Peddlers Get Their Way in Washington*, p. 3 (Random House 1992).
[133] *The Lobbyists*, at p. 3.
[134] Eddy article, 22 Pace Envtl. L. Rev. 261, 275-276.
[135] Eddy article, 22 Pace Envtl. L. Rev. 261 ,275 (citing Tom Pelton, Hunters, Activists Have Many States In Cross Hairs: Md. Animal-Rights Groups Join in National Fight, Balt. Sun, Oct. 24, 2004, at 1B.)
[136]Steven Best, Ph.D., *Terrorists or Freedom Fighters supra*, p. 313.
[137]Dolovich, Sharon, ARTICLE: STATE PUNISHMENT AND PRIVATE PRISONS, 55 Duke L.J. 437, 526 (2005).
[138]Lawrence Sampson, *Terrorists or Freedom Fighters, supra, p.*186 ("A politician doesn't have a very long shelf life if he or she doesn't kowtow to the corporate mob.")
[139] Daniel Berry, Clearinghouse for Environmental Advocacy and Research ("If environmental groups cost business money, then they're eco-terrorists.") http://www.drstevebest.org/papers/vegenvani/defining_terrorism.php

V. CONCLUSION

Those seeking to engage in civil disobedience activities on behalf of animals or natural resources must now follow a different set of rules than those, e.g., who wish to engage in similar activities on behalf of citizens desiring to buy artillery without restrictions or on behalf of human embryos. Despite the judiciary's declaration that the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,"[140] the overbroad, vague, and discriminatory ecoterrorism bills promote the very evil that decades of Supreme Court decisions sought to protect against. As it is truly the 'message on the picket sign' that motivated the generation, and subsequent ratification, of ecoterrorism bills, citizens have a very valid fear that we are entering an age of governmental thought control.

[140] *Rosenberger*, 515 US. At 829

DANGEROUS DOG LAWS: FAILING TO GIVE MAN'S BEST FRIEND A FAIR SHAKE AT JUSTICE

CYNTHIA A. MCNEELY & SARAH A. LINDQUIST*

"Addressing the real issues of crime, poverty, animal abuse, ignorance, greed and man's lust for violence is far too daunting a task for most people, and so we blame the dogs for our societal ills."[1]

"In Marion County [Florida], if a dog leaves [his] owners' property and [scares] somebody else, that dog *will* be declared dangerous."[2]

I. INTRODUCTION

It is estimated that 68 million domesticated dogs[3] live in United States households.[4] While dogs continue to assist humans as service or work animals as they have for thousands of years, today their primary role in the United States and most western civilizations is as companions to humans. This has led to dogs being deemed "man's best friend."[5] Yet, despite this privileged status accorded to dogs as compared to other animals, the American legal system treats dogs as the property of humans.[6] Regarding the best interests of dogs and the people who love them, there are both weaknesses and strengths in this designation as property.[7]

When humans and dogs--both species that can have violent tendencies--live in close proximity to each other, there should be no surprise when someone gets injured. Annually, approximately 800,000 Americans seek medical attention for dog bites[8], and the majority of those bitten are children between the ages of five and nine[9]. Causation is varied and far-ranging, but data collected over the course of 36 years indicate that dogs who live their lives as "yard dogs" tethered to chains are far more likely to bite humans than dogs who run at large.[10]

The United States Department of Health and Human Services' Centers for Disease Control and Prevention cite the average number of people killed annually by dogs at 12.[11] Again, most are children, under age 12.[12] Fatal attacks constitute roughly 0.0002 percent of the annual total number of people bitten.[13]

Contemporary news reports have profiled various vicious dog attacks, particularly those resulting in human deaths. For example, in 2001 the brutal mauling death of a San Francisco woman received intense national media coverage.[14] In 1989 in Florida a 73-year-old woman was bitten more than 300 times by three dogs and killed when she attempted to retrieve her newspaper from her driveway.[15]

These events are profoundly tragic and indicate serious problems with some animals--and more accurately, with their owners--that need to be addressed to ensure public safety.[16]

But what is not reported in these stories is the indisputable conclusion borne out by empirical statistical evidence: such incidents are extremely rare and unusual.

The fact is that far more humans are killed or injured annually by other animals, such as cattle[17]--a species most humans do not perceive as dangerous. Far transcending deaths or injuries to humans caused by dogs, cattle, or other animals are the intentionally inflicted deaths or injuries caused by other humans. Humans are far more likely to be killed by being intentionally

or unintentionally shot or stabbed by other humans than they are at being killed by dogs. In 2003 alone, 29,174 humans were killed by people shooting firearms.[18]

Sadly, children are more than 100 times more likely to suffer intentionally inflicted injuries or deaths at the hands of their parents or caregivers than they are by dogs.[19] In 2003, at least 1041 children under age 14 were killed by their parents or caregivers.[20]

Yet, heightened media reporting of dog attacks has resulted in a public perception of dogs as inherently vicious creatures likely to turn on their human house mates or other innocent victims at any moment. While caution is nonetheless necessary in any situation where one deals with any animal--especially interactions involving very young children--the media-inflamed hysteria over "vicious" dogs[21] has resulted in innocent dogs merely engaging in normal dog behaviors, such as running and barking, being treated as abnormal, dangerous, or even vicious criminals deserving of lifelong confinement or even death.[22]

Most states now prosecute dogs believed to exhibit or engage in violent behaviors under "Dangerous Dog" laws. In too many jurisdictions, the Dangerous Dog classification process is a constitutionally flawed, inherently subjective proceeding in which a dog--oftentimes one who is merely engaging in normal dog behaviors--is far more likely to be declared dangerous than not.[23] Often the dogs' human companions are not equated state and federal constitutional protection of their property rights commensurate with their property interests in their dogs.[24] Dog owners who at most should probably be cited for dogs running-at-large or violations of leash laws, are charged high fees and sanctions and are forced to confine their dogs to uncomfortably small enclosures for the rest of their lives. Worse yet, some have had to fight well-endowed local governments to ward off unwarranted death sentences imposed upon their canine friends.[25]

The real story behind the average Dangerous Dog classification process is that too many local governments are declaring too many dogs "dangerous," probably because they fear being held liable in the future should the dogs at issue actually eventually attack a human.[26] In many cases there is no evidence that these dogs possess truly vicious propensities and are engaging in anything other than normal dog behaviors.[27] Subjective standards that accord overwhelming weight to the opinions of those who believe they were approached in "a menacing fashion" or in "an apparent attitude of attack" by a dog--terms used in some statutes or local ordinances--allow the liberal application of the "dangerous" classification to dogs who are merely engaging in normal dog behaviors that are not intended to--and do not--culminate in bites or attacks.

Irrefutably, such actions are an abuse of discretionary governmental power and a breach of justice.

With specific focus on Florida law, this Article explores the validity of non-breed-specific Dangerous Dog laws.[28] Part II of this Article discusses the development of the domesticated dog and his relationship with humans. Part III explores how dogs engage in particular behaviors to communicate with other animals, including humans, and also examines normal and abnormal aggressive dog behavior. Part IV analyzes fatal and non-fatal aggressive dog behavior. Part V reviews the development of the concept of dogs as the property of humans. Part VI explores constitutional protections available to humans as owners of dogs, and government's ability to intrude upon those rights under its police power. Part VII examines Dangerous Dog laws in general, while Part VIII provides a detailed historical review of Florida's state Dangerous Dog law including events that spurred its creation, legislative intent, constitutional flaws in the initial law, general content, process, and application. Part VIII also looks at selected Florida counties' Dangerous Dog ordinances. Part IX presents case studies that illustrate serious flaws in the construction and application of Florida's state and selected local governments' Dangerous Dog

laws. Part X analyzes the confusion resulting from the inartfully drafted state statute that attempts to instruct the parties on the legal procedure that is to follow a dog being declared "dangerous." Part XI discusses whether local government are classifying dogs "dangerous" who are not truly dangerous because they fear being held legally liable in the future should the dogs at issue eventually harm humans or other animals. Part XII offers recommendations for correcting problematic components of Dangerous Dog laws, and for addressing issues underlying most Dangerous Dog cases.

The Article concludes that too many dogs who are not truly dangerous are being classified "dangerous" for a variety of unfounded reasons ranging from the failure of local governments to understand the legislative intent underlying the law, to improper weighing of expert testimony on the dogs' true behavior as compared to the subjective opinions of the complaining parties, to local governments' speculative fear of being held liable in the future should the dogs eventually cause real harm to a human or other animal. The end result is that man's best friend is not receiving the fair shake at justice that he deserves.

II. EVOLUTION OF THE HUMAN-DOG RELATIONSHIP

A. Domesticated Dog Development and Early Life with Humans

Domesticated dogs, known by their Latin name of *Canis lupus* (*familiaris*)[29], are descended from wolves, *Canis lupus*.[30] This genetic conclusion was only recently determined[31] but nonetheless significantly impacts the manner in which we humans must consider the "propensities and nature of an animal that is such an integral part of our society."[32]

Wolves are predatory animals.[33] They have existed for thousands of years by tracking, stalking, running down, and killing prey, with special expertise in hunting in packs.[34]

As early human populations increased and coagulated into communities, wolves foraged for food scraps and waste around these civilizations, which placed them in closer proximity to humans.[35] The closer contact between humans and wolves eventually eroded wolves' natural fearfulness of interaction with humans, and vice versa.[36] Wolves began to follow humans on hunts, aiding them with tracking and cornering stalked prey, and participating in the kill.[37]

Humans recognized the benefit in receiving hunting assistance from creatures with swifter tracking capacities and an enhanced sense of smell, and the human-*Canis lupus* bond was formed.[38] By the time of the last Ice Age, around 12-14,000 years ago, true human domestication of *Canis lupus*, the first such domestication of any wild animal, became a common practice.[39]

Separating these wild but recently domesticated *Canis lupus* from broader gene pools resulted in inbreeding and the emergence of physical and behavioral characteristics not seen comparatively in feral versions.[40] Traits essential to living in the wild, such as a high degree of alertness or sensitivity and quick reactions, were replaced over time through natural selection by behaviors such as docility and even temperament.[41] Even these early humans did not want to live amongst vicious predators who could harm or kill them, and thus the developing wolf-dog who could not resist attacking humans would be killed or run out of camp.[42]

Wolves function within their packs according to a social hierarchy that allows dominant members to be in charge, while subservient ones defer to stronger leaders.[43] Because wolves were accustomed to accepting such structure, when they assumed close cohabitation with humans they more readily allowed the thinking, dominant humans--who could wield weapons to hurt or kill wolves--to become the "alpha dogs" of the pack.[44]

Wolves' physical traits also changed, and they developed smaller head shapes, brain capacities, and tooth size.[45] Consequently, *Canis lupus familiaris* genetically emerged due to changes in the dogs' environment because of living closely with humans in domesticated habitats.[46]

Later, when most ancient human cultures became agriculturally based, dogs were used not only for the occasional hunt,[47] but, over thousands of years, for herding livestock, to carry heavy loads and pull carts or sleds, to guard people and possessions, as service animals, for the amusement of humans through activities such as baiting[48] and dog fighting, to control rodents, to assist on battlefields, sometimes as food themselves, and, in what has arguably become their most enduring role, for human companionship.[49]

B. Changing Relationships, and Cohabitation With Good Dogs and Bad Dogs

As human civilizations advanced, cultures, such as the ancient Egyptians, began to collar and leash dogs, and keep them for companionship.[50] Around 1400 A.D. purebred dogs assumed an elevated role amongst the aristocracy and more privileged classes as status-symbol companions used for formal hunting, a "sport" reserved for the wealthy.[51] However, just as they had for thousands of years, free-roaming mongrels lived intertwined with and alongside humans of all means.[52]

The human-dog relationship continued to grow even more intermingled. Dogs continued to provide services and companionship to humans. Conversely, in most situations dogs received very little from humans in return for their services, subservience, and loyalty. Although select dogs might be permitted to sleep indoors and were provided food, most were expected to remain outside no matter the weather, and to find their own sustenance.[53]

Because dogs were viewed as inferior creatures over which mankind has dominion, humans were usually free to viciously beat, injure, or kill them, whether the violence was justified or not.[54]

Remarkably, beginning in the Middle Ages, some communities prosecuted dogs (and other animals such as pigs, cows, sheep, donkeys, birds, rats, and even insects) just as they would humans accused of crimes.[55] Animals were appointed legal counsel and tried for crimes such as killing, maiming, or injuring humans, or destroying property.[56] The animals themselves were held accountable for their actions as if they were capable of possessing the necessary *mens rea* to understand and choose to commit criminal acts.[57] The important point to note in relation to this Article, however, is that dogs generally received due process through a tribunal that took the proceedings seriously, appointed legal representation for them, and heard and weighed evidence before imposing a sentence (usually a violent one meant to instill retribution and act as a deterrent to future criminal acts being committed by other animals).[58] While the criminal prosecution of animals by a judicial tribunal might seem farcical and a mere relic of a less educated and conscious time period, it nonetheless continued into the twentieth century.[59]

When the human population boomed, a transmogrification occurred regarding how humans perceived what constituted an acceptable lifestyle for dogs, who previously had had free reign to run--for thousands of years--through fields, forests, and open terrain. As human civilizations developed into urban and suburban communities, shedding small farms and rural living for citified centers, toleration of free-roaming dogs evaporated. "Dog catchers" were utilized to pick up stray dogs running-at-large who were usually killed en masse through barbaric methods such as clubbing in town squares, drowning, electrocution, and, as still utilized today in some

communities, gassing.[60] Metropolitan local governments instituted laws that required dog owners to have their dogs on leashes at all times while outside and off of their owners' property, and fined dog owners for allowing their dogs to run-at-large.[61] Thus, dogs that were genetically designed and accustomed to partaking in large measures of physical exercise while traversing through undeveloped natural ranges now found their lifestyles radically altered when they were confined to backyards and tied or chained to trees, doghouses, and other anchors.

When cultures shifted from agrarian to industrialized societies, the household's father was absent from the home during the day.[62] While some children attended schools, others were involved in the labor force until state or federal child labor laws were enacted prohibiting children less than various ages from working, and requiring mandatory school attendance.[63] In either event children also no longer remained at the family's residence during the day. While limited numbers of married women worked outside of the home, subsequent to the enactment of sweeping workplace reforms benefiting women's right to equal consideration to employment women entered the workplace in unprecedented numbers.[64] For the family dog this generally meant that the entire family left the home unattended for long periods of time at least five days of the week. The dog--still a pack animal--often spent his days leading a solitary and lonely life in the backyard.

Even though humans determined that dogs' unrestrained modus vivendi must end due to human needs, dogs did not necessarily agree with this decision. Following their natural instincts to run, explore, chase, forage, and otherwise live a dog's life, dogs dug under, leapt over, and squeezed through fences to run neighborhoods, chase milkmen, and wait on street corners for school children to come home. As human populations continued to increase and tolerance for dogs running at large further waned, dog catchers became better trained "animal control officers" with a mission to keep neighborhoods clear of loose dogs.[65]

The surge in human population was accompanied by the introduction and growth of a new and deadly dog enemy--the automobile.[66] Now, for their own safety as well, dogs had to be confined to their owners' property.

C. Americans and Dogs Today

As noted *supra* in the Introduction to this Article, it is estimated that today approximately 68 million dogs live in some of the more than 115 million American households[67] (or somewhere on the property) which are inhabited by nearly 300 million Americans.[68] Most of these humans have dogs living with them for either companionship, protection, or both.

Of all the companion animals, dogs share a more privileged relationship with humans.[69] Generally, dogs in western cultures are seen as "loyal and faithful companion[s] who share[] our homes, our lives, and, not infrequently, our food and furniture as [] equal or near-equal member[s] of [] famil[ies]."[70] Dogs are named, touched affectionately, played with, and groomed.[71] In return, most dogs provide unconditional affection which, recent studies have shown, positively benefits humans.[72]

However, not all dogs experience such a rewarding relationship with humans. Millions are dumped at shelters and killed, or abandoned to the streets, each year.[73] Countless others are beaten, tortured, neglected, and killed by their owners or other humans.[74]

James Serpell, Ph.D., section chief of the University of Pennsylvania's Animal Behavior and Human-Animal Interactions division, explains this schizophrenic human-canine relationship:

> In symbolic terms, the domestic dog exists precariously in the no-man's-land between the human and non-human worlds. It is an interstitial creature, neither person nor beast, forever oscillating uncomfortably between the roles of high-status animal and low-status person. As a consequence, the dog is rarely accepted and appreciated purely for what it is: a uniquely varied, carnivorous mammal adapted to a huge range of mutualistic associations with people. Instead, it has become a creature of metaphor, simultaneously embodying or representing a strange mixture of admirable and despicable traits. As a beast that voluntarily allies itself to humans, the dog often seems to lose its right to be regarded as a true animal. . . . In our own culture, the dog has been granted temporary personhood in return for its unfailing companionship. But, as we have seen, this privilege is swiftly withdrawn whenever the dog reveals too much of its animal nature. In other words, we love dogs and invest them with quasi-human status, but only so long as they refrain from behaving like beasts.[75]

Thus, our human culture both reveres and holds at arm's length our relationship with dogs. As with intra-human relationships, the essential ingredient to defusing conflict that predictably and understandably occurs with cohabitation of any species is to pay closer attention to what the other side is attempting to communicate, and to understand his or her motivation and needs. We cannot require dogs to study and understand our behavior before choosing to act on their perceptions; thus, we humans as the "higher species" must educate ourselves on the true nature of the dogs with whom we have lived for thousands of years, with the goal of better protecting ourselves and our canine friends.

III. Dog Communication and Normal and Abnormal Aggressive Behavior in Dogs

Humans and dogs communicate using very different systems. Consequently, both groups are likely to misinterpret or misunderstand what the other is attempting to communicate:

> Because humans and dogs have different communication systems, misunderstandings may occur between the two species. A person may intend to be friendly toward a dog, or at least not threatening, but the dog may perceive the person's behavior as threatening or intimidating. Dogs are not schizophrenic, psychotic, crazy, or necessarily "vicious" when they display aggressive behavior.[76]

The key to proper stewardship and management of dogs by people is to better understand how dogs communicate to us, and what they may perceive we are communicating to them through our actions and behaviors. This educated status will help to protect both humans and dogs from harm.

A. Dog Communication Behavior

Dogs communicate with other dogs, and humans, through auditory, visual, and olfactory methods.[77] The former two categories are the most relevant to understanding and properly assessing truly aggressive behavior in dogs.

Primary auditory communications fall into one of five categories:

1. Bark–communicates defense, play, greeting, lone call, call for attention, warning;
2. Grunt–communicates greeting, sign of contentment;
3. Growl–communicates defense warning, threat signal, play;
4. Howl–communicates need for assembly, other reasons unknown;
5. Whimper/whine–communicates submission, defense, greeting, pain, attention seeking.[78]

According to one dog expert barking "is always a means of communication triggered by a state of excitement."[79] The bark is meant to sound the alarm and put all on notice to pay attention to what is happening.[80] A barking dog is usually not an attacking dog.[81] While a dog may bark to warn humans he believes may be a threat to him, and may subsequently bite, it is the dog that is not barking that is more likely to bite: "[a] fearless dog that is intent on attacking is *silent*. It doesn't waste time barking, that is, sounding the alarm. It just rushes over and bites."[82]

Some dogs emit vocal warning signals before they bite. Growling is more likely a pre-bite signal than barking.[83]

Dogs also use visual communication via body movements and posture to display aggressive or nonaggressive behaviors.[84] An aggressive dog considering biting will have raised hackles, curled lips, and bared teeth.[85] He will also use facial communications, the most common of which is the direct stare.[86]

B. Normal and Abnormal Aggressive Dog Behavior

Ancient humans weeded out aggressive dogs by killing them or running them off. [87] The remaining non-aggressive dogs bred and produced offspring who were likely also non-aggressive due to genetics.[88] At some point humans discerned that dogs could be intentionally bred to reinstitute aggressive behaviors which humans desired that dogs possess, for reasons such as fighting other animals to entertain humans;[89] to protect people and property;[90] and for image--that is, for humans to appear threatening and dangerous to other humans because they owned specific breeds with a reputation for being vicious[91]. When under the influence of humans who desired that such dogs act aggressively and who thus encouraged aggressive behavior and allowed them to act aggressively, these breeds developed a nasty reputation for being vicious animals.[92]

The *Merck Veterinary Manual* ["*Manual*"], considered to be a reliable and comprehensive source of information on veterinary medicine and animal behavior, discusses aggression in dogs.[93] Importantly, the *Manual* emphasizes that some aggressive dog behaviors are *normal*, and even *desirable* by humans.[94]

Aggression in dogs is manifested as dominance, fear, food-related, idiopathic, interanimal or interdog, maternal, pain, play, possessive, predatory, protective, redirected, and territorial aggressive behaviors.[95] One of the key conditions indicating that a dog is truly aggressive is that the aggressive behavior must be exhibited on more than one occasion.[96]

The *Manual* explains that dominance aggression is an "abnormal, inappropriate, out-of-context aggression (threat, challenge, or attack) consistently exhibited by dogs toward people under any circumstances involving passive or active control of the dog's behavior or the dog's access to the behavior."[97] Notably, the *Manual* states that dominance aggression is difficult to diagnose due to "*human misunderstanding of canine social systems, canine signaling, and*

canine anxieties associated with endogeneous uncertainty about contextually appropriate responses. This diagnosis [of dominance aggression] cannot be made on the basis of a one-time event. The behavior, once it begins, will become more visible and consistent . . . ."[98]

Fear and food-related aggressions are triggered when a dog feels that he or his food are threatened by a human or other animal.[99]

Interanimal or interdog aggression are behaviors that do not comport with normal social hierarchy and communications between dogs.[100] Dogs simply seem to dispense with normal patterns and interactions establishing or respecting dominance and submission and move directly to violence. The *Manual* states that particularly in this category, aggressive behaviors are, to a point, *normal*.[101]

Possessive aggression applies to protection of non-food items that consistently occurs when a human or other animal nears or seeks to acquire a non-food object that a dog possesses or to which he controls access.[102]

Predatory aggression is the behavior most consistent with the "silent" dog discussed *supra;* that is, the dog who is most likely committed to biting or to a complete attack. Predatory aggression consists of "[q]uiet, unheralded attacks generally involving at least one fierce bite and shake, that include staring, salivating, stalking, body lowering, and tail twitching, etc., consistently exhibited toward species-contextual prey items."[103] Such items may include human infants, young or ill animals, senior citizens, joggers, and bicyclists.[104] A dog may identify a human as prey if he or she exhibits uncoordinated movements or sudden sleep and wake cycles.[105]

Protective aggression is aggressive behavior exhibited when a dog is approached by a human who does not present "an actual, contextual threat."[106] The dog continues to display aggressive behavior despite the approaching individual's desire to interact, or attempts made by the dog's caretaker to stop the behavior.[107] The *Manual* states that "[i]t is important to acknowledge that some degree of in-context, innate 'protectiveness' is desired in most pet dogs."[108]

Territorial aggression consistently occurs when a dog is located in his or her environment and, as with protective aggression, the aggressive response is uncontrollable even though the approaching third party is not an actual threat.[109]

Thus, some degree of aggressive behavior is normal in dogs. Due to humans and dogs possessing two radically different methods of communicating, the difficulty for the average, untrained human is in discerning what is normal and reasonable aggressive dog behavior from that which is truly threatening and dangerous to humans and other animals.

IV. An Examination of Fatal and Non-Fatal Aggressive Behavior By Dogs Toward Humans

What is clearly remarkable regarding the long history of humans and dogs cohabitating is that dogs--who are generally regarded as unsophisticated and intellectually inferior by human standards--have managed to reside amongst humans for thousands of years while by and large meeting our expectations that they behave themselves and be obedient to us as they live nonaggressively with us. They do so even though they are animals with natural tendencies and instincts to ensure their survival by engaging in aggressive behaviors that, for the most part, they manage to suppress.

A. Fatal Attacks by Dogs on Humans

Vicious dogs do exist and can cause serious, deadly harm to humans and other animals. Objective, empirical statistical data, studies, and reports indicate that the root causes of vicious dog attacks are almost always traced to the following categories:

• humans who have intentionally trained larger, stronger dogs to act aggressively and attack other animals or humans, or who have otherwise encouraged their dogs to act aggressively;[110]

• humans who have abused and/or neglected larger, stronger dogs, including chaining dogs in yards for extended periods of time (perhaps most of the animal's life), which has facilitated aggressiveness in them due to lack of socialization and increased territorialism;[111]

• dogs who are reverting to instinctive behavior to protect either puppies, food, family or "pack" members, territory, or themselves;

• dogs who are ill;

• dogs who are chasing moving objects; or

• dogs who are unsterilized, particularly males, and near unspayed females, especially those who are in heat.[112]

Karen Delise, an author and licensed veterinary technician who spent more than a decade researching fatal dog attacks, writes that "[a] fatal attack is always the culmination of prior and present events that include: inherited and learned behaviors, genetics, breeding, socialization, environmental stresses, owner responsibility, victim behavior, victim size and physical condition, timing and misfortune."[113]

A review of United States Department of Health, Centers for Disease Control fatal dog attack data indicates that most fatal dog attacks occur on the property where the dog usually resides, and the victim is usually a child or elderly person.[114] Although the public may perceive vicious, attack-prone dogs as free-roaming, the fact is that humans are far more likely to be attacked by approaching dogs who are chained or tethered on particular properties, rather than by dogs running at large.[115] Delise notes that:

> Many people may not view a chained dog as a potential threat by sheer fact that the dog's access is limited. This is a fallacy. Chained dogs have killed at least 98 people. Of the 98 people, 92 were children that either wandered into reach or attempted to play, tease, feed, or untangle a chained, tied, or similarly restrained dog and six were adults that approached or had an altercation with a restrained animal. An additional 11 people were killed when a dog straining against a chain[] broke free and attacked and killed a person nearby.
>
> Chained dogs are not afforded the same opportunity to bond and socialize with the human members of a household as are dogs maintained within the home. Therefore, it is unreasonable to expect the same behaviors from dogs kept in such different environments. . . .
>
> Chaining a dog creates an unnatural and unhealthy environment. Dogs require exercise, mental stimulation and social interaction with either other dogs or with humans who acquire them. None of these requirements can be met living at the end of a chain. Besides the negative impact chaining has on the well-being of the dog, it also increases the likelihood of a dangerous defensive response to a perceived encroachment on the dog's territory or possessions (food or water bowls).

> Because dogs are territorial animals, chaining them only serves to exacerbate space issues, as space is limited and more clearly defined. Concurrently, the natural fight or flight response afforded to most animals in stressful situations is denied to a chained animal. The dog is cognizant of the fact that he can only retreat the length of the chain and will often opt to "stand his ground." Removing the option of flight for any animal will always increase the chance of a physical encounter (or fight response) to a perceived threat.[116]

Regarding dogs running-at-large and off of the property where they reside, a review of CDC statistics appears to indicate that between 1997 and 2001, 13 people were fatally attacked by dogs running loose.[117] When dogs are running-at-large, pack mentality can play a role in fatal attacks on both humans and other animals.[118] Statistically, however, such attacks occur far less often than those caused by chained dogs.

B. Non-Fatal Attacks

No one seems to know with certainty why some dogs stop at biting victims, usually for the same reasons that fatal attacks are committed, and why some dogs go on to inflict more extensive damage and actually kill humans. Factors indicate that:

> [t]he extent to which [a lowered threshold for attack and higher pain thresholds] are genetically determined within the fighting breeds has been the subject of considerable controversy []. Although complex behaviors such as pointing, retrieving, herding and livestock guarding are generally accepted to have a strong genetic component, many fanciers of the fighting breeds attribute the comparatively simple lowering of the thresholds for aggression to purely environmental influences of irresponsible owners.[119]

While some experts believe that genetic history plays a role in inducing aggressive dog behaviors, as well as selective breeding,[120]

> [t]he likelihood that a particular individual will bite is also strongly influenced by many environmental barriers including the training of the animal, the extent of its socialization to people (especially children), the quality of the animal's supervision and restraint, and the behavior of the victim []. This multiplicity of interacting factors in dog bite makes it difficult and often meaningless to base predictions of a particular animal's aggressive behavior on a single characteristic, such as breed.[121]

What is known is that dogs that bite humans once or twice and stop at that often do so for the same reasons that dogs commit fatal attacks.[122] In non-fatal attacks, children are again usually the victims, but here they are usually older children, and they are usually male.[123] Issues such as the provision of adult supervision during the dog-child interaction, behavior of the victim, condition of the dog including whether restrained or not and whether food was present, location of the animal at the time of the bite, and many similar factors play a role in facilitating dog bites.[124]

While biting dogs is certainly a problem warranting examination and prophylactic treatment, it is important to remember that such encounters represent a very small fraction of the hundreds of millions of human-dog contacts that occur each day, most of which are deeply enjoyed. Likewise, the [] focus on the small fraction of dogs implicated in human fatalities should not obscure the fact that these 20 or so animals involved in such attacks each year represent an infinitesimal portion of the American dog population, less than .00004%! The proportion of American humans who kill other human beings is more than 200 times this fraction.

> Humankind has made the dog in its image, and, increasingly, that image has become a violent one. The breeds of dogs that have been chosen to reflect our aggressive impulses have changed over the millennia. In the last 20 years the choice has moved from German shepherds, to Dobermans, to pit bulls, to Rottweilers to a current surge in problem wolf-dog hybrids.
>
> Problems of irresponsible ownership are not unique to pit bulls or any other breed, nor will they be in the future. Effective animal control legislation must emphasize responsible and humane ownership of genetically sound animals, as well as the responsible supervision of children and animals when they interact.[125]

This dog behavioral expert, and many others, believe that to protect against dog bites, legislation must be passed that strengthens and enforces laws prohibiting dog fighting and the cruel treatment of dogs, which makes them turn vicious; requires owners to act responsibly and humanely when caring for their dogs; and, through active enforcement, holds them accountable when they do not.[126] The public must also be educated about responsibly caring for dogs who live with them, including not chaining dogs for long periods of time and supervising small children any time they are near dogs, whether the dogs are tethered or not.[127]

While owning a dog requires humans to meet certain obligations and responsibilities to ensure that dogs do not engage in truly violent, dangerous behaviors, as discussed *infra* dog ownership also provides humans with certain constitutionally protected property rights due to the dogs' current legal status as human "property."

V. DOGS AS HUMAN PROPERTY

A. Historical Development of the Concept of Animals as Property

At some point in ancient history, pre-humans decided that certain items, such as food, "belonged" to them, thus giving birth to the concepts of personal property and ownership that were later applied to right-of-possession of other tangible items, such as weapons and other useful tools, living animals, and even other humans.[128]

Non-feral, domesticated dogs were treated as human personal property by particular ancient cultures.[129] For example, Pompeian mosaics depict dogs tethered on leashes,[130] while engraved stone tablets set forth laws decreeing that domesticated animals are to be treated as human property.[131] Early written explanations justifying human ownership of animals explained that animals were created for mankind's use through what was designated the "Great Chain of Being."[132] Later theorists developed various concepts to justify human ownership of animals such as "occupation"--the taking control of an animal which resulted in acquisition of title of the animal, and thus ownership[133]; "labor"--the act of taming a wild animal which thus made the animal the property of the human due to human expenditure of labor[134]; and the "right to use"

theory, which purported that animals were made by God or a Creator for man's use, and thus God or the Creator intended for humans to own animals[135].

Ownership concluded if the animal left the control of the human deemed to be its owner; that is, if the animal acquired its liberty by leaving the control of the human, the human no longer possessed legal property rights to the animal.[136] In this instance the animal could be acquired by another human through the aforementioned acts which resulted in property ownership of the animal in the first place. If, however, the animal indicated an intention or habit of returning to the original owner, then the original owner's property rights continued unabated.[137]

For dogs, however, the rules were generally different. Under the common law, dogs were treated as though they had no "useful, social value . . . except for companionship"[138] which translated generally into the legal system as no compensable value when someone injured or killed another's dog.[139] In fact, a person who "stole" a dog could not be prosecuted for larceny "because of the base nature of a dog, which was kept for mere whim and pleasure and was unfit for food and of no intrinsic value; [thus] dogs were not administered as property . . . . "[140] American jurisprudence began to grant human property status to dogs who were "not merely [] pet[s], but [who] serve[d] some valuable and useful purpose, such as guarding the premises of [their] owner[s]."[141] Eventually, dogs came to be legally recognized as the personal property of humans, and courts allowed humans to be compensated for the market value of their dogs when they were hurt or injured by others.[142]

B. Current Status of Dogs as the Personal Property of Humans

In the United States, dogs continue to be legally treated as human property.[143] For example, in *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. 1st DCA 2004), the Florida appellate court reaffirmed its statement in *Bennett v. Bennett*, 655 So. 2d 109 (Fla. 1st DCA 1995), that "[w]hile a dog may be considered by many to be a member of the family, under Florida law animals are considered to be property." These and other court opinions that reach the same conclusion are based upon precedence written during much earlier ages when dogs were seen as unfeeling, basically valueless entities that resided outside and with whom most humans did not have an emotional attachment.[144]

Currently, there is an undeniable philosophical shift emerging within the judicial system which is struggling with whether or not it should continue to treat dogs as the personal property of humans, and if not, just exactly how should they be legally treated. For example, in *Bass v. State*, 791 So. 2d 1124 (Fla. 4th DCA 2000), the appellate court analyzed whether a lower court erred by designating a police dog an "individual," a designation which resulted in a harsher penalty being imposed upon a convicted criminal who injured the dog. The appellate court concluded that "as much as dogs are loved and cherished by their owners, they are not persons or 'individuals' for purposes of the criminal law."[145] Obviously, the lower court recognized that dogs may be more than inanimate human property.

Perhaps the greatest reflection of the struggle over whether or not to continue to legally treat dogs as property appeared in a 2001 Wisconsin Supreme Court opinion:

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog, such as Dakota, as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to

> other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.
>
> The association of dog and human is longstanding. Dogs have been a part of human domestic life since 6,300 B.C. Archaeologists have uncovered a 12,000 year-old burial site in which a human being and a dog lay buried together. The arm of the person was arranged on the dog's shoulder, as if to emphasize the bonds that existed between these two individuals during life. Dogs are so much a part of the human experience that we need not cite to authority when we note that dogs work in law enforcement, assist the blind and disabled, perform traditional jobs such as herding animals and providing security, and, of course, dogs continue to provide humans with devoted friendship.[146]

As a result of the paradigm shift in how the public, and the more reactionary legislative and judicial branches of government, view dogs, a growing number of jurisdictions throughout the country are enacting laws to treat the human-dog relationship as one of a guardian caring for a ward, rather than humans possessing dogs as their personal property.[147]

Nonetheless, the current status of dogs as human personal property continues to prevail in jurisdictions throughout the country.[148]

VI. Conflict Between the Constitutional Protection of Dogs as Personal Property and Government Regulation of "Dangerous" Dogs Under its Police Power

Because dogs are treated as the personal property of humans, humans are thus entitled to protection of this personal property interest under federal and state constitutions before government can interfere with an individual's property.[149] However, dog ownership is seen as a qualified or imperfect right, subject to significant or even intensive invasion by government under its broad police powers.[150] As *American Jurisprudence* succinctly explains, "[t]he police power of the state has been exercised to regulate and control dogs to a greater extent than it has for any other class of domestic animals, and . . . they may be subjected to peculiar and drastic police regulations without their owners being deprived of any federal rights."[151]

Despite government's ability to interfere with humans' personal property rights in dogs, federal and state constitutions require that, in the case of processing and possibly declaring one's dog "dangerous," the state must afford the dog owner due process of law.[152] At a minimum, the state must provide an individual with notice and an opportunity to be heard before it deprives the individual of his or her property.[153] The "opportunity to be heard" must be meaningful, and the hearing must be fair.[154]

Thus, while government can strictly regulate dogs as the personal property of humans, that regulation must follow constitutional requirements of due process. In this light this Article examines the most recent trend of regulating dogs through Dangerous Dog laws to analyze whether governments are adhering to these constitutional requirements and properly balancing the goal of protecting the public against the rights of dog owners. This Article concludes that, at least in some counties, too many dogs are being unjustly declared "dangerous," and their owners' constitutionally protected property rights are being violated, due to seriously flawed classification processes that deprive owners of their right to a fair hearing and due process. A

review of Dangerous Dog cases indicates that many of these classifications are likely motivated by local governments' fears of being held liable--financially, politically, and even morally--in the future should the dogs actually eventually harm someone.

VII. Dangerous Dog Laws in General

With the broad health, safety, and welfare police power standard in mind, it is easy to see why government's authority to enact Dangerous Dog laws would rarely, if ever, be called into question. Not only is it "well settled that the regulation of dogs is within the police power of the State and may be delegated to municipalities,"[155] dog attack and dog bite injuries are clearly a public safety concern. Armed with the well-established police power and concern for public safety, a majority of states have enacted Dangerous Dog laws.[156] Even those states that do not have statewide policies may have laws at the city or county level.[157]

Although there is no uniform, nationwide Dangerous Dog law, there are some general, commonly shared characteristics. A typical Dangerous Dog statute or ordinance usually contains four components: (1) a definition of a "dangerous dog"[158] or "vicious dog;"[159] (2) a procedure for officially declaring a dog dangerous;[160] (3) restrictions applicable to those dogs officially declared dangerous;[161] and (4) penalties for violating the restrictions, including penalties for when a dog injures someone after he has been declared dangerous.[162] Procedures typically include an official complaint,[163] an investigation on the part of animal control or other local authority,[164] and a hearing at which the results of the investigation are presented.[165] Restrictions may include registration with the local authority,[166] permanent confinement,[167] sterilization,[168] permanent identification with a tattoo or microchip,[169] and liability insurance.[170] The penalties for violating the restrictions are often monetary fines,[171] but if an owner whose previously-declared-dangerous dog injures someone, the penalties can be more severe. The owner may be guilty of a criminal offense[172] and the dog will likely be confiscated and destroyed.[173]

VIII. Florida's Dangerous Dog Laws

A. *History and Legislative Intent*

Although the Florida Animal Control Association had lobbied for Dangerous Dog legislation for several years,[174] Florida's first Dangerous Dog law was enacted in 1990.[175] Legislators sought to address the issue of severe attacks by dogs on humans, especially after several particularly gruesome and brutal incidents occurred in their own districts.[176] For example, a major impetus for the legislation was the 1989 case of a 73-year-old woman who was killed after she went into her driveway to get her newspaper and was bitten more than 300 times by three neighborhood dogs.[177]

Initially, the proposed legislation framed the planned designation of problem dogs as "vicious."[178] At the Senate Judiciary-Criminal Committee hearing, one senator expressed concern that his neighbors' pit bulls approached his fence when his children played in their yard.[179] The director of Leon County Animal Control discussed two attacks in Jacksonville, one on a four-year-old girl and one on the aforementioned 73-year-old woman.[180] The Florida Association of Kennel Clubs submitted position papers on all four proposed bills, noting an "unquestionable need" for a "'vicious dog' law" that would focus on dogs who "have exhibited

dangerous behavior."[181] The Humane Society of the United States submitted a letter in which it noted the need for a statewide policy to address Dangerous Dogs.[182]

Support for the bill was qualified by the assertion that it must be non-breed-specific. The Humane Society of the United States explained that focusing on a specific breed "fail[s] to take into consideration that serious aggressive behavior in dogs is invariably caused by irresponsible ownership and improper or inadequate training of the animal."[183] Similarly, the Florida Association of Kennel Clubs noted that the law should protect the public by "consequating irresponsible owners"[184] and said that they would withdraw their support if the law was breed-specific.[185] The law passed with an express ban on breed-specific regulations.[186]

As originally contemplated the statewide policy would require a dog to exhibit certain characteristics before it would be declared dangerous.[187] A dog would be declared dangerous if it (1) injured or killed a human; (2) injured or killed an animal; or (3) was used in dog fighting.[188] But animal control officials and legislators were concerned that such a narrow definition would not be effective.[189] Leon County's Animal Control Director explained that the law needed to protect the public before the attack occurred and, for this reason, she supported the inclusion of "menacing fashion" or "apparent attitude of attack" language within the statute.[190] This language was subsequently incorporated into the final draft of the bill.[191] Thus, in its current form, the Dangerous Dog definition includes a fourth "apparent attitude of attack" prong.[192] A dog can be declared dangerous if it "has, when unprovoked, chased or approached a person . . . in a menacing fashion or apparent attitude of attack, provided such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority."[193] Florida's Dangerous Dog bill became law in 1990.

B. *1990 Law Declared Unconstitutional Due to Failure to Provide Due Process*

In 1993, a Florida appellate court affirmed a lower court order permanently enjoining a county animal control agency from enforcing a Dangerous Dog classification because the state statute failed to provide due process--notice of the proceedings and a fair hearing--to the dog owner before declaring a dog "dangerous."[194]

In its original form, the law required the person seeking to declare the dog dangerous to file a sworn affidavit and the governing animal control authority to investigate the reported incidents.[195] Animal control was not required to notify the dog's owner until *after* it determined that a dangerous classification was warranted.[196] Even after notification, the owner was given no opportunity for a hearing to present any objections or defenses to the classification.[197] Because of these infirmities, in *County of Pasco v. Riehl*[198] the Second District Court of Appeal held the statute unconstitutional because it violated constitutional due process requirements.[199] The court explained that because a Dangerous Dog classification "places many onerous restrictions on dog owners with so-called dangerous dogs," which "serve to deprive such owners of legal property interests[,]" a dog owner must be given an opportunity to be heard *before* the restrictions could be enforced.[200] The Florida Supreme Court later affirmed the appellate court's determination that the statute was indeed unconstitutional due to its failure to adhere to due process requirements.[201]

Presumably in response to the ongoing litigation, the Florida legislature made substantive changes to the Florida Dangerous Dog statute in both 1993 and 1994. The 1993 amendments added an owner interview during the investigation process,[202] modified the definition of "severe injury,"[203] and--importantly--gave the owner the right to request a hearing after county officials permanently classified a dog as "dangerous."[204] Significantly, the statute still lacked a pre-

deprivation hearing.[205] In 1994 the legislature finally added the required pre-deprivation hearing to the statute.[206] Animal control's classification after its investigation is now characterized as "initial" and a dog owner may request a hearing before animal control makes its final decision.[207]

C. *Florida's Current State Dangerous Dog Law*

Sections 767.10 through 767.14, *Florida Statutes*, comprise Florida's state Dangerous Dog law.

Section 767.11(1) defines a Dangerous Dog as a dog that has exhibited one of four behaviors: (1) bitten, attacked, endangered, or inflicted severe injury[208] on a person; (2) more than once severely injured or killed a domestic animal while off of the owner's property; (3) been used in or trained for dog fighting; or (4) "[h]as, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, provided that such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority."[209]

Section 767.12(1) sets forth the state's basic requirements for establishing whether or not a dog meets the requirements to be declared dangerous.[210] The process varies between counties; some require only a sworn affidavit setting forth the alleged facts underlying the incident, while others require more specific forms describing the incident to be completed and notarized under oath.[211]

The animal control authority that receives the affidavit or petition then investigates the alleged incident by speaking to the person who filed the affidavit or petition, notifying the dog's owner and offering him an opportunity to respond to the allegations, and possibly canvassing the neighborhood to contact neighbors who may have information on not only the alleged incident but on the general behavior of the dog.[212] Importantly, beyond the information provided in either the sworn affidavit or sworn petition, as discussed *infra* in part IX.A.i., information provided through interviews of neighbors and other witnesses is not always required to be sworn. Nonetheless, this information is frequently used to make an initial determination of whether or not a dog is dangerous, and may be used to permanently classify the dog dangerous.[213]

After compilation of the evidence that will be used to make a classification decision, the record is presented to the entity charged with making the initial determination of whether or not a dog should be classified "dangerous." The statute dictates that following "the investigation, the animal control authority shall make an initial determination as to whether there is sufficient cause to classify the dog as dangerous and shall afford the owner an opportunity for a hearing prior to making a final determination."[214] This initial classification is generally determined by an authority within the animal control agency. For example, prior to 2005 in Leon County, Florida, a three-member Leon County Animal Control Classification Committee received the evidence and made the initial determination as to whether or not a dog would be declared dangerous or aggressive.[215] In 2005 the Leon County Board of County Commissioners amended Leon County Code section 4-93 to allow the Leon County director of animal control to singularly make the initial determination.[216] In Marion County, Florida and Miami-Dade County, Florida, the "animal control authorities" make the initial determination. In Marion County the authority is an animal control officer.[217] In Miami-Dade County, the initial determination is made by a code enforcement officer from the animal control department.[218]

The animal control authority is required to provided written notice of the sufficient cause finding to the owner.[219] The owner may then file a written request for a hearing to contest the initial classification within seven calendar days, and the hearing must be held expeditiously.[220]

The entity hearing the matter varies between counties. For example, in Leon County, Florida, the three-member Leon County Animal Control Classification Committee, consisting of a licensed veterinarian, a Leon County Sheriff's Office representative, and "an informed citizen appointed by the Leon County Board of County Commissioners" hears the case.[221] In Marion County, Florida, the hearing is held before the Marion County Code Enforcement Board–a body comprised of residents with special knowledge in areas such as business management, construction, government administration, and even spiritual matters--one of the members is a minister.[222] In Alachua County, Florida, the hearing is held not before a board, panel, or committee, but before the county manager or a designee.[223]

During the investigation the subject dog can either be impounded--usually at owner expense--by the animal control agency, or the owner will be required to confine the dog in a securely fenced or enclosed area.[224] The dog may not be relocated or ownership rights transferred.[225]

If the entity conducting the hearing issues a final determination of "dangerous," the owner may "file a written request for a hearing in the county court to appeal the classification within 10 business days after receipt of a written determination . . . . Each applicable local governing authority must establish appeal procedures that conform to this paragraph."[226]

If the owner does not appeal the decision to the county court within ten business days of notification or loses his appeal, the owner must comply with all state and local requirements.[227]

Sections 767.12(2)-(4) also provide penalties that must be imposed once a dog is permanently classified as "dangerous." At a minimum, a Florida Dangerous Dog owner must register the dog and pay any related fees; provide animal control with certification of the dog's rabies vaccination; permanently identify the dog with a tattoo or electronic implant; and permanently confine the dog in an approved enclosure.[228] In counties requiring dog owners to obtain a license, the owner must renew the dog's license and pay any local Dangerous Dog renewal fees annually.[229] Notably, in some states, such as Florida, the "Dangerous Dog" status remains with the dog for the rest of his life.[230] The penalty for violating these restrictions is a noncriminal infraction with fines of up to $500.[231]

Section 767.14 permits local governments to implement additional penalties beyond those listed in the statute, as long as the additions are not breed-specific and weaker than the penalties provided in the statute.[232]

Additionally, home owners with dogs declared dangerous may have their homeowners insurance fees increased, or the insurance itself cancelled.[233]

Section 767.13 states that if a dog declared "dangerous" thereafter attacks or bites a person or domestic animal without provocation, the owner can be found guilty of either a first-degree misdemeanor or a third-degree felony, depending upon the severity of the injury, and the dog will likely be destroyed.

D. *Local Government Codes and Ordinances*

Local governmental ordinances adopting and expanding upon the state Dangerous Dog law vary.[234] For example, in Leon County a dog can be declared "aggressive" rather than "dangerous" if he injures or kills "a domestic animal in a *first* unprovoked attack."[235] The inclusion of "first" makes this ordinance more restrictive than the state statute, which allows

dogs to be classified "dangerous" only after more than two severe injuries on a domestic animal.[236] The attack on the animal must take place off of the dog owner's property.[237] The penalty is permanent confinement, just as if the dog were declared "dangerous."[238]

Marion County allows a dog to be declared "vicious" or "dangerous" depending upon whether a human or animal is the target of the attack[239] The governing Marion County ordinance requires that a dog declared "vicious" by the Marion County Code Enforcement Board be surrendered to animal control within 24 hours after classification, so that the dog can be killed.[240] A dog can be classified as "dangerous" if it has killed a domestic animal or livestock.[241] A dog can also be declared "dangerous" if it injures a domestic animal or livestock more than once while off of the owner's property.[242] A final classification of "dangerous" will result in the dog being permanently confined.[243]

Several local governments now have online Dangerous Dog registries, complete with photos of dogs declared dangerous who reside within the local government's jurisdiction, and the addresses of where the dogs reside.[244]

Some local governments, such as Atlantic Beach, Florida, require that owners of dogs classified as "dangerous" obtain liability insurance in the amount of $100,000, and also a $100,000 surety bond.[245] Other counties, such as Hillsborough, Florida, require dog owners to complete responsible pet ownership training.[246]

Despite evidence that confining or tethering a dog can induce biting or attacks, Port Orange, Florida, requires that dogs declared dangerous be kept in a locked cage or *tethered*.[247]

Alachua County presents an example of the harshest exercise of section 767.14's authorization that local counties may "plac[e] further restrictions or additional requirements on [dog] owners": On January 24, 2006, the Alachua County Board of County Commissioners enacted Ordinance Number 06-01, section 5, codified at Alachua County Code of Ordinances title 7, section 72.17.5, which authorizes Alachua County to seize any dog located within Alachua county that has been declared dangerous after February 1, 2006--not just by Alachua County but by *any* Florida county--and kill him.[248]

IX. Case Studies

In theory, all dogs that are officially classified "dangerous" should display obviously vicious and truly threatening behaviors. In practice, such is not always the case. The authors believe that the following case studies illustrate and expose flaws in the structure and application of Florida's state statute and some local ordinances.

A. Leon County, Florida

Leon County, Florida's, Dangerous Dog ordinance states:

> *Dangerous animal* shall mean an animal that has, when unprovoked,
> a) Bitten, attacked, or endangered or has inflicted severe injury on a human being on public or private property; or
> b) Has more than once severely injured or killed a domestic animal while off the owner's property; or
> c) Has, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion, or an apparent attitude of attack[;]

> d) Provided that such actions as set forth and described in paragraphs a), b) and c) above are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority; []

i. Ortega v. Leon County[249]

Patricia Ortega, a single-mother with a then-teenage son, lived with a female Labrador retriever named "Angel." During her first heat Angel became pregnant by Ms. Ortega's adult son's dog, Duke, while the two were visiting Ms. Ortega.[250] Angel gave birth to several puppies, and Ms. Ortega kept two, naming them "Buster" and "Buck."[251] Less than a year later, Angel, Buster, and Buck escaped from Ms. Ortega's back yard, although she had installed an electric fence, and allegedly ran onto the property of the neighbor who lived across the street, Ms. Marion Hammer--the 1995-98 president of the National Rifle Association.[252]

Leon County Animal Control records indicate that Ms. Hammer's daughter, Ms. Sally Hammer, who resided with Ms. Hammer, had called Leon County Animal Control in September and October 2001 to report the dogs running loose and on Ms. Hammer's property.[253] Ms. Hammer stated that an animal control officer told her that he could not issue a citation to Ms. Ortega for dogs running loose unless an animal control officer witnessed the dogs off of her property.[254] According to Ms. Sally Hammer, to assuage the Hammers' complaints the animal control officer gave her a petition for classification of a dangerous or aggressive animal to complete and submit to Leon County Animal Control to begin the process of having the Labrador retrievers investigated under the county's Dangerous Dog ordinance.[255] Both Hammers submitted statements; Ms. Hammer wrote that she was "not willing to mediate with the Neighborhood Justice Center or anyone else."[256]

Ms. Sally Hammer wrote in the petition that the dogs ran loose in the neighborhood "on a daily basis."[257] She stated that the dogs charged her and her two children.[258] She did not claim that the dogs bit, attacked, or injured in any way her or her children.[259]

Ms. Hammer, however, wrote that her grandchildren were "charged and attacked" by the dogs, and that the dogs "were attacking with bared teeth."[260] However, no evidence was offered that the dogs bit, attacked, or injured either of the Hammers or the children. Ms. Hammer further wrote that because the dogs continued to run loose, Leon County Animal Control and its governing entities would be guilty of "gross culpable negligence and complicity in any injury that may result, in the future, from this pack of dogs being allowed to roam and terrorize our neighborhood."[261]

A Leon County animal control officer canvassed the neighborhood seeking witnesses. [262] The officer left notices on some of the residents' doors that stated that Ms. Ortega's dogs were under investigation and which requested that residents contact Leon County Animal Control if they had any knowledge of the dogs' behaviors or their running at large.[263] At least two neighbors contacted Animal Control and verbally reported that either the dogs were running at large, or that the dogs were not a problem.[264] These unsworn statements were presented to the three-member Leon County Animal Control Classification Committee.[265]

The Committee considered the Hammers' petition and reviewed the written information provided to them by Animal Control. By a vote of 2-1 the Committee applied an initial classification of "dangerous" to Angel and Buster, but chose to not declare Buck dangerous.[266]

Ms. Ortega requested a hearing and obtained an attorney. On March 1, 2002, the Classification Committee held a hearing. Besides Ms. Ortega and her attorney; a few of her

witnesses; Richard Ziegler, the director of Leon County Animal Control; an animal control staff member; the Hammers; two of their witnesses; and the Classification Committee, the hearing was attended by several members of the public who were not affiliated with the case but who apparently had an interest in animals.[267]

Leon County Code section 4-93(d)(3) dictates that "[i]n hearings before the animal classification committee, formal rules of evidence shall not apply, but fundamental due process shall be observed and govern the proceedings."

Mr. Ziegler announced the general ground rules for the hearing, but neither Mr. Ziegler nor any member of the Classification Committee acted as chairperson and took control of the hearing.[268] No witnesses were sworn before giving testimony.[269] Hearsay testimony against Ms. Ortega's dogs, not only offered during the hearing but provided earlier by neighbors via phone calls and written communication to Animal Control, was again introduced into evidence.[270] Members of the audience--who had no personal knowledge of the case--interrupted what was, due to the ordinance's direction that formal rules of evidence will not apply, essentially a discussion of the allegations, to voice their mere opinions.[271]

Regarding the testimony itself, two Leon County animal control officers testified to their experiences with the dogs, and opined that, in both of their opinions, the dogs were not "dangerous."[272]

Nonetheless, the Classification Committee--again, by a vote of 2-1--declared Angel and Buster "dangerous."[273] Buck was not classified "dangerous," although Ms. Hammer tried several times to have the Classification Committee reconsider its decision.[274]

Ms. Ortega timely filed a notice of "appeal" with the Leon County County Court.[275] She argued that she was entitled to a de novo hearing because the process before Animal Control and the Classification Committee failed to comport with due process.[276] The county court, faced with inartfully drafted statutory language that referred interchangably to an "appeal" and a "hearing" before the county court, issued an opinion stating that because the Florida Constitution does not award appellate court jurisdiction to county courts, and because county courts are courts of original jurisdiction, that the hearing must be de novo.[277]

Thousands of dollars in salaries, court costs, attorney's fees, impoundment costs, and boarding fees later, Ms. Ortega and Leon County settled the matter out of court, with Ms. Ortega agreeing to keep her dogs confined to her property.[278] No further problems have been reported.

ii. Moore v. Leon County[279]

Shrek, a Johnson-bred American bulldog who was eight months old at the time of the event at issue, was classified "dangerous" by the Leon County Animal Control Classification Committee based upon a one-time incident in which he and a companion mixed-breed dog momentarily escaped from their yard through a hole in a fence, and ran into a neighbor's yard after the neighbor's grandchildren called the dogs to come to them.[280] The neighbor and her son excitedly chastised the children for calling a neighbor's dogs, and the children turned to run to the porch.[281] The neighbor shouted to the children to stop running and stand still.[282] Because he was beckoned Shrek ran to the neighbor's yard.[283] He passed by one child who had stopped running, and according to the neighbor, continued to run after the second child, who did not stop running.[284] The neighbor claimed that Shrek was going to bite the second child but that her son intervened from the porch and shouted at Shrek, who stopped.[285] The son threw hot coffee in Shrek's face.[286] Shrek turned and went back to his home, where he was immediately let into the

house by the family's visiting grandmother, who had stopped by to feed him and who was unaware that the two dogs had momentarily escaped through a hole in the fence.[287]

The neighbor filed a petition for classification of a dangerous or aggressive animal with Leon County Animal Control to have both dogs classified "dangerous."[288] Animal Control launched an investigation, seeking information from other neighbors.[289] One neighbor named "Stephanie" phoned Animal Control to state that she had no knowledge of the incident detailed in the form that Animal Control left on her door, but that she knew that the dogs lived with the Moores and that she was "afraid of them."[290] A second neighbor reported that she had seen the dogs out of their yard, which she said was unusual, but she witnessed them returning immediately to their property.[291] She added that, in her opinion, because Shrek was a puppy he likely wanted to play with the children and that the matter should have been handled by the complaining neighbor discussing the incident with the Moores rather than by filing a petition with Leon County Animal Control.[292]

After a public hearing, the Classification Committee voted 2-1 to classify Shrek as "dangerous"[293] although the veterinarian committee member--the only dog behavioral expert on the panel, and the only member who voted not to declare Shrek dangerous--noted that "[all] [d]ogs run with their mouths open[,]"[294] that the evidence indicated that the behavior could have been play-related,[295] and that there were no "earmarkings of true aggressiveness"[296]. The veterinarian further noted that if Shrek were truly intent on attacking, that throwing hot coffee on him would have only served to further incite him rather than ward off an attack.[297]

The Moores "appealed" the case to the Leon County County Court.[298] As in *Ortega*, after thousands of dollars in taxpayer-funded county attorney salaries[299], expenses, costs, and fees, following mediation the Moores and Leon County settled the case out of court.[300] No further problems with Shrek's behavior have been reported.

iii. Sullivan v. Leon County[301]

Deuce, a pit bulldog mix, was allegedly allowed by the family with whom he lived to run loose in his neighborhood.[302] A neighbor who lived across the street from Deuce's family, Warren Head, reported that Deuce twice approached him when he was outside playing with his children.[303] Mr. Head filed a petition for classification of a dangerous or aggressive animal with Leon County Animal Control because he wanted Deuce removed from the neighborhood.[304] Mr. Head stated that he had "every intention to kill the dog the next time it comes in our yard."[305]

Ten days later Mr. Head wrote that he wished to drop the petition.[306] He stated that he chose to drop the petition because the dog's owner told him that he had placed an advertisement in the local newspaper seeking a good home for the dog.[307] Deuce was given to another owner, but was subsequently picked up by Animal Control while he was running at large and placed in the city shelter.[308] The shelter called Deuce's original owners, who retrieved him from the shelter.[309]

On February 1, 2005, Deuce's teenage owner arrived home in her vehicle and pressed the garage door opener to park her car inside.[310] Deuce ran out of the garage and, seeing Mr. Head across the street, ran toward him.[311] Deuce was hit by a car, survived the crash, got up, and limped back home.[312]

Mr. Head claimed that Deuce ran at him and his children "full blast, very aggressive, hair raised on his back, ears back, growling and barking."[313] However, an indifferent third party witness stated that he did not hear Deuce growl or bark, or see him bare his teeth or have the hackles on his back raised.[314] The witness also stated that in his opinion Deuce was not about to

attack the Heads but instead, because he had been "cooped up" in the garage, Deuce was merely "running to the direction of activity."[315]

Subsequent to this incident, but before Mr. Head could file a second petition for classification of a dangerous or aggressive animal, Deuce's owners gave him to Tracy Sullivan, a person more experienced with managing pit bulldog mixes.[316] Mr. Head filed a second petition against Deuce's original owners[317], but when he learned that Deuce had been given to someone who lived in another neighborhood, he filed a third petition against Deuce's new owner, Ms. Sullivan[318]. Leon County's animal control director, Richard Ziegler, made an initial determination to classify Deuce "dangerous."[319] Ms. Sullivan requested a formal hearing.

Ms. Sullivan had Deuce examined by her veterinarian, who stated that Deuce did not show any aggressive tendencies whatsoever.[320] Ms. Sullivan also had Deuce evaluated by a behavioral specialist who concluded that Deuce was merely engaging in normal dog behaviors and needed training.[321] By the date of the formal hearing, Ms. Sullivan had devoted a significant amount of time having Deuce evaluated and training him.[322] However, the Leon County Animal Control Classification Committee said this information was irrelevant and that they were only concerned about the incidents that let to the filing of the petitions.[323] Deuce was declared dangerous by unanimous vote.[324]

Ms. Sullivan appealed to the county court.[325] She filed a motion for summary judgment arguing that the Dangerous Dog classification should be dismissed because the law was intended to hold accountable irresponsible dog owners, that she did not own Deuce at the time of the incidents, and that she had assumed ownership of Deuce before Mr. Head had filed the second petition.[326]

Once again, after several thousands of dollars in boarding, evaluation, training, lawyer's fees, filing costs, and taxpayer dollars to fund the Leon County Attorney's Office and Leon County Animal Control staff to prosecute the case, Ms. Sullivan and Leon County mediated the matter and settled out-of-court.[327] There have been no subsequent complaints about Deuce's behavior.

B. Marion County, Florida

Marion County defines a Dangerous Dog as

> any domestic dog, Canis familiaris, and any genetic hybridization thereof, whether alone or as a member of a pack, any dog that [sic] according to the department of code enforcement:
> (1) Has aggressively bitten, attacked, or endangered, or has inflicted on a human being lawfully on public or private property; or
> (2) Has killed a domestic animal or any livestock, or has more than once, injured a domestic animal or livestock while off the owner's property; or
> (3) Has been used primarily or in part for the purpose of dog fighting, or is a dog trained for dog fighting; or
> (4) Has, when unprovoked, chased or approached a person while off the premises or property of the owner in a menacing fashion or apparent attitude of attack; provided that such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority.

i. Marion County Animal Control Authority v. Delp[328]

Beth Delp found Marion County, Florida's, spacious horse country an enticing place for a second home where she could enjoy peace and quiet and where she could be more involved with the large number of owners and breeders of show dogs. She also wanted a place where her four champion Weimaraner show dogs could have a yard in which to stretch their legs. In addition to showing the dogs, Ms. Delp bred some of them, and they provided a substantial income to her.[329] Immediately after moving into the new property Ms. Delp contracted with a fence company to have a fence erected around the parameter of the property, and construction commenced at once.[330] On November 10, 2005, the next-door neighbors, Robert and Lois Mulligan, left their house to walk their dog and take out the trash can.[331] Mr. Mulligan noticed that two of the Weimaraners were out of their yard, and he stated to Ms. Mulligan that "[t]hey [the dogs] are out."[332] Although neither neighbor reported that the Weimaraners first engaged in any aggressive behavior toward them or were doing anything other than standing near the end of the Mulligan's driveway, Mr. Mulligan threw the garbage can at the dogs.[333] Ms. Mulligan picked up her Dachshund. The Mulligans stated that then two Weimaraners charged at them, barking and growling.[334] Mr. Mulligan stamped his feet and shouted at the dogs.[335] The Mulligans claimed that they backed into the house, yelling and stomping at the dogs, until they were inside their home.[336] Neither stated that they had been bitten or otherwise touched by the Weimaraners.[337] Mr. Mulligan stated that "he was so upset and scared for his wife that he thought he was going to have a heart attack."[338]

The Mulligans telephoned 911.[339] Some time later Code Enforcement Officer Kathleen Decker arrived at the Delp residence.[340] Officer Decker later wrote in a report that "4 large dog[s] tried to attack [the neighbors' dog and] complainant [and] his wife."[341] The report made no mention that Mr. Mulligan first threw the garbage can at the dogs before the dogs allegedly acted. Officer Decker wrote that when she arrived at Ms. Delp's residence and parked at the end of the driveway the dogs were circling her vehicle and charging at the driver's side door.[342] She slid a catch pole out of the window to try to catch one of the dogs.[343] She wrote that the dogs began to lunge at her open window.[344] She then "closed [her] window and cracked the door and began to yell at the dogs at which point they climbed back through a hole in the fence."[345] She wrote that she then "chased all four of the dogs back through the hole and patched the fence using a sliplead."[346] She next went to the Mulligan's home, where they allegedly stated to Officer Decker that Ms. Delp had told them that "she has had to move several times because of the dogs and that because of her dogs that she was in the newspaper in Melbourne Fl[orida]."[347] Officer Decker stated that she "posted" Ms. Delp's property requesting that Ms. Delp contact her.[348] There was no mention that Officer Decker attempted to telephone Ms. Delp although she listed a phone number for Ms. Delp on her incident report.[349] Officer Decker "advised" the Mulligans to fill out sworn affidavits on the incident, and she obtained one from Mr. Mulligan.[350]

On November 16, 2005, Marion County Animal Control Dangerous Dog Investigator Jennifer Kelly telephoned Sarasota and Brevard counties to research whether she could locate any previous complaints about Ms. Delp's Weimaraners.[351] Investigator Kelly later wrote in the sworn affidavit that "[b]oth counties indicated that they had previous complaints regarding Beth Delp's Weimaraners."[352] She wrote that "in this information there were eight separate complaints involving one or more dog[s] on each occasion the violations ranging from control to bites. Names of the dogs involved are [] Elwood, Steele, Banner, Liberty, Secret."[353]

On November 29, 2005, Investigator Kelly reinterviewed Lois Mulligan about the November 10th incident.[354] Investigator Kelly wrote that Ms. Mulligan reported that Mr. Mulligan first threw the garbage can at the two dogs, who then "clicked" their teeth, barked, growled, were low to the ground, and allegedly charged the Mulligans.[355] Ms. Mulligan did not state that she or Mr. Mulligan were bitten or physically harmed.[356] Investigator Kelly wrote that Ms. Mulligan said that Ms. Delp had stated to her that "if her dogs were under investigation for Dangerous Dog [sic] she would just move again."[357]

Investigator Kelly sought and received an administrative warrant from the court to take the four dogs into custody, based upon the Mulligans' assertion that Ms. Delp said she would move if her dogs were under investigation.[358] In the affidavit Investigator Kelly also wrote that the neighbors were "attacked" by Ms. Delp's Weimaraners.[359] She wrote that "the dogs were extremely aggressive" and that they ran back into their yard only after Officer Decker got out of her vehicle with the catch pole and "went after the dogs charging and yelling at them."[360] Investigator Kelly received the warrant[361] and went to Ms. Delp's residence to pick up two of the dogs identified by the Mulligans--Secret and Liberty.[362] Investigator Kelly told Ms. Delp that Secret and Liberty were being impounded because the County "wanted to ensure that she did not leave the County until the investigation was completed."[363] Ms. Delp stated that she would not have moved out of the county.[364] Investigator Kelly told Ms. Delp that she had researched Brevard and Sarasota counties' records and found that there were "numerous complaints" in the file against Ms. Delp's dogs.[365] Ms. Delp denied that she left the two prior counties "because of the dogs."[366] Investigator Kelly nonetheless took Secret and Liberty to the Marion County Animal Center.[367] Ms. Delp was later allowed to move them to her veterinarian's office.[368]

Investigator Kelly sent Ms. Delp a letter notifying her that there was sufficient evidence to classify "two gray Weimaraner type canines as dangerous."[369] Ms. Delp requested a formal hearing before the Marion County Code Enforcement Board on Animal Control's intent to permanently classify Secret and Liberty "dangerous."[370] Ms. Delp hired an attorney.

On December 21, 2005, the Marion County Code Enforcement Board[371] presided over Ms. Delp's Dangerous Dog classification formal hearing.[372]

Investigator Kelly read from her Summary of Investigation.[373] She stated that when Officer Decker arrived at the Delp residence she spotted four dogs in the roadway.[374] Officer Decker pulled her vehicle into the Delp residence's driveway and parked it.[375] The dogs circled her vehicle while it was parked on Ms. Delp's property.[376] Investigator Kelly stated that Officer Decker reported that the dogs charged at her door.[377] She tried to catch one of the dogs by sliding the catch pole out of the window, but was unsuccessful.[378] She then cracked her door and yelled at the dogs.[379] The dogs retreated based upon her voice commands.[380] She then secured them behind the gate.[381] Officer Decker went to the Mulligans' residence, where they advised her that Ms. Delp had told them that she had to leave several counties because of her dogs.[382]

Investigator Kelly then detailed her phone calls to Sarasota and Brevard counties, and stated to the Code Enforcement Board that "there were eight separate complaints involving one or more dog[s] on each occasion the violations ranging from control to bites."[383]

A review of the Sarasota County documents in the record of the hearing indicate that there may have been two separate bite incidents that occurred in Sarasota County; one incident involved two dogs (Banner and Steele) allegedly biting someone on or about January 16, 2001 (no details on this bite were provided at the hearing or in the record), and the second incident involved only one dog (Banner) allegedly biting a deliveryman who came onto Ms. Delp's property and left a package at the door.[384] The Brevard County document in the record indicates

that Anthony Lombardo stated that five Weimaraners ran out of Ms. Delp's home when she opened the door, ran to his property where he was talking outside on the phone, and Steele bit him on the calf.[385] The document indicates that when a police officer went to investigate the bite report the next day, he believed that the bite mark indicated that the bite had occurred more than 24 hours earlier because there was "dried," "white flaking skin around scabs."[386] Nonetheless, the officer issued four citations to Ms. Delp.[387] The remaining three Brevard County incidents involved dogs running at large; one 2002 incident involved one dog, a 2003 incident--marked "disregard"--appears to have involved one dog, and a 2004 incident involved three dogs.[388]

Investigator Kelly did not explain to the Marion County Code Enforcement Board that the Brevard and Sarasota counties records indicated that Secret and Liberty had never bitten anyone.[389] This information was not noted until Ms. Delp's attorney questioned Investigator Kelly.[390] Officer Kelly then stated that the information was being provided to the Code Enforcement Board to establish Ms. Delp's "control of the dogs."[391] No one from Brevard or Sarasota counties was present for questioning on the records. Notably, neither Brevard nor Sarasota counties classified the dogs as "dangerous."

Mr. Mulligan testified next. He described how the dogs bark "every time" he and his wife are outside of their residence.[392] He described how he yelled at the dogs and stomped his feet until he and Ms. Mulligan and their dog reentered their home.[393] He stated that he "was panicking," and "was really upset."[394] He stated that he went inside and telephoned 911; the operator asked if anyone had been bitten and Mr. Mulligan replied that no one had been bitten but it was "something close to that effect."[395] He concluded his testimony by stating that he "feared for [his] life."[396]

Neither Investigator Kelly nor Ms. Delp's attorney questioned Mr. Mulligan about the statement in his wife's November 29 interview or in Officer Kelly's Summary of Investigation in which Ms. Mulligan reported that Mr. Mulligan first threw a garbage can at the dogs before they started barking and charging at him.

Ms. Mulligan spoke next.[397] She stated that "every day the dogs are very agitated by any activity in our yard."[398] She stated that during the alleged incident she felt "very, very frightened for all of us."[399] She stated that she "started to get tunnel vision" when two of the dogs approached them during the incident.[400] She described an October 26 visit at Ms. Delp's home, the first time the two spoke as new neighbors. The dogs had not yet been brought to Ms. Delp's new residence and the Mulligans had not yet seen the dogs.[401] Ms. Mulligan stated that Ms. Delp told her that she was going to put in a gate at the back of her fenced property so that the dogs could run and exercise in the woods.[402] Ms. Mulligan stated that she was very concerned about the dogs running in the woods because at the time the Mulligans did not have a fence around their property, and she believed that she and her husband and dog would be "appetizers" for Ms. Delp's dogs.[403] She stated that Officer Decker told her and her husband that they "needed to fill out an affidavit right then and there."[404] She stated that Officer Decker told them "what to put in the affidavit."[405]

Ms. Mulligan was also not asked by anyone about whether or not Mr. Mulligan threw the garbage can at the dogs before they allegedly started barking and charging.

Officer Decker then spoke.[406] She stated that the dogs responded to her command to retreat to the yard.[407] When questioned by Ms. Delp's attorney, she stated that she had not been attacked by the dogs, although their behavior toward her was the same as that described by the Mulligans, and the incident involving them was labeled by Officer Kelly as an "attack" in her Summary of Investigation.[408] Officer Decker described her previous experience with animals as consisting of

more than two years with Marion County Animal Control, and several years as a dog groomer, showing dogs, and working at the race track training horses.[409]

Officer Suzanne Ericson spoke next.[410] She stated that she had heard Ms. Delp state that she had previously left two areas "because of her dogs."[411] When questioned by Ms. Delp's attorney she admitted that she was standing a distance away from Ms. Delp and that Ms. Delp may have made the comment in the vein that she had left the prior area because her neighbors did not like dogs, and not because she had difficulties with the prior counties' animal control agencies.[412]

Ms. Delp spoke and refuted that she had moved to Ocala to escape difficulties with any prior animal control agencies.[413] She noted that she still owned her home in Brevard County.[414] She described how she found Officer Decker's posted notice on her fence, and how she spent several days telephoning Marion County Animal Control to figure out what had happened, because she was not home at the time of the alleged incident.[415] She stated that Officer Decker had told her that she did not "have a problem" with the dogs' behavior when she was at the Delp residence because Officer Decker was parked in Ms. Delp's driveway and that the dogs were simply "protecting their property."[416] Ms. Delp stated that one of the fence workmen did not secure the gate when he left.[417] She testified that she went through the back yard gate to get to her car because the front gate had just been painted, and that she did not leave the gate unsecured.[418]

Ms. Mulligan spoke again and stated that although she did not see Ms. Delp leave she was certain that she did not leave through the back gate and that Ms. Delp was the last person to leave the property.[419]

The Code Enforcement Board members began to participate in the discussion.[420] One stated that these hearings usually involved testimony from veterinarians, professional handlers, and owners regarding the dogs' good behavior, but what he needed to hear was that the incident did not happen.[421] A Board member noted that Ms. Delp's life was "built around dogs," so there were more likely to be incidents concerning dogs.[422] A Board member stated that Ms. Delp had a responsibility to keep her dogs on her property, and to not allow them to "put someone else in fear."[423] This same commissioner then stated that "in Marion County if a dog leaves their [sic] owner's property and does that to somebody else, that dog *will* be declared dangerous."[424]

The Marion County Code Enforcement Board voted unanimously to find that competent, substantial evidence existed to permanently classify Secret and Liberty "dangerous."[425] It its Final Order the Code Enforcement Board wrote that based upon the sworn testimony and documents provided that there was substantial, competent evidence to support Marion County Animal Control's initial determination that Secret and Liberty should be classified "dangerous."[426] However, in the Final Order the Board made no findings of fact to support its dangerous classification.[427] The Final Order further stated that in accordance with Marion County Code section 4-13(e), an appeal "shall be by petition for writ of certiorari under the traditional record review applicable to other types of appeals from quasi-judicial decisions of administrative bodies."[428]

Due to appeal costs and fees, and confusion over the appeal process, Ms. Delp chose to not appeal the code enforcement order to the County Court. Ms. Delp was forced to have Secret and Liberty spayed and neutered.[429] She paid a $1000 fee to Marion County Code Enforcement, an annual charge.[430] As required by Marion County ordinance, she also had Secret and Liberty implanted with microchips that identify them as dangerous.[431] Because she still owned a residence in Brevard County, Ms. Delp paid an additional $600 Dangerous Dog fee--another annual payment--to register the two dogs there as well.[432] Brevard County required Ms. Delp to obtain $200,000 in liability insurance to cover both dogs, and to name Brevard County Animal

Services and Enforcement as a certificate holder.[433] Ms. Delp is also subject to unannounced inspections to ensure her compliance with the Dangerous Dog regulations.[434]

X. "APPEALING" A DANGEROUS DOG CLASSIFICATION TO A FLORIDA COUNTY COURT

A. Statute Language is Contradictory

Section 767.12(1)(d), *Florida Statutes* (2005), sets forth the process of how the Dangerous Dog classification case may move into the county court:

> Once a dog is classified as a dangerous dog, the animal control authority shall provide written notification to the owner . . . and the owner may file a written request for a hearing in the county court to appeal the classification . . . . Each applicable local governing authority must establish appeal procedures that conform to this paragraph.

The use of the words "hearing" and "appeal" indicate two different proceedings that occur in courts. *Black's Law Dictionary* defines a "hearing" as "[a] judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying."[435] *Black's Law Dictionary* defines an appeal as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp[ecially] the submission of a lower court's or agency's decision to a higher court for review and possible reversal."[436] Often it is a review of the record to determine if competent, substantial evidence supports the decision of the lower tribunal which considered the facts and weighed the evidence to determine, for example, whether the prosecuting animal control agency met its burden to prove by a preponderance of the evidence that the subject dog could be declared "dangerous" in accordance with state and local laws.[437] The arguably offhand use of the word "appeal," however, appears to be unconstitutional because, for the reasons in the subsequent section of this Article, Florida county courts do not have appellate jurisdiction.

B. County Courts Do Not Have Appellate Jurisdiction

The Florida Constitution does not award appellate jurisdiction to county courts, but instead states that "[t]he county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state."[438] The general law is that which is enacted by the Legislature, and not by local governments; elsewise, there would not be uniform jurisdiction throughout the state.[439]

The *Florida Statutes* direct that "[c]ounty courts shall have original jurisdiction . . . of all violations of municipal and county ordinances."[440] The statute also explains that "[a] county court is a trial court."[441]

The *Florida Rules of Appellate Procedure* also do not confer appellate jurisdiction upon county courts. For example, Rule 9.030(a) sets forth appellate jurisdiction of the supreme court, Rule 9.030(b) addresses appellate jurisdiction of the district courts of appeal, and Rule 9.030(c) describes circuit court appellate jurisdiction. The *Rules* are silent on county court appellate jurisdiction.

The Florida Constitution, the *Florida Statutes*, and the *Rules* also do not award county courts certiorari jurisdiction.

It cannot be concluded that section 767.12(1)(d)'s inartfully drafted language, which refers to both a "hearing" and an "appeal," constitutionally awards appellate jurisdiction to a county court to conduct a traditional, record-review type of appeal of a Dangerous Dog classification case that originated at the local government level. Thus, the authors believe, dog owners who wish to move their cases to their county court are constitutionally entitled to de novo hearings.[442]

C. Some Courts Interpret Section 767.12(d) to Achieve Unconstitutional Results

While some Florida courts have reached the conclusion that dog owners are entitled to a de novo hearings in the county courts, others have determined that dog owners are only entitled to a traditional record review of their Dangerous Dog classification cases, or worse yet, that owners must file a petition for writ of certiorari--a discretionary writ--in the county court to initiate the "appeal" process.

For example, in *Dorsch v. Marion County Code Enforcement Board*,[443] the county court, relying upon *Pinellas County Animal Control v. Sabates*,[444] concluded that the dog owner was required to proceed to the county court via a petition for writ of certiorari. *Sabates*, however, was flawed. In *Sabates*, the circuit court opined that the county court erred by finding that the dog owner was entitled to a de novo hearing because the Dangerous Dog statute did not expressly state (expressio unius est exclusio alterius) that the hearing was to be de novo.[445] The court looked at two unrelated cases--one concerning an appeal from a state agency to a governing commission (not a constitutionally derived court) which was specifically directed by statute,[446] and the other concerning a lemon law case in which the governing statute expressly provided for an appeal to a circuit court[447]--for examples of statutes which either expressly required traditional record-review types-of-appeals or de novo hearings. Conspicuously absent is the *Sabates* court's failure to conduct a review and analysis of the absence of a constitutional or statutory award of appellate jurisdiction to county courts, and how this absence should be applied to an interpretation of section 767.12(1)(d).

D. *Informal Procedures Require De Novo Hearing in the County Court Due to Lack of Due Process and Fair Hearing*

Although chapter 767 does not address how the Dangerous Dog classification formal hearing at the pre-county court level is to be handled, other than to state that after the animal control authority has determined there is sufficient cause to classify a dog "dangerous" that it "shall afford the owner an opportunity for a hearing prior to making a final determination[,]" some local governments have passed ordinances that provide more direction on how the hearing is to be conducted. Unfortunately, as discussed in some of the case studies cited *supra* in Part IX, these hearings often fall far short of ensuring that dog owners' constitutionally mandated rights to due process and fair hearings are upheld.

For example, Leon County, Florida's, ordinance governing Dangerous Dog classification formal hearings before the Leon County Animal Control Classification Committee states that "formal rules of evidence shall not apply, but fundamental due process shall be observed and govern the proceedings."[448] Despite this pronouncement the Classification Committee continues to accept and consider unsworn evidence collected through neighborhood canvassing, which

sometimes elicits calls such as "I don't know anything about the incident you described, but I know the dogs are there, and I'm afraid of them."[449] The Classification Committee is free to base its decisions solely upon these out-of-court statements in the petitions or investigation records gleaned from phone calls and notes consisting of non-witnesses' mere opinions. The Committee also does not list findings of fact in its orders informing dog owners of the evidence the Committee believes demonstrated by a preponderance that the animal control director properly initially classified the dogs as "dangerous." Moreover, regarding the weighing of the evidence, the Committee frequently appears to place more weight on the subjective interpretations submitted by the persons filing the petitions, over the testimony of its own animal control officers, Committee veterinarians, and behavioral specialists, who presumably have much more extensive training and experience with assessing animal behavior than at least most of the petition filers.

Some counties deny dog owners *any* significant formalities at the formal hearing. At a 2005 Orange County, Florida, Classification Committee hearing the Committee chair emphasized that the Committee hearing was not being conducted in a court of law and affidavits and animal control interviews would substitute for witnesses.[450] Witnesses who were present at the hearing and who had direct knowledge of the incident were allowed to speak, but only at the discretion of the Committee.[451] In response to the attorney for the dog owner's[452] repeated requests for live witnesses to be placed under oath and for an opportunity to cross examine them, the Committee chair simply re-emphasized that it was not a court of law and such formalities would not be engaged.[453]

The dog owners' interests at stake also extend beyond the dogs themselves. As noted in *Riehl*, a Dangerous Dog classification imposes "many onerous restrictions on dog owners with so-called dangerous dogs."[454] Constructing a proper enclosure, registering with the local government entity, paying to spay or neuter their dogs, obtaining liability insurance, and permanently identifying their dogs through tattoos and tags, all come at a cost to dog owners. These costs do not even include an "appeal" to the county court, which will trigger filing and attorneys' fees, and costs. Shrek's owner estimated her costs to be at least $1500, and this was before she initiated an appeal to the final classification in the Leon County county court.[455] Fifteen thousand dollars is probably a conservative estimate regarding what a dog owner will pay in fees and costs, especially if a dog owner hires counsel and pursues an appeal. In Osceola County, Florida, for example, registration alone costs $1000 for the first year and $500 for each year thereafter.[456] If a dog owner does "appeal," the case can rack up legal fees for months or years. One Palm Harbor, Florida, dog owner accumulated approximately $80,000 in legal bills during the first four years of her appeal process.[457]

As in the *Delp* case, a county may also require a dog owner to purchase liability insurance, which will tack on another financial burden.[458] The dog owner can be subjected to scrutiny or even harassment by his or her neighbors, and may be required to pay higher homeowner's association fees, especially if the county has an online Dangerous Dog registry. Yet, too many local governments fail to recognize these significant costs to dog owners whose dogs are unjustly declared "dangerous."

Most significantly, in counties such as Alachua, a Dangerous Dog classification can mean a death sentence for the dog declared dangerous. A dog owner is faced with being forced to pay legal fees and costs to appeal the classification to the Alachua County county court if he or she wants to save the life of his or her dog.

The next section of this Article reviews what the authors believe is likely the true underlying motivation for most of the classification designations.

XI. Local governments May Be Classifying Dogs "Dangerous" to Protect Themselves from Possibly Being Held Liable in the Future

Local governments may be erring on the side of declaring dogs dangerous because they are concerned about potential liability for future attacks if they do not declare a dog dangerous. In too many cases in which dogs are classified “dangerous,” the facts indicate that the subject dogs were simply engaging in normal dog behaviors such as running and barking. In *Ortega* and *Sullivan*, for example, neighbors obviously were frustrated because dogs were continuing to run at large and bark at them. If these dogs intended to attack, they had ample opportunity to do so, yet they never did. It is certainly arguable that in some cases animal control officers have provided petitions for classification of a dangerous or aggressive animal as a means to assuage the neighbors’ frustrations rather than citing the dog owners for dogs running at large or violating leash laws.[459]

It is notable that some presiding authorities ignore the testimony of their own officers, who state that they do not believe the dogs are dangerous. Additionally, in *Moore* two Classification Committee members ignored the statements of the only animal behavioral expert on the panel--a licensed, practicing veterinarian who was placed on the committee for his expertise and knowledge of dogs--who stated that there was insufficient evidence to show that Shrek was doing anything other than engaging in behaviors normal for an eight-month-old puppy, and that the county did not show by a preponderance of the evidence that Shrek qualified for being permanently classified "dangerous."

Local governments should not fear being held liable for not classifying dogs "dangerous" when the evidence obviously does not support the classifications or the legislative intent underlying the law. Under Florida law, discretionary government actions that involve basic policy or planning decisions are immune from tort liability.[460] When a decision is made pursuant to government’s police power, it is a discretionary policy decision that is immune from liability.[461] For example, a Florida appellate court has concluded that a local government was immune from liability after it did not classify a dog "dangerous." In *Metro Dade County Public Works Department, Animal Care & Control Division v. Browd*[462], a citizen filed a complaint with the Dade County Animal Control Division after her neighbor’s dog bit her own dog on two separate occasions.[463] Although the division investigated the incident and concluded that the dog did commit the attacks, it concluded that the dog was not dangerous.[464] The Third District Court of Appeal rejected the petitioner’s argument that the county ordinance required the division to declare the dog dangerous.[465] The court concluded that the decision "was a discretionary executive action not amenable to control, superintendence, or review by the judiciary."[466]

Additionally, in *Carter v. City of Stuart*[467] the Florida Supreme Court confirmed that a city’s decision to not enforce its animal control ordinance is a discretionary policy decision.[468]

It is particularly important that local governments adhere to the original intent of the Florida Legislature when it passed the Dangerous Dog Bill: that the "dangerous" classification only be applied to dogs who are truly dangerous or vicious because they have attacked humans or other animals, or who undoubtedly possess the propensity to attack a human or another animal. Running up to and barking at humans, while likely to be annoying to many, is more often than not *normal* dog behavior, as noted in the *Merck Veterinary Manual*. However, engaging in

annoying behavior does not justify the use of taxpayer-funded animal control services to prosecute dogs and their owners through local government dangerous dog programs.

Moreover, not only does an unfounded Dangerous Dog classification create serious hardships for dog owners, it imposes inhumane confinement or even death for the dogs at issue. With counties such as Alachua County, Florida, instituting a death sentence for dogs classified "dangerous," local governments must refrain from classifying dogs "dangerous" when the evidence does not support such a classification, simply because of speculative fears that they may be held legally liable in the future.

XII. RECOMMENDATIONS

A. Cite Owners for Their Dogs Running at Large or Violating Leash Laws Rather Than Classifying Dogs Dangerous When There is No Evidence that the Dogs are Truly Dangerous

When dogs are running-at-large and are in violation of local leash laws, in appropriate situations dog owners should receive citations, and the citations should be issued upon a graduated scale of fee increases if the violations continue. There are too many cases in which dogs are simply running-at-large and engaging in normal dog behaviors such as barking, yet, as in the case studies cited above, local governments allow or even encourage neighbors to initiate Dangerous Dog cases against dog owners. Not only is this unjust, it wastes limited local government resources that are required to investigate and prosecute the complaints at the animal control level, and subsequently at the county court level or beyond if the dog owner chooses to pursue appeals.

If a local ordinance requires an animal control officer to witness a dog running at large before a citation can be issued, local governments should amend their ordinances to allow citations based upon a minimum of two sworn affidavits provided by adult citizens not residing in the same household.

B. Cease Handling Cases Before Animal Control Authorities and Move Directly into County Court

As discussed above, the governing state statute simply does not provide the due process required to be provided to dog owners by the federal and state constitutions. By not addressing evidentiary standards, section 767.12(1)(c) allows local governments to implement and follow laws that allow for "informal"[469] and "non-adversarial"[470] procedures that permit the introduction of unsworn, and in some cases hearsay, evidence and allow the classification review entity to decide who will be permitted to speak as witnesses and who will not. The informal evidentiary standards do not ensure a fair balancing and weighing of the totality of the evidence. Moreover, the parties cannot subpoena witnesses, which has been an impediment to the presentation of cases for not only dog owners but also animal control authorities prosecuting Dangerous Dog cases.

Requiring Dangerous Dog cases to be handled from the initiation of the case in county courts will provide the structure and process to both dog owners and animal control authorities to which they are entitled under federal and state constitutions. It will also protect against waste of local government resources when they conduct an initial classification and formal hearing which is then followed by a de novo appeal in a county court.

Some may argue that courts are already overburdened and that Dangerous Dog cases will further tax the system, but moving directly to county court removes the duplication of conducting two hearings or trials, whether informal or formal. If a party is not satisfied with the decision reached by the county court judge, the party may seek a traditional, record-review type of appeal in the circuit court. Through this scheme government resources are conserved and both parties have a better chance of receiving due process and a fair hearing.

When citizens receive traffic tickets, they are generally permitted to have their cases heard at least in traffic court. Given the interests at stake in "Dangerous Dog" cases--in which many humans love their dogs as equal or near-equal family members--these matters should be heard at their origin by county courts who are far better equipped to provide the due process and fair hearings mandated by our constitutions. Chapter 767 should be amended by the Florida Legislature to expressly require that animal control authorities proceed with the prosecution of Dangerous Dog cases in county courts. The current process which allows Dangerous Dog cases to be handled by animal control authorities--many of whom fear being held liable in the future should they fail to declare a dog dangerous--is simply too fallible.

Additionally, the internally structured process--which, for example, allows an animal control officer to classify a dog "dangerous," and then requires that an animal control director conduct a formal hearing to consider permanent classification--is without sufficient safeguards to ward against decisions motivated by collegiality and a desire to support the decisions of co-workers.[471] Such structure undeniably smacks of incestuousness.

In lieu of proceeding with a Dangerous Dog classification in the county court, at a bare minimum Dangerous Dog classifications should be handled by persons specially trained in dog behavior. For example, Brevard County requires that after the animal services and enforcement director finds that there is sufficient cause to institute an initial determination of dangerous, the matter proceeds to the Animal Services and Enforcement Council.[472] The Council consists of one veterinarian and one alternate veterinarian, one dog behavioral trainer and one alternate dog behavioral trainer, and one kennel worker and one alternate kennel worker.[473] The Council is required to adopt rules of procedure.[474] A copy of the rules is provided to the dog owner requesting a hearing.[475] If a dog is declared dangerous the Council must provide the basis for declaring the dog dangerous.[476] A committee comprised of individuals with no allegiance to the local government over the dog owner, and which has members who possess quality training, education, and experience with animal behavior, is far more likely to provide a fair assessment of the dog and the alleged incident than a committee comprised of local government employees or others with little or no training, education, or experience in dog behavior and a collegial relationship with animal control agencies.

C. Modification of "Menacing Fashion" and "Apparent Attitude" Language

Section 767.11, *Florida Statutes* (2005) states that:

> (1) "Dangerous dog" means any dog that according to the records of the appropriate authority:
> (d) Has, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack . . . .

Until the legislature modifies or better explains the definition of "menacing fashion" and "apparent attitude of attack," this Dangerous Dog law cannot provide dog owners with adequate due process. Citizens are able to misuse the Dangerous Dog law because the definitions of "menacing fashion" and "apparent attitude of attack" are not clear enough to exclude improper complaints. Coupled with obvious local government fears of being held legally liable in the future should they choose to not classify a dog "dangerous" and the dog later hurts someone, the failure to define how "menacing fashion" and "apparent attitude of attack" will be determined results in an evidentiary standard easily met by the complaining party. Oftentimes this is someone who knows little or nothing about basic dog behaviors and how dogs use these behaviors to communicate, and who may personally fear dogs in general. These parties are permitted to subjectively assess the behavior of the dogs as approaching them in a "menacing fashion" or "apparent attitude of attack," even when the dogs are truly not engaging in such behavior. The subjective assessments are usually given great weight by the boards, committees, or other authorities hearing the cases. A particularly illustrative example is the statement made by the Alachua County code enforcement board member who said that a dog who is off of his property and who "scares" someone is going to be classified "dangerous" in Alachua County.[477]

Although there is a valid concern that making the definition more stringent will exclude some truly dangerous behaviors, if the definitions are carefully crafted they will include all Dangerous Dogs and exclude all non-Dangerous Dogs who are merely engaging in normal dog behaviors that are not truly dangerous.

Shrek's case also provides an illustrative example of the difficulty the average person has in understanding normal dog behavior. Although the legislature intended the language in the statute to mean a *true* threat, and believed that the average citizen would understand when such a true threat is present,[478] the practical application to real-life cases has proven otherwise. The average citizen, especially one who has a general fear of dogs, is unable to distinguish between a dog running toward a person in an excited, playful manner--in this case, an eight-month-old puppy--and a dog running toward a person in a vicious manner. The only evidence of Shrek's "dangerousness" was the neighbor's petition that described a single incident in which the dog ran to those who beckoned him, and who never bit or otherwise injured anyone although, as the veterinarian committee member noted, throwing hot coffee on him would have incited rather than deterred Shrek if he were truly intent on attacking.[479]

To resolve the difficulty of interpreting what "menacing fashion" and "apparent attitude of attack" mean, more weight should be given to qualified experts such as veterinarians or animal behaviorists. The "menacing fashion" and "apparent attitude of attack" prong should be redrafted to state "as determined by a qualified animal behaviorist or veterinarian." All counties should have access to at least qualified veterinarians, so this clarification and redrafting should not impose a severe hardship on animal control authorities.

Section 767.11(1)(d) should also be amended to require a display of the alleged behavior on more than one occasion, and to include a statute of limitations. Several states have enacted such provisions. For example, in Nevada, a Dangerous Dog is defined as a dog who "*on two separate occasions within 18 months* . . . behaves menacingly . . . ."[480] In Louisiana, a dog who "*on two separate occasions* . . . engages in any behavior that requires a defensive action by any person" may be declared dangerous.[481] Both California and Louisiana also have statutes of limitations requiring that the dog exhibit the dangerous behavior within the "prior 36-month period."[482]

D. Enact an Intermediate "Potentially Dangerous Dog" Category

Section 767.11 should also be amended to include a "potentially Dangerous Dog" category.[483] Minnesota's statute, which includes a potentially dangerous category, can be used as a model.[484] The statute retains its Dangerous Dog classification, but only those dogs who have inflicted "*substantial* bodily harm" are included in the definition.[485] A "potentially Dangerous Dog" is then defined as a dog who has engaged in behavior causing less severe injury or has exhibited an "apparent attitude of attack."[486]

Applying this model to the Florida statute, the forth prong of the current Dangerous Dog definition should be moved into a "potentially dangerous" category. A dog who approaches a person in an apparent attitude of attack only once would be "potentially dangerous," while a dog who approaches a person with an apparent attitude of attack on more than one occasion would be "dangerous." Notably, California requires the dog to display the threatening behavior more than once even in the "potentially dangerous" category.[487] Distinguishing between dangerous and potentially dangerous classifications is a compromise that recognizes concerns that the public should be protected from a dog who exhibits dangerous behavior only once. A fifth prong, providing for "potentially Dangerous Dogs" who display threatening behavior after classification, would then be added to the Dangerous Dog definition.

Even though one instance of behavior will still subject the dog owner to regulation, the compromise is also in the dog owner's best interest. A potentially Dangerous Dog owner is subject to less severe restrictions and costs than a Dangerous Dog owner. Under the Minnesota model, a potentially Dangerous Dog owner must permanently identify the dog[488] and is subject to other regulations on a county basis,[489] but is not subject to the criminal penalty, confiscation, or euthanasia provisions.[490]

Notably, the California statute provides that any potentially Dangerous Dog who does not display new "instances of [threatening] behavior . . . within a 36-month period from the date of designation . . . *shall* be removed from the list . . ." and any dog may be removed from the list at any time if the owner shows that "changes in circumstances or measures taken . . . , such as training of the dog, have mitigated the risk to the public safety."[491] This removal provision is a logical conclusion that recognizes the potential for some dogs' behavior to be misjudged, and that inclusion in even the potentially Dangerous Dog category imposes hardships on the dogs' owners and the dogs which may not be justified. Providing the ability to remove the dog from the potentially Dangerous Dog category provides a fair and reasonable option that respects the property rights of dog owners while also protecting citizens and making better use of government resources. Florida's potentially Dangerous Dog category should also include a removal provision.

E. Evidentiary Standards and Administrative Procedure During the Classification Process

Amending the statutory definition and adding an intermediate classification is a good start, but animal control authorities should also be held to a stricter evidentiary burden. Although federal and state laws of evidence only apply directly to courts of law[492], a county may follow them at its quasi-judicial hearings when doing so would best serve interests of justice. For example, a local zoning commission will frequently place witnesses under oath, allow for cross-examination, and limit witness testimony to those with direct knowledge.[493] Like these zoning commissions, the Dangerous Dog classification committees should recognize the property rights

at stake and allow for the basic rules of evidence to be followed, even if the proceeding is not held in a court of law.

Animal control authorities should also adhere to administrative procedure. Although local governments are not statutorily bound by the Florida Administrative Procedure Act ("FAPA"), the legislature may expressly make a local agency subject to FAPA.[494] A local agency may also voluntarily choose to follow the procedures set forth in FAPA.[495] At least one Florida county has an administrative hearing officer issue a formal order of final classification under section 767.12(1)(c).[496] The administrative hearing officer must clearly set forth the findings of fact and explain the final order.[497] Given the dog owners' interests at stake, due process and fair hearing requirements demand this degree of structure, at a minimum. Unfortunately, most Florida counties do not even begin to implement this minimal degree of structure in their Dangerous Dog proceedings.

Once an agency is subject to FAPA, it must follow certain procedures set forth by the *Florida Statutes*. If there are disputed issues of material fact, an administrative law judge must conduct the hearing[498] and the hearing is to be a "trial type proceeding."[499] Parties must be given an opportunity to respond, present evidence, conduct cross-examination, and submit rebuttal evidence.[500] Moreover, hearsay alone cannot support the ultimate decision; it may only be used to supplement or explain other evidence.[501] Thus, following the administrative process should ensure that facts truly supporting the classification are present and will result in better defined and preserved ruling should the owner decide to proceed to the county court under section 767.12(1)(d).

F. Outlaw Chaining Dogs for Prolonged Periods of Time

As discussed *supra* in Part IV of this Article, research undeniably indicates that chaining dogs for prolonged periods of time is a primary cause of dog bites. Throughout the country a growing number of communities have either banned chaining or tethering of dogs for prolonged periods of time, or they are about to ban this practice.[502] Local governments who do not already have such chaining bans in place should enact them immediately. Not only do these chaining bans successfully prevent situations in which dogs are likely to bite, they better ensure humane treatment of dogs.[503]

G. Public Education

While public education is not a solution in and of itself, it is a valuable part of any public safety program. Some counties already have certain education programs in place and others are planning to implement them.[504] Public education should include both responsible pet ownership and responsible parenting. Approximately 79% of the victims of fatal dog attacks are children under the age of 12.[505] Many of these fatal attacks occur when a child is trying to play with a dog while he is eating.[506] If parents are aware of these factors, it can prevent the death or serious injury of a child as well as the initiation of the Dangerous Dog classification process.

H. Implement Licensing Requirements for Those Who Own Large Dogs

Ironically, the one characteristic that many dogs classified "dangerous" *do* share is the one characteristic that the legislature expressly rejected as a component of the Dangerous Dog law--a

common breed. Local governments and citizens frequently express specific concern with pit bulls and ignore the effect of irresponsible ownership.[507] Although Florida local government officials recognize that they cannot expressly enact a breed-specific ban,[508] many are applying their ordinances to reach the same effect.[509] An inordinate number of dogs classified "dangerous" are pit bulls, Rottweilers, Akitas, and other breeds usually targeted by breed specific legislation.[510]

One probable reason for this application of the dangerous dog proceedings to these specific breeds of dog may be human perception. For example, if two cars--one a Honda Civic and one a red Corvette--are speeding down a highway at an identical rate of speed, more often than not it will be the driver of the Corvette who is pulled over for ticketing rather than the Honda's driver. Image and reputation flavor perception. A pit bull running up to and barking at someone--in other words, engaging in normal dog behaviors--is much more likely to be seen as "attacking" than a host of other dogs who do not carry the same negative reputation as pit bulls. Coupled with many local governments' obviously politically motivated fears of being held liable in the future should a dog with a bad breed reputation actually cause harm to someone, it is easy to understand why local animal control authorities classify an inordinate number of "bad-reputation" breeds "dangerous" based on facts which indicate that the dogs are doing nothing more than engaging in normal, non-dangerous dog behaviors.

Rather than more freely apply Dangerous Dog classifications to pit bulls and other dogs perceived to be dangerous due to their reputations, local governments can require citizens who own large to complete responsible dog owner courses as a precursor to owning the dogs or receiving a dog license.

This requirement is for the good of the dogs as well as the public. It is well known that people usually fear large dogs rather than small ones.[511] Requiring big dog owners to complete responsible owner classes prior to ownership, or soon thereafter, ensures in the least that these humans are exposed to concepts of humane treatment of the dogs, as well as the knowledge that other humans are more likely to perceive the actions of these dogs as "menacing" or as engaging in an "apparent attitude of attacks" if the dogs approach others. It informs good owners of the need to be vigilant about keeping watch over, and controlling, their dogs. Requiring completion of such a class also informs owners that undertaking the care of such a dog is a serious responsibility. Owners who are willing to complete the required class will generally indicate that they are capable of acting as responsible owners. The outcome should be a win-win situation for all involved.

Local governments need not fear violating constitutional restrictions against imposing such requirements because owners of large dogs are not a suspect class, and governments have a valid public safety interest in imposing such requirements.

Of course, such requirements would trigger the need for enforcement by local governments, which thus becomes a resource allocation issue. However, this preventative measure is a reasonable--and probably more cost effective--alternative to the current provision of animal control services investigating and prosecuting dog bite incidents, dogs running at large, and animal cruelty cases.

I. Institute Better Training for Animal Control Staff

While some animal control staff members are trained to control and confine dogs, some have received no training on normal and abnormal dog behaviors. It is important to note that some

rural Florida counties, and other rural counties throughout the country, have no animal control divisions. Animal control matters in these locales are generally handled by local police or sheriff departments.[512] These entities are usually even less likely to be trained in normal and abnormal dog behaviors.

Currently there is a shift taking place in this country to move from "animal control" to "animal care and control."[513] These animal control agencies are taking seriously the charge that many animal control agencies pledge to uphold--to ensure the humane treatment of animals, including dogs, within their communities, in equal measure to making sure companion animals' behavior is reasonably controlled and that the animals are not a public safety threat.[514]

Animal care and control divisions should work with citizens who are experiencing dogs running-at-large to assuage the problem before it rises to the level of citizens believing that they must file documents to institute Dangerous Dog classifications. Animal care and control officers should work with dog owners to educate them on how to contain their dogs on their properties, and not simply show up at their doorstep to issue citations. Many of these citizens, such as the dog owner in *Ortega*, are good citizens trying to keep their dogs on their properties but having difficulty doing so for understandable reasons that simply need adjustment.[515] Counseling and instruction from trained animal care and control officers who recognize the need to avoid unnecessary Dangerous Dog classifications should be capable of heading off unfounded Dangerous Dog classification filings through these more holistic, preventative measures, while also protecting the general public. Dangerous Dog cases are stressful for both dog owners and complaining citizens, and they quickly tax limited government resources. Logical, holistic measures that can be taken by animal care and control officers to solve problems with dogs who are truly not dangerous but who nonetheless are a nuisance because they are running-at-large, should be employed whenever possible.

J. Pass Legislation Requiring Owners of Dogs Repeatedly Running-at-Large to Complete Responsible Owner Classes

In addition to requiring dog owners who allow their dogs to run at large, or who violate leash laws, to pay financial penalties, local governments should require that the owners pay for and complete a responsible dog owner course. Dog owners should have the option of completing the course in lieu of paying a monetary fine. Proof of successful completion of the course provided to the animal control authority should result in a refund or abatement of any running-at-large or leash law violation fees that were or could be imposed.

K. City and County Attorneys Should Properly Advise Animal Control Directors on Liability Exposure

Some animal control directors appear to be unfamiliar with concepts such as government sovereign or qualified immunity regarding discretionary decisions. City and county attorneys should issue memoranda of law to animal control directors and the entities within their governments that consider Dangerous Dog cases, explaining that governments generally cannot be held liable for reasonable decisions in discretionary acts. Dangerous Dog classifications should not be based upon speculative, possible future behavior, or for political motivations. Hopefully better informing animal control agencies and Dangerous Dog

classification decision-makers on this matter will result in only dogs who are truly dangerous being classified as such.

L. Under the Current Scheme, Dog Owners of Dogs Truly Not Dangerous Should "Appeal" to Their Jurisdiction's County Court

For the reasons discussed *supra*, dog owners who truly believe their dogs have been unjustly classified "dangerous" should appeal their cases to their county courts.[516] Using the arguments set forth in this Article, dog owners in counties that are currently requiring "appeals" of Dangerous Dog classifications to be conducted as traditional record reviews of the proceedings below, or through petitions for writ of certiorari, should argue that they are entitled to de novo hearings. A de novo hearing will afford the dog owner with formal structure more likely to focus on the totality of the circumstances rather than simply the subjective opinion of the complaining party. Formal rules of evidence will be applied: witnesses can be subpoenaed and sworn before testifying, hearsay evidence should be excluded, documents will need to be authenticated, and non-witnesses sitting in the galley will not be allowed to interject their mere opinions. The presiding judge will be much better educated on the evidentiary burden that the prosecuting county must meet--usually a preponderance of the evidence--and far better schooled in properly weighing all of the evidence. In short, dogs are far more likely to get a fair trial in court than they are before many local government animal control committees, code enforcement boards, or county managers.

M. Consider Extracting the Root of the Problem

Based upon traditional and historical practices, humans have adopted, and continue to subscribe to, the mindset that the only way to deal with most dogs who bite is to kill them.

Dogs generally cause harm by using their elongated snouts and numerous sharp teeth to bite.[517] In the wild, the extended canine teeth are used to catch, stab, and hold prey.[518] Behind the canine teeth, the premolars are designed for cutting and shearing.[519] The molars, located at the very rear of the jaw, are used to chew and grind.[520] The small incisors, located in the front of a dog's mouth, are used to gnaw.[521] A dog also can engage crushing power with his jaws to bear down on and contain prey, or in the case of small animals, to kill them.[522] The roots on a dog's teeth are very long.[523] Nearly all of the harm caused by vicious dogs is created by their teeth and the crushing power of the jaws.[524] Dogs can kill small prey by grasping the prey in their jaws and vigorously shaking their heads from side to side, which can break the neck of the prey.[525] Grasping the throat of prey and pressing it to the ground can cause suffocation.[526]

Rather than impose a death sentence on some dogs who have bitten and harmed or killed other animals, or who have caused relatively non-serious injuries to humans, animal control authorities should consider allowing some dog owners to pay to have their classified-"dangerous" dog's teeth extracted. Removing the teeth at least in the front of a dog's mouth should render him far less dangerous and far less likely to cause harm in the future.[527] While the dog will still have some crushing power, he definitely will be much less of a threat to most humans and other animals.[528]

If the goal of killing a "dangerous" dog is ensure that he will never cause harm again, then extraction of his teeth should serve that purpose in most situations as well.[529] Of course, if the goal of killing the dog is to exact revenge upon him, then removal of teeth is irrelevant.

XIII. CONCLUSION

When drafting Florida's Dangerous Dog law, the legislature's focus was on a very specific class of dogs--those with vicious propensities--and the groups who supported the legislation did so with the understanding that the goal was to control vicious dogs before they could attack. A review of several Dangerous Dog cases from around the state of Florida, some receiving treatment in this Article, clearly indicates that some local governments are enforcing the statute outside of the original intent of the legislature. Some of these local government entities are classifying dogs who are simply engaging in normal dog behaviors "dangerous" because they fear being held legally liable in the future should the dogs actually eventually hurt someone. Such fear is unnecessary because local governments are immune from liability for making discretionary decisions when the decisions are reasonable.

A statewide remedy is necessary because the broadly written statute allows counties to circumvent due process, impose excessive penalties upon dog owners, and to treat inhumanely dogs who are not truly dangerous and who are merely engaging in normal dog behaviors.

As the human population continues to increase,[530] and people live closer together than ever, the issue of dogs running at large and those involved in Dangerous Dog classification cases will become an even greater problem. Local governments must deal reasonably with owners who have dogs who are not truly dangerous but who run loose, first to counsel and educate them, and if the problem continues, to fine them.

In Florida, Dangerous Dog classifications should only be applied as the Florida Legislature intended--to dogs who are truly dangerous. Local governments must realize that they serve the parties who complain about dogs who are allegedly dangerous to the same degree that they serve owners of dogs who are accused of behaving in dangerous behaviors. To classify dogs who are not truly dangerous, "dangerous," as a means to circumvent deficient running-at-large laws, to avoid future liability, or even to assuage aggressive citizens' complaints, means that local governments are failing to meet their responsibility to serve *all* citizens in a professional, fair, and legally responsible manner.

The need for impartial and fair treatment of Dangerous Dog cases is even more punctuated by the fact that counties such as Alachua, Florida, are putting to death dogs classified "dangerous." The authors believe it is foreseeable that before long other counties will change their Dangerous Dog policies and follow suit.

Over the course of thousands of years most dogs have loyally served man's needs above their own. Justice requires that in return for their long-term and unequaled commitment to bettering our human lives, that dogs receive a fair shake when they are embroiled in Dangerous Dog classification cases. The U.S. and Florida Constitutions require that dog owners receive due process and fair hearings. Unfortunately, in too many Dangerous Dog classification cases, such is not the standard practice.

* Citations to the *Florida Statutes* and cases reported in the *Southern Reporter Second* are formatted in accordance with *The Florida Style Manual*. Cynthia McNeely has a J.D., The Florida State University, 1998; 1997-98 editor-in-chief, The Florida State University College of Law Law Review; adjunct professor of animal law, The Florida State University College of Law. The author dedicates this Article to Professor Phil Southerland, Judith Dougherty, and Carol Clark, true friends to animals. She also dedicates this Article to Richard Ziegler, the Director of Leon County Animal Control, with whom she does not always agree but who she nonetheless considers to be a true gentleman. Finally, she dedicates this Article to the dogs who have blessed her life, and the lives of others. Sarah A. Lindquist has a J.D., with highest honors, Florida State University College of Law, 2006; B.S., with honors,

University of Florida, 2003. Thanks to my family members for their continued guidance and support. May this article inspire all who read it to advocate for our faithful, furry companions.

[1] KAREN DELISE, FATAL DOG ATTACKS: THE STORIES BEHIND THE STATISTICS 87 (Anubis Press 2002).

[2] *See* Audio tape: Hearing before the Marion County Code Enforce. Bd. (Dec. 21, 2005), Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) [hereinafter Delp Hr'g Tape] (statement made by unidentified member of the Code Enforcement Board).

[3] The authors refer to domesticated dogs throughout this article as simply "dogs." There are feral, or wild, dogs that continue to exist in certain areas of the United States and throughout the world, but this Article focuses upon domesticated dogs. Although the authors believe "guardian" is a more accurate term to describe the human role in the relationship, because American jurisprudence treats dogs as human property the authors will use the term "owner" throughout this Article.

[4] *See* U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Morbidity and Mortality Weekly Report*, July 4, 2003, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm [hereinafter "MMWR"].

[5] James Serpell, *From paragon to pariah: some reflections on human attitudes to dogs*, *in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 252 (James Serpell ed., Cambridge Univ. Press 1995); Part II.C (discussing the human-dog relationship and the special consideration generally accorded to dogs, while also holding dogs to a high standard to behave in a heightened manner although they are animals).

[6] *See, e.g.*, Kennedy v. Bias, 867 So. 2d 1195 (Fla. 1st DCA 2004) (explaining that although some humans in contemporary society may view dogs as more than property, that the law nonetheless continues to treat them as simply human property); Harold W. Hannah, *Animals as Property, Changing Concepts*, 25 S. ILL. U. L.J. 571 (2001).

[7] For example, as discussed *infra* in Part VI, humans are accorded constitutional protections before government can summarily deprive them of their property interests in their dogs. However, dogs not accorded self ownership are subject to the whims of those who own them.

[8] *See* U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Dog Bite Prevention*, *available at* http://www.cdc.gov/ncipc/duip/biteprevention.htm [hereinafter Dog Bite Prevention].

[9] *See* MMWR, *supra* note 4.

[10] *See* DELISE, *supra* note 1, at 23.

[11] *See* Dog Bite Prevention, *supra* note 8. This statistic is calculated using data gathered from 1965 through 2001. The average number of humans killed by dogs between 1996 and 2001 is closer to 20. *See* DELISE, *supra* note 1, at 116. The reason for the increase is not clear, but speculatively can be attributed to better reporting of events, and/or human population increase. Between 1965 and 2001, the United States' human population increased from approximately 191.25 million to approximately 282 million. *See* Frank Hobbs & Nicole Stoops, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, *Demographic Trends in the 20th Century*, *available at* http://www.census.gov/prod/2002pubs/censr-4.pdf; U.S. Census Bureau, American Factfinder, http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on (last visited Nov. 13, 2006).

[12] *See* DELISE, *supra* note 1, at 14-15 (noting that infants and males between the ages of 2 and 4 constitute the majority of those killed). DELISE notes that toddlers are generally not capable of recognizing or understanding the "significance of an aggressive display by a dog." *Id*. at 15. DELISE states that:

> [a] probable scenario is; [sic] upon approaching a dog, particularly a chained dog, the child is given a warning, displayed as either a stiffened posture, raised hackles, and/or a growl. The toddler, not realizing the implications, continues his approach, and the dog may consider this a challenge or a threat. Chained dogs, having no option to retreat, may lash out at this perceived threat or encroachment.

Id.

Comparatively, in 2003 (the most recent year for which CDC data are available on the CDC website for the following categories) the number of children under the age of 14 reported to have died in specified categories are: drownings-834; falls-122; fires-527; firearms-380; machinery-24; poisonings-184; struck by/against–61; suffocation–1149; vehicle-related-2553. One thousand and forty-one of these deaths were classified as "homicides;" i.e., that the mode of death (e.g., drowning-32; fire-37; firearm-235; suffocation-80) was intentionally employed to kill these children. *See* U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *WISQARS Injury Mortality Report 2003*, *available at* http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html [hereinafter HHS Mortality Report]. The United States

Department of Justice reports that five infants, in most cases newborns, are killed or left to die each week by their mothers or guardians. *See* DELISE, *supra* note 1, at 45. DELISE notes that:

> [s]tatistically, parents or human guardians of children (aged 1-day-old to 12-years-old) pose an incredibly greater threat to children than dogs. An estimated three children die every day in the United States due to abuse, neglect or maltreatment at the hands of their human caretakers.[] In 1995, there were 1,248 children that died at the hands of their parents or caretakers, according to the National Child Abuse & Neglect Data System. In 1996, at least 1,046 children died from abuse, maltreatment, and/or neglect from their human guardians (parents or caretakers), according to NCPCA's 1996 Annual Survey.[]
>
> Over the last 37 years, there have been 342 children from 1 day to 12 years old killed by dogs, or approximately nine children per year.
>
> A child in the United States is over 100 times more likely to be killed by his/her parents or human caretaker than by a dog.
>
> In unabashed defense of dogs, it cannot be denied that dogs exhibit far more tolerance towards infants and children than many of their human counterparts. Statistically speaking, the family member to be most feared and guarded against as it relates to fatally inflicted injuries in newborns and children is not to be found in the species *Canis lupus familiaris.*

DELISE, *supra* note 1, at 45 (internal citations omitted).

[13] *See* Dog Bite Prevention, *supra* note 8.

[14] *See Nation in Brief*, WASH. POST, May 30, 2001, at A20; Evelyn Nieves, *A Bizarre Dog Attack Shakes San Francisco*, N.Y. TIMES, Feb. 1, 2001, at A14; *The Attack-Dog Killing*, NEWSWEEK, Feb. 12, 2001, at 27.

[15] *See* DELISE, *supra* note 1, at 104; *infra* Part VIII. This attack was one of the primary impetuses for Florida passing its Dangerous Dog bill in 1990.

[16] This Article offers some suggestions in this regard in Part XII.

[17] *See* DELISE, *supra* note 1, at 26 (citing Dino Drudi, *Are Animals Occupational Hazards?*, *in* COMPENSATION AND WORKING CONDITIONS 15-22 (2000)).

[18] *See* HHS Mortality Report, *supra* note 12.

[19] *See supra* note 12.

[20] *See id.*

[21] *See, e.g.*, Serpell, *supra* note 5, at 252-53 (discussing the British media's and public's "national spasms of horror and outrage" over seven dog attacks that were "grossly out of proportion to the actual risks"). Serpell notes that "in a nation of 50 million people and 7.4 million dogs--perhaps half of which are large and potentially dangerous--it is in some respects astonishing that so *few* people are seriously injured or killed." *Id*.

[22] *See, e.g.*, *infra* Part IX.

[23] *See, e.g.*, Aetna Smith, *Local Family's Dog Deemed Dangerous*, TALLAHASSEE DEM., Dec. 12, 2003, at B1 (stating that in 2003 Leon County Animal Control initially classified dogs "dangerous" in 18 cases, but only two cases were overturned during the final hearing stage). Notably, when the authors made a public records request for the number of petitions for classification of dangerous or aggressive animals filed from 2000 through 2005, and the number of dogs permanently classified "dangerous," Leon County Assistant County Attorney Cherry Shaw responded that their records indicated that in 2003, Animal Control received eight petitions, and four dogs were classified "dangerous." *See* letter from Cherry A. Shaw, Leon County Assistant County Attorney, to Cynthia A. McNeely, Esq., (Oct. 16, 2006) (on file with authors).

[24] While the authors do not agree with the concept that dogs can be owned by humans and are thus human property, they recognize that American jurisprudence classifies dogs as such. Thus, for purposes of legal analysis, dogs are treated as human property in this Article. *See, e.g.*, Bennett v. Bennett, 655 So. 2d 109 (Fla. 1st DCA 1995) ("While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property."). For a detailed discussion on human ownership of nonhuman animals, *see* STEVEN WISE, RATTLING THE CAGE–TOWARDS LEGAL RIGHTS FOR ANIMALS (2000); Gary L. Francione, *Animals, Property, and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS L. REV. 721 (1994); Thomas G. Kelch, *Toward a Non-Property Status of Animals*, 6 N.Y.U. ENVTL L.J. 531 (1998); Derek W. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-human Animals*, 9 HASTINGS WOMEN'S L.J. 255 (Summer 1998).

[25] A particularly illustrative example of such a situation is the case of Beans, an Oklahoma City bulldog. *See* Oklahoma City Animal Welfare Div. v. Corrales, No. 97012618X (Okla. City Mun. Ct. 1997); Jennifer Jackson, *Rehabilitated pit bull gets new leash on life*, THE OKLAHOMAN, July 10, 2003, at 65. In 1997 an oil company employee was checking a home gas pump at a residence next to the home where Beans lived when Beans jumped

his fence and ran to the employee, who was behind a fence on the other property. *See* Telephone Interview with Carole A. Wangrud, Attorney for Hector Corrales (and Beans), in Oklahoma City, Okla., Nov. 14, 16 (2006) [hereinafter Wangrud Interview]. Beans barked at the employee, who had in his possession a large flashlight which he used to hit Beans with through the gate. *See id.* After being hit on the head Beans retreated to his yard, without injuring the employee. *See* Gregory Potts, *Pit bull finally may find new life beyond death row*, THE OKLAHOMAN, Aug. 27, 2001, at 59; Wangrud Interview, *supra*. The employee finished his work and went to his truck, where he called animal control to report Beans for barking at him through the fence. *See* Wangrud Interview, *supra*. Animal Control confiscated Beans, and a local judge imposed a death sentence upon Beans for barking. *See* Potts, *supra*; Jackson, *supra*.

Carole Wangrud, a local attorney, refused to accept the sentence and challenged it all the way to the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals. *See* Wangrud Interview, *supra*. In the interim, Beans sat at the local shelter for nearly six years. Finally, with the appeal still pending, a volunteer arranged for an agreement in which Beans was transferred to the Best Friends Animal Sanctuary in Kanab, Utah. *See* Jackson, *supra.* In 2006 Beans was adopted by a family who resides in Louisiana. *See* E-mail from Michele Besmehn, Dog Care Manager, Best Friends Animal Society, to Cynthia A. McNeely, Attorney (Nov. 9, 2006, 12:21 EST) (on file with authors). Unfortunately, Beans is suffering from a number of health ailments that a veterinarian determined resulted from Beans being caged at the animal shelter for so many years, which did not allow his muscles to develop properly, despite a cadre of dedicated volunteers who regularly walked him on a leash. *See id*.; Potts, *supra*.

While Beans's story has a mostly happy ending, for far too many good dogs their stories do not end on a positive note. Local governments routinely sentence dogs to death for doing nothing more than engaging in normal dog behaviors, such as barking, running, and protecting what they believe is their own property.

Until dog owners (guardians) are willing to stand firm and fight for their dogs' lives, unjust atrocities, such as those experienced by Beans, are undoubtedly going to continue--and even increase in number, as the human population increases and people live closer together than ever, which will naturally result in increased contact with neighbors' dogs.

[26] *See, e.g., infra* Part IX.

[27] *See id.*

[28] Many courts and legislatures are willing to concede that Dangerous Dog laws are questionable when they are breed-specific, but few are willing to question the validity of laws that equally regulate all breeds. *See, e.g.*, FLA. STAT. § 767.14 (2005) (prohibiting local governments from enacting breed-specific regulations); Am. Dog Owners Ass'n v. City of Lynn, 533 N.E.2d 642, 646 (Mass. 1989) (finding an animal control ordinance that regulated "pit bulls" was unconstitutional because it was "not sufficiently definite to meet due process requirements"); Ferrar v. Marra, 823 A.2d 1134, 1137-38 (R.I. 2003) ("Although we recognize that some states and municipalities successfully regulate certain breeds of dogs such as pit bulls our Legislature has not, as yet, chosen to create a species-specific standard of care.") (internal quotations omitted). For a discussion of the debate on breed-specific regulation, see Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems*, 27 NOVA L. REV. 415, 439-43 (2003). This Article does not explore in detail the issue of breed-specific legislation.

[29] In 1993, taxonomists from the American Society of Mammalogists reclassisfied the domesticated dog from the zoological classification of *Canis familiaris* to that of *Canis lupus (familiaris)* after a contemporary analysis of mitochondrial DNA indicated a minute (.2%) difference between domesticated dogs and the Gray Wolf. Although some experts disagree with this reclassification, it is now widely accepted that the domestic dog descended from the wild wolf. *See* DELISE, *supra* note 1, at 1-2.

[30] *See* Juliet Clutton-Brock, *Origins of the dog: domestication and early history*, *in* THE DOMESTIC DOG, ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 8 (James Serpell ed., Cambridge Univ. Press 1995).

[31] *See* DELISE, *supra* note 1, at 1.

[32] *Id*. DELISE further notes:

> [w]hat this reclassification means is that we now recognize what nature knew all along; that the wolf and the domestic dog are the same species, *Canis lupus*. The domestic dog is now recognized as a subspecies of the wolf, rather than a separate species; the Golden Retriever nestled comfortably in an old stuffed armchair is *Canis lupus* (*familiaris*) just as the Alaska Wolf bracing against the cold tundra winds is *Canis Lupus* (*tundrarum*).

[33] *See id.* at 2.

[34] *See id.*

[35] *See* Clutton-Brock, *supra* note 30, at 8-10; Chris Thorne, *Feeding behaviour of domestic dogs and the role of experience, in* THE DOMESTIC DOG, ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 105 (James Serpell ed., Cambridge Univ. Press 1995).
[36] *See* Clutton-Brock, *supra* note 30, at 15.
[37] *See* Serpell, *supra* note 5, at 247.
[38] *See id.*
[39] *See id.* at 10; DELISE, *supra* note 1, at 5; Lynette A. Hart, *Dogs as human companions: a review of the relationship, in* THE DOMESTIC DOG, ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 162 (James Serpell ed., Cambridge Univ. Press 1995).
[40] *See* Clutton-Brock, *supra* note 30, at 15.
[41] *See id*.; Raymond Coppinger & Richard Schneider, *Evolution of working dogs, in* THE DOMESTIC DOG, ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 35-44 (James Serpell ed., Cambridge Univ. Press 1995).
[42] *See* Clutton-Brock, *supra* note 30, at 15-16.
[43] *See* John W.S. Bradshaw & Helen M.R. Nott, *Social and communication behaviour of companion dogs, in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 116-17 (James Serpell ed., Cambridge Univ. Press 1995).
[44] *See id*.
[45] *See* Clutton-Brock, *supra* note 30, at 15-16.
[46] *See id*.
[47] In the Middle Ages hunting as a sport rather than solely as a means to sustain human life became a popular pastime amongst the aristocracy. *See id*. at 18.
[48] Baiting consists of bears, bulls, lions or other large wild animals being tethered or put into pits or other enclosed areas with dogs, who then charge at and fight the larger animals. *See* JULIETTE CUNLIFF, THE ENCYCLOPEDIA OF DOG BREEDS 74-75 (Paragon Pub. 1999). Baiting became very popular in Europe in the Middle Ages. Spectators were often charged to watch the bloody combat between dogs and larger mammals usually fighting to the death. *See id*.
[49] *See* id. at 68-89, 92-93.
[50] *See id*. at 71, 132.
[51] *See id.* at 95, 110. For example, King Charles II spent a great deal of time playing with his spaniel dogs, which resulted in the entire breed being renamed the "King Charles Spaniel." *See id; see also* Clutton-Brock, *supra* note 30, at 16-17.
[52] *See* D.W. MacDonald and G.M. Carr, *Variation in dog society: between resource dispersion and social flux, in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 200-15 (James Serpell, ed., Cambridge Univ. Press 1995).
[53] *See, e.g.*, Clutton-Brock, *supra* note 30, at 15.
[54] Anti-cruelty laws originated in Great Britain in the early 1800s. *See* Mark J. Parmenter, Note, *Does Iowa's Anti-Cruelty to Animals Statute Have Enough Bite?*, 51 DRAKE L. REV. 817, 820-25 (2003). The momentum to protect animals against abuse in the United States was initiated in the mid-1800s by Henry Bergh, who was the first president of the American Society for the Prevention of Cruelty to Animals. *See id*. at 823-24.
[55] *See* Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 505-13 (1996); Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97 (2003).
[56] *See* Wise, *supra* note 55, at 505-13.
[57] *See* Serpell, *supra* note 5, at 246.
[58] *See id*., Girgen, *supra* note 55, at 101, 111-12.
[59] *See* Girgen, *supra* note 55, at 122-30 (discussing 20th century cases in which a dog was executed for assisting two men in committing a robbery and murder (the men received life in prison); a dog was tried and sentenced to life imprisonment at the state penitentiary for killing the governor's cat; a monkey was arrested and fined for smoking a cigarette in public; and a dog was tried and incarcerated for bothering a neighbor's cat). Girgen also likens the current practice of vicious or dangerous dog classification proceedings to the historical practice of prosecuting animals as criminals. Notably, at a 2004 Leon County Animal Control Classification Committee hearing, one of the committee members asked the dog owner, "You do understand [that] the [Dangerous Dog] petition is not filed against the owner; it is filed against the dog?" *See* Audio tape: Hearing before the Leon County Animal Control Dangerous Dog Classification Comm. (Dec. 11, 2003), Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with Leon County Animal Control).

[60] *See* Pune Dracker, The American Society for Prevention of Cruelty to Animals, *About Us, History*, http://www.aspca.org/site/PageServer?pagename=about_history (noting that dog catchers were often paid by the dog and thus frequently stole dogs to kill to increase their wages, and describing the practice of rounding up approximately 300 dogs per day, placing them in a cage, and throwing the cage into the East River to drown them); NATHAN J. WINOGRAD, REDEMPTION: THE MYTH OF PET OVERPOPULATION AND THE NO KILL REVOLUTION IN AMERICA (Almaden Books forthcoming summer 2007).
[61] *See* Rebecca F. Wisch, *Does My State Have a Leash Law?*, Animal Legal & Historical Center, Michigan State University College of Law, *available at* http://www.animallaw.info/articles/ovusdogleashlaws.htm#s1.
[62] *See* Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. STAT. L. REV. 891, 898 (1998).
[63] *See* Seymour Moskowitz, *Malignant Indifference: The Wages of Contemporary Child Labor in the United States*, 57 OKLA. L. REV. 472-87, 521-25 (Appendix A) (2004).
[64] *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 587-91 (1997). Notably, unmarried women, and married women during World War II, were frequently employed for wages.
[65] Whether called dog catchers or animal control officers, these government employees were largely motivated to round up dogs in part due to fears of rabies transmission to humans. *See, e.g.*, Rachel G. Castillo, *Canines Cry Out: Is Six Months in a British Quarantine a Necessity for Rabies Prevention?*, 16 DICK. J. INT'L L. 459, 462-69 (1998).
[66] *See, e.g.*, *Automobile, History of the Automobile*, http://www.answers.com/topic/history-of-the-automobile (last visited April 18, 2007) (noting that in 1903 the number of cars in the United States numbered in the thousands); *Automobile*, http://en.wikipedia.org/wiki/Automobile (last visited April 18, 2007) (placing the number of automobiles in the United States in 2002 at roughly 140 million).
[67] *See* U.S. Census Bureau, American Fact Finder, http://www.factfinder.census.gov (last visited April 18, 2007).
[68] *See id*.
[69] *See* Serpell, *supra* note 5, at 252.
[70] *Id*.
[71] *See id*.
[72] *See id*.
[73] *See id*.
[74] Dogs pay a price for their privileged cohabitation with humans: "dogs are by far the most common animal victims of human negligence and abuse." *See* Serpell, *supra* note 5, at 252. No central organization collects data on the total number of dogs killed, abused, or neglected each year by humans, but due to mankind's well-documented propensity toward violence there can be no doubt that injuries to dogs perpetrated by humans vastly outnumber the damage dogs cause to humans. *See, e.g.*, Pet-Abuse.com, http://www.pet-abuse.com/pages/home.php (reporting and discussing thousands of cases of human abuse and/or killing of pets). *See also* James Serpell, *The Hair of the Dog, in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 261 (James Serpell, ed., Cambridge Univ. Press 1995). Serpell states:

> Unfortunately, the domestic dog's extraordinary contribution to human welfare is not invariably reciprocated. In what is euphemistically referred to as the ["]pet overpopulation problem["], at least five million dogs are discarded and euthanized annually in the United States alone. . . . [] [D]ogs are also the most common animal victims of human abuse and cruelty. They are sometimes chronically deformed by our taste for strange or comical physical features, they are regularly subjected to painful and pointless cosmetic procedures in order to fit our capricious, aesthetic preferences, and they are still one of the most widely used species in biomedical research. Yet, although the science of animal welfare has significantly improved our understanding of the biological and behavioural needs of farm animals, or captive animals in zoos or circuses, we remain surprisingly ignorant of the basic welfare needs of the domestic dog. Perhaps because dogs are so amiable and obliging by nature, we seem to take it for granted that they are happy and contented regardless of how we keep them. The evidence reviewed here . . . suggests a different conclusion, and points to a need for additional research on aspects of canine welfare.

Serpell, *supra*, at 261.

Regarding "pit bulls," DELISE states:

> For the past 20 years, Pit Bulls have been subjected to cruelty, abuse and mistreatment to a degree and on a scale that no other breed in recent history has ever had to endure.
>
> The stories are brutal and sickeningly common. Dogs are tortured, teased and abused in hopes of making them mean. Dogs are pitted against each other in fights. Those refusing to fight

> or who lose are horribly killed or left to die in alleyways. Dogs carry huge chains and padlocks around their necks and live in squalor. Inexorably intermingled in these cruel pursuits are drugs, guns[] and theft. People from the worst segments of our society seek these animals out to guard drug houses, intim[id]ate other gang members, thwart police action and enhance their vacuous self esteem. Any real or imagined viciousness on the part of the Pit Bull breeds pales in comparison to the brutality, callous disrespect for life, and inhumanity of many of their owners.

DELISE, *supra* note 1, at 85-86.
[75] Serpell, *supra* note 5, at 254-55.
[76] Dumb Friends League, *Understanding Aggressive Behavior in Dogs*, *available at* http://www.ddfl.org/behavior/dog-agg.pdf.
[77] *See* Bradshaw & Nott, *supra* note 43, at 117.
[78] *Id.*
[79] *Id.* at 118.
[80] *See id.*
[81] *See id.*
[82] *Id.* at 118-19.
[83] *See* DELISE, *supra* note 1, at 17.
[84] *See* Bradshaw & Nott, *supra* note 43, at 118-19.
[85] *See id*. at 118 (Bradshaw and Nott cite a study that examined wolves, which, as discussed *supra*, are closely related to dogs).
[86] *See id*. at 119.
[87] *See* Clutton-Brock, *supra* note 30, at 10.
[88] *See id.*
[89] *See* Cunliff, *supra* note 48, at 74-75.
[90] *See* OTTO H. SIGMUND, D.V.M., MERCK VETERINARY MANUAL 1176-77 (Susan B. Aiello, D.V.M., ed., Eighth Edition 1998) [hereinafter MERCK VETERINARY MANUAL].
[91] *See* DELISE, *supra* note 1, at 26.
[92] *See id*. at 65-88.
[93] *See* MERCK VETERINARY MANUAL, *supra* note 90, at 1175-78.
[94] *See id*. at 1176-77.
[95] *See id*. at 1175-78.
[96] *See id*. The only exception to the requirement that the aggression be consistently exhibited is idiopathic aggression, which can occur "in an unpredictable, toggle-switch manner." *Id.* at 1176.
[97] *Id.* at 1175.
[98] *Id*. (emphasis added).
[99] *See id.* at 1176.
[100] *See id.*
[101] *See id.*
[102] *See id*. at 1177.
[103] *Id*.
[104] *See id*.
[105] *See id*.
[106] *Id*.
[107] *See id*.
[108] *Id*. at 1178.
[109] *See id*.
[110] *See, e.g.*, DELISE, *supra* note 1, at 34, 85-88 (discussing how pit-bull type dogs, in particular, are "tortured, teased, and abused" by humans who seek to make them vicious). Regarding pit bull and pit-bull type dogs, DELISE notes: "How much easier it is to dismiss this as a breed problem! Addressing the real issues of crime, poverty, animal abuse, ignorance, greed, and man's lust for violence is far too daunting a task for most people and so we blame the dogs for our societal ills." *Id*. at 86.
[111] *See id*. at 23-24 (chaining); 43 (mother went out and left 6-day-old infant on floor with dog she had not fed in six days; the dog killed the infant).
[112] *See* DELISE, *supra* note 1, at 9-14. DELISE notes that unneutered males are 2.6 times more likely to bite than neutered males, and male dogs are 6.2 times more likely to bite than females.
[113] DELISE, *supra* note 1, at 51.

[114] *See id*. at 11, 97-112.
[115] *See id*. at 23-24.
[116] *Id*. at 23.
[117] *See id*. at 108-12 (indicating that two attacks occurred in Texas, two in Arkansas, two in Arizona, and the rest in Kansas, Alabama, North Carolina, Oklahoma, South Carolina, California, and Missouri).
[118] *See id*. at 36-39 (explaining that when a group of dogs is implicated in an attack, it is very difficult to determine which dogs actively participated and which did not). Notably, some ordinances allow for all dogs who are considered to be part of a pack to be classified dangerous, even if not all members of the pack bit or harmed a victim. *See, e.g.*, MARION COUNTY, FLA. CODE § 4-2 (2006) (defining a Dangerous Dog as "any domestic dog . . . whether alone *or as a pack* . . .[who aggressively bites, attacks, endangers, or causes injury to a human being or who kills or more than once injures a domestic animal]. The same ordinance describes a pack as "two (2) or more animals that run together."
[119] Randall Lockwood, *The Ethology and epidemiology of canine aggression*, *in* THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR AND INTERACTIONS WITH PEOPLE 133 (James Serpell ed., Cambridge Univ. Press 1995).
[120] *See id*.
[121] *Id*. at 134 (citing Randall Lockwood, *Vicious Dogs*, *in* THE HUMANE SOCIETY NEWS 31 (1986)).
[122] *See id.* at 132-36.
[123] *See id*. at 134.
[124] *See id*.
[125] *Id*. at 136-37.
[126] *See id*. at 137.
[127] *See id*. at 135, 137.
[128] *See* Wise, *supra* note 55, at 476-503; Hannah, *supra* note 6, at 572.
[129] *See* WISE, *supra* note 24; at 26; David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 477-80 (2000); Wise, *supra* note 55, at 476-505.
[130] *See* Cunliffe, *supra* note 48, at 11.
[131] *See* Wise, *supra* note 55, at 492-93.
[132] *Id.* at 471-72.
[133] *Id.* at 530-31.
[134] *Id*. at 524.
[135] *Id*. at 523-27.
[136] *See id*. at 527-28.
[137] *See id*. at 528.
[138] Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies*, 11 CONN. INS. L.J. 1, 43 (2004-05).
[139] *See, e.g.*, Henderson v. Lancaster & Wallace, 2 La. App. 680, 1925 WL 3455, 4 (1925), stating that:

> Dogs are not in the class of ordinary domesticated animals. From the standpoint of being property they are not even in the class with fowls, such as chickens, geese and turkeys. This is true in practically all of the states so far as we are able to ascertain.
>
> Dogs are not property under Louisiana law today unless assessed. They cannot be made the subject of larceny unless carried on the assessment roll. We do not think of them ordinarily as property, and this is true not only in the state of Louisiana but everywhere. On the contrary, we always think of "stock" or "live stock" as property, that is, something of value intrinsically.
>
> However, some jurisdictions treated dogs as "imperfect property," which allowed owners to recover their value when someone hurt or killed another's dog via a civil action, but which did not provide justification for criminal prosecution for larceny when someone stole a dog. *See* Salley v. Manchester & A.R. Co., 32 S.E. 526, 526 (1899).

[140] State v. Weekly, 63 N.E.2d 558, 558-59 (1945).
[141] State v. Trapp, 48 S.C.L. 203, 1 (14 Rich. 203, 1) (1867), 1867 WL 2696 (S.C.) (Report of the District Judge).
[142] *See* Salley, 32 S.E. at 527 (citing numerous cases in which state courts found dogs to be the personal property of humans, which allowed civil actions to be pursued against those who had injured or killed humans' dogs).
[143] *See* Wise, *supra* note 55, at 538; SONIA S. WAISMAN, ET AL., ANIMAL LAW 91 (2d ed. 2002); Bennett v. Bennett, 655 So. 2d 109 (Fla. 1st DCA 1995). In *Bennett*, a divorce case, the trial court awarded custody of the family dog to the husband but granted the wife visitation rights for every other weekend. On appeal, the District Court held that the dog was property and thus a marital asset not subject to custody or visitation, but only ownership. Examples of cases and statutes that make this declaration: IDAHO CODE § 25-2807 (2005) ("Dogs are property"); 3 PA. STAT.

ANN. § 459-601(a) (2005) ("All dogs are hereby declared to be personal property . . . ."); Bennett v. Bennett, 655 So. 2d 109, 110 (Fla. 1st DCA 1995) ("[U]nder Florida law, animals are considered to be personal property.") (citations omitted); Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987) ("In the eyes of the law, a dog is an item of personal property.") (citations omitted); Corn v. Sheppard, 229 N.W. 869, 870 (Minn. 1930) ("Dogs are personal property.").

[144] *See, e.g.*, Brown v. Hoburger 52. Barb. 15 (N.Y. Sup. Ct. 1868) ("Dogs, in general, as is well known, have no fixed or general market value."); Lawler v Henderson, 36 Kan. 754, 14 P. 164, 166 (Kan. Sup. Ct. 1887) (describing that the townspeople believed one dog residing in the community had rabies, and they thus decided to kill everyone's dogs; the jury was instructed "[t]hat, as a general rule, dogs have no value.").

[145] Bass v. State, 791 So. 2d 1124, 1125 (Fla. 4th DCA 2000).

[146] Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001) (stating that "the argument concerning the distinction between companion animals and goods owned primarily for their economic value is set forth fully in Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 69-70 (1998)" (internal citations omitted)).

[147] *See, e.g.*, Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 73 U. COLO. L. REV. 181, 197-200 (2003).

[148] *See* Heather K. Pratt, *Canine Profiling: Does Breed-Specific Legislation Take a Bite out of Canine Crime?*, 108 PENN ST. L. REV. 855, 860 (2004) (""The modern view, however, is that dogs are property . . . .). Despite continuing to classify dogs as property, some jurisdictions now allow compensation to humans beyond the market value of the dog, for noneconomic damages such as the intentional infliction of emotional distress, or less commonly negligent infliction of emotional distress, when dogs are injured or killed. *See, e.g.*, Harabes v. The Barkery, Inc., 791 A.2d. 1142, 1144 (N.J. 2001).

[149] *See* County of Pasco v. Riehl, 635 So. 2d 17, 18-19 (Fla. 1994).

[150] *See, e.g.*, 62 C.J.S. *Municipal Corporations* §124 (2006).

[151] 4 Am. Jur. 2d *Animals* § 24 (2006).

[152] *See* County of Pasco v. Riehl, 635 So. 2d 17, 18-19 (Fla. 1994).

[153] *See* Rucker v. City of Ocala, 684 So. 2d 836, 840 (Fla. 1st DCA 1997).

[154] *See id.*

[155] King v. Arlington County, 81 S.E.2d 587, 589 (Va. 1954); *see also* American Dog Owners Assoc. v. City of Yakima, 777 P.2d 1046, 1048 (Wash. 1989) ("Dogs are subject to police power and may be destroyed or regulated to protect citizens."); Lynn Marmer, Comment, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. CIN. L. REV. 1067, 1070 n.17 (1984) (listing some of the court decisions that have upheld dog regulation).

[156] *See* MARY RANDOLPH, EVERY DOG'S LEGAL GUIDE 12/2 (2005) (noting the widespread use of Dangerous Dog laws and stating that "[u]nfortunately, many of the laws are so vague that they invite arbitrary enforcement").

[157] *See id.* at 11/6. Because the police power is inherent in the state, the state must delegate its authority down to local governments before the local governments may enact ordinances and regulations.

[158] *See, e.g.*, COLO. REV. STAT. § 18-9-204.5(2)(b) (2005); LA. REV. STAT. ANN. § 102.14(A) (2005); MD. CODE § 10-619(a)(2) (2005); MINN. STAT. § 347.50(2) (2005); NEB. REV. ST. § 54-617(3) (2005); NEV. REV. ST. § 202.500(1)(a) (2005); 4 OKL. ST. § 44(2) (2005); WASH. REV. CODE § 16.08.070(2) (2005); ORANGE COUNTY, FLA., CODE § 5-29 (2006); LEON COUNTY, FLA. CODE § 4-26 (2006).

[159] *See, e.g.*, CAL. AGRIC. CODE § 31603 (2005); NEV. REV. ST. § 202.500(1)(c) (2005); S.D. CODIFIED LAWS § 40-34-14 (2005). Some regulations also contain a "potentially dangerous dog" definition. *See, e.g.*, CAL. AGRIC. CODE. § 31602 (2005); MINN. STAT. § 347.50(2) (2005); NEB. REV. ST. § 54-617(6) (2005); 4 OKL. ST. § 44(1) (2005); WASH. REV. CODE § 16.08.070(1) (2005); ORANGE COUNTY, FLA., CODE § 5-29 (2006).

[160] *See, e.g.*, CAL. AGRIC. CODE §§ 31621-31624 (2005); 7 DEL. CODE ANN. tit. 7, §§ 1732, 1734, 1735(a); FLA. STAT. § 767.12(1) (2005); MD. CODE § 10-619(c) (2005); NEV. REV. ST. § 202.500(4)-(5) (2005).

[161] *See, e.g.*, CAL. AGRIC. CODE §§ 31641-31643, 31645 (2005); 7 DEL. CODE ANN. tit. 7, §§ 1735(b)-(c), 1737 (2005); FLA. STAT. § 767.12(2)-(4) (2005); MD. CODE § 10-619(d)-(e) (2005); NEB. REV. ST. §§ 54-618, 54-619, 54-621 (2005); 4 OKL. ST. § 45 (2005).

[162] *See, e.g.* CAL. AGRIC. CODE § 31662 (2005); C.R.S.A. § 18-9-204.5(3)(a)-(g) (2005); 7 DEL. CODE ANN. tit. 7, § 1739; FLA. STAT. §§ 767.12(7), 767.13 (2005); NEB. REV. ST. §§ 54-620, 54-622, 54-623 (2005); 4 OKL. ST. § 47 (2003).

[163] *See, e.g.*, LEON COUNTY, FLA. CODE § 4-93 (2006).

[164] *See, e.g.*, FLA. STAT. § 767.12(1)(a)-(b) (2005).

[165] *See, e.g., id.* § 767.12(1)(c)-(d).
[166] *See, e.g.*, CAL. AGRIC. CODE § 31641 (2005); FLA. STAT. § 767.12(2) (2005).
[167] *See, e.g.*, CAL. AGRIC. CODE § 31642 (2005); FLA. STAT. § 767.12(4) (2005); LA. REV. STAT. ANN. § 102.14(C) (2005); SEMINOLE COUNTY, FLA., CODE § 20-28 (2006).
[168] *See, e.g.*, ORANGE COUNTY, FLA., CODE § 5-32(e) (2006); VOLUSIA COUNTY, FLA., CODE § 14-40(f)(5) (2006).
[169] *See, e.g.*, FLA. STAT. § 767.12(2)(c) (2005); ORANGE COUNTY, FLA., CODE § 5-32(g)(3) (2006).
[170] *See, e.g.*, MINN. STAT. § 347.51 (2005).
[171] *See, e.g.*, CAL. AGRIC. CODE § 31662 (2005); LA. REV. STAT. ANN. § 102.14(F) (2005).
[172] *See, e.g.*, FLA. STAT. §§ 767.13(1), (3) (2005).
[173] RANDOLPH, *supra* note 156, at 12/2; *see, e.g.*, ORANGE COUNTY, FLA., CODE § 5-32(l) (2006); MIAMI-DADE COUNTY, FLA., CODE § 5-6.2(m) (2006); SEMINOLE COUNTY, FLA., CODE § 20-27(d) (2006).
[174] *See* Cathy English, *Dangerous Dog Bill Passes*, FACA TRAX Q. REP. (Fla. Animal Control Ass'n), Aug. 1990, at 4.
[175] *See* Dave Bruns, *Bills Offer Controls for Dangerous Dogs*, TALLAHASSEE DEM., Mar. 8, 1990, at 4B.
[176] *See id.*
[177] *See* English, *supra* note 174; *see also* Bruns, *supra* note 175.
[178] Early versions of the bills were entitled "vicious dogs," and the staff analyses noted that ten percent of Florida's dog bite incidents "could be specifically attributed to situations involving *vicious* dogs." *See* Fla. H.R. Comm. on Judiciary, HB 413 (1990) Staff Analysis 1 (Feb. 26, 1990) (on file with comm.) (emphasis added); Fla. H.R. Comm. on HRS, HB 413 (1990) Staff Analysis 1 (Jan. 24, 1990) (on file with comm.) (emphasis added). Later versions changed the title to "Dangerous Dogs" and attributed the ten percent to "dangerous *or* vicious dogs." *See* Fla. H.R. Comm. on Judiciary, CS/HB 1345, 1021, 413 (1990) Staff Analysis 1 (Apr. 26, 1990) (on file with comm.); Fla. H.R. Comm. on Judiciary, HB 1021 (1990) Staff Analysis 1 (Feb. 28, 1990) (on file with comm.).
[179] *See* Audio tape: Fla. S. Comm. on Judiciary-Criminal (May 14, 1990) (on file with comm.) (statement of Sen. Diaz-Balart) [hereinafter S. Judiciary-Criminal Tape].
[180] *See id.* (statement of Cathy English, Leon County Animal Control Director, on behalf of Florida Animal Control Association). Additionally, at the Senate Appropriation Committee hearing, a Dade County lawyer displayed graphic photographs of a young girl who was brutally attacked by pit bulls in her driveway. *See* Audio tape: Fla. S. Comm. on Approp., (May 22, 1990) (statement of Tom Logue) (on file with comm.).
[181] Florida Association of Kennel Clubs, Position Paper on HB 1345/CS SB 312-Rep Sindler, "An Act Relating to Dangerous Dogs" (Mar. 1990) (on file with comm.) [hereinafter Position Paper on HB 1345/CS SB 312]; Florida Association of Kennel Clubs, Position Paper on HB 1021-Rep. King, "An Act Relating to Dogs" (Mar. 1990) (on file with comm.) [hereinafter Position Paper on HB 1021]; Florida Association of Kennel Clubs, Position Paper on HB 413-Rep. Mims, "An Act Relating to Dogs" (Mar. 1990) (on file with comm.) [hereinafter Position Paper on HB 413]; Florida Association of Kennel Clubs, Position Paper on CS/SB 1644-Sen. Gardner, "An Act Relating to Dangerous Dogs" (Apr. 1990) (on file with comm.) [hereinafter Position Paper on CS/SB 1644].
[182] *See* Letter from Marc S. Paulhus, Dir., S.E. Regional Off. HSUS, to Rep. Bob Sindler (Mar. 6, 1990) (on file with comm.).
[183] *Id.*
[184] Position Paper on HB 1345/CS SB 312, *supra* note 181; Position Paper on HB 1021, *supra* note 181; Position Paper on HB 413, *supra* note 181; Position Paper on CS/SB 1644, *supra* note 181.
[185] S. Judiciary-Criminal Tape, *supra* note 179 (statement of Dr. Mary Birch, representing the Florida Association of Kennel Clubs).
[186] *See* FLA. STAT. § 767.14 (2005). The breed-specific prohibition only applies to local ordinances adopted after October 1, 1990. *See id*. This language was included as a result of a compromise between Senator Gardner, who proposed the bill, and Senator Diaz-Balart, who wanted to keep Miami's breed-specific ordinance. *See* S. Judiciary-Criminal Tape, *supra* note 179 (statement of Sen. Diaz-Balart, expressing his concerns for breed-specific legislation); Audio tape: Fla. S. (May 31, 1990) (presentation of the Dangerous Dog bill and explanation of the compromise) (on file with Secretary).
[187] S. Judiciary-Criminal Tape, *supra* note 179 (statement of Sen. Gardner, presenting his Dangerous Dog bill).
[188] *See id.*
[189] At the hearing before the Judiciary-Criminal Committee, for example, one senator remarked that "[d]ogs have more rights than human beings in [this] regard – they can bite you once and get away with it." S. Judiciary-Criminal Tape, *supra* note 179.
[190] *See id.* (statement of Cathy English, Leon County Animal Control Director, representing Florida Animal Control Association).

[191] *See* Fla. H.R. Comm. on Judiciary, CS/SB 1644 (1990) Staff Analysis 2 (final July 24, 1990) (on file with comm.).
[192] *See* FLA. STAT. § 767.11(1)(d) (2005).
[193] *Id.*
[194] *See* County of Pasco v. Riehl, 620 So. 2d 229, 230 (Fla. 2d DCA 1993), *affirmed by* County of Pasco v. Riehl, 635 So. 2d 17, 19 (Fla. 1994).
[195] *See* FLA. STAT. § 767.12(1) (1990).
[196] *See id.* ("The animal control authority . . . shall provide written notification . . . to the owner of a dog that *has* been declared dangerous") (emphasis added).
[197] *See* Riehl, 620 So. 2d at 230.
[198] 620 So. 2d 229 (Fla. 2d DCA 1993).
[199] *See id.* at 232.
[200] *Id.*
[201]*See* County of Pasco v. Riehl, 635 So. 2d 17, 19 (Fla. 1994).
[202] *See* Act effective Oct. 1, 1993, ch. 93-15 § 3, 1993 Fla. Laws 116, 118 (codified at FLA. STAT. § 767.12(1)(a) (1993)).
[203] *See* Ch. 93-15, § 2, 1993 Fla. Laws at 117 (codified at FLA. STAT. § 767.11(3) (1993)). The amendment changed the definition of "severe injury" from "physical injury that results in . . . multiple *punctures* . . . requiring sutures or *cosmetic* surgery" to "physical injury that results in multiple *bites* . . . requiring sutures or *reconstructive* surgery." *Compare* FLA. STAT. § 767.11(3) (1990) (emphasis added), *with* FLA. STAT. § 767.11(3)(1993) (emphasis added). One legislative committee noted that they thought this change would "make it easier to demonstrate severe injury." Fla. H.R. Comm. on Agric. & Consumer Servs., HB 103 (1993) Staff Analysis 2 (final Mar. 17, 1993) (on file with comm.). Arguably, this suggests that even though the dog owner has greater procedural rights, it is now easier for animal control to classify dogs as "dangerous."
[204] *See* Ch. 93-15 § 3, 1993 Fla. Laws at 118 (codified at FLA. STAT. § 767.12(1)(b) (1993)).
[205] The Second District Court noted this gap in *Riehl* when it recognized that although the legislature amended the statute in 1993 that the 1993 amendment "may be infected with the same infirmity described herein." Riehl, 620 So. 2d at 230 n.1.
[206] *See* Act effective Oct. 1, 1994, ch. 94-339 § 3, 1994 Fla. Laws 2433, 2434 (codified at FLA. STAT. § 767.12(1) (2005)).
[207] *See* FLA. STAT. § 767.12(c) (2005).
[208] Section 767.11(3) defines a severe injury as "any physical injury that results in broken bones, multiple bites, or disfiguring lacerations requiring sutures or reconstructive surgery."
[209] *Id*. § 767.11(a)-(d). As discussed in Part IX of this Article, subsection (d) is the most problematic for dog owners because of its reliance upon an individual's subjective belief regarding what constitutes being approached by a dog in a "menacing fashion" or in an "apparent attitude of attack."
[210] *See* FLA. STAT. § 767.12(c), (d) (2005) (requiring each local government to establish specific hearing and appeal procedures to conform with the Florida statute).
[211] *Id*. § 767.12(1)(a). Although the statute only requires a sworn affidavit "if possible," some county ordinances require a sworn affidavit from the person seeking to have the dog declared dangerous during the investigation. *See, e.g.*, ORANGE COUNTY, FLA., CODE § 5-32(a) (2006); ALACHUA COUNTY, FLA., CODE § 72.16(a) (2006); MIAMI-DADE COUNTY, FLA., CODE 5-6.2(b) (2006). Other counties have even more particularized forms, such as a "petition for classification of a dangerous or aggressive animal." *See, e.g.*, LEON COUNTY, FLA. CODE § 4-93 (2006).
[212] *See, e.g., infra* Part IX.A.i. (discussing one animal control agency's neighborhood canvassing activities as part of its investigation).
[213] *See, e.g., infra* Parts IX, X.D.
[214] *See* FLA. STAT. § 767.12 (1)(c) (2005).
[215] If the dog owner requested a hearing, the hearing would be held before this same panel that made the initial determination of "dangerous" or "aggressive." *See* LEON COUNTY, FLA. CODE § 4-93 (2006).
[216] *See* LEON COUNTY, FLA. CODE § 4-93(c) (2006).
[217] *See* MARION COUNTY, FLA., CODE § 4-13(d) (2006).
[218] *See* MIAMI-DADE COUNTY, FLA., CODE § 5-6.2(b) (2006).
[219] *See id.*
[220] *See id.*
[221] LEON COUNTY, FLA. CODE § 4-93(d) (2006).

[222] *See* MARION COUNTY, FLA. CODE § 4-13(g) (2006); List of Code Enforcement Board members and their category of expertise, revised 6/6/06 (listing seven regular members and two alternates) (available from the Marion County Office of the County Administrator).
[223] *See* ALACHUA COUNTY, FLA, CODE § 72-16(d) (2006).
[224] *See* FLA. STAT. § 767.12 (1)(a) (2005).
[225] *Id*.
[226] FLA. STAT. § 767.12(1)(d) (2005). As discussed *infra* in Part X of this article, this rather inartfully drafted language attempts to direct how a dog owner may seek a "hearing" in the county court to "appeal" the classification. The use of terms used to describe two distinctly different forms of procedural events--a hearing is usually an original or de novo proceeding, while an appeal involves a review of the record and an overturning of the lower tribunal's decision only if reversible error occurred--has caused confusion regarding the type of action that is to take place in the county court. Notably, county courts are courts of original jurisdiction and do not have appellate jurisdiction under the Florida Constitution. *See infra* Part X (discussing that Florida County Courts do not have appellate jurisdiction over Dangerous Dog classification cases).
[227] *See* FLA. STAT. § 767.12(1)(d) (2005).
[228] *See id.* §§ 767.12(2)-(4).
[229] *See id.* § 767.12(2).
[230] *See id.* § 767.12(3) (requiring someone who acquires a dog after it is declared dangerous to comply with all of the same requirements regardless of his or her location within the state).
[231] *See id.* § 767.12(7).
[232] *See id*.
[233] *See* M.P. McQueen, *Personal Business: Snarling at Insurers*, WALL ST. J., July 16, 2006, at 2A.
[234] Most of Florida's local government ordinances regarding regulating dangerous dogs can be found at http://www.municode.com, which offers a free online library.
[235] LEON COUNTY, FLA. CODE §§ 4-26, 4-91 (2006).
[236] *See* FLA. STAT. § 767.11(b) (2005).
[237] *See* LEON COUNTY, FLA. CODE § 4-26 (2006) (defining an aggressive animal as one who has "injured or killed a domestic animal in a first unprovoked attack while off of the premises of the owner.").
[238] *See id.* § 4-91(a).
[239] *See* MARION COUNTY, FLA., CODE §§ 4-2, 4-13 (2006).
[240] *See id*. § 4-13(f). Section 4-13(d) explains that if a dog is declared vicious (or dangerous) that the owner may "appeal" the final determination to the county court. However, section 4-13(f) states that a dog declared "vicious" must be turned over to the animal control authority for "expeditious" euthanasia. A dog owner may not understand that the dog may not be euthanized by the animal control authority if the dog owner "appeals" to the county court and possibly higher courts until all appeals are exhausted and these courts uphold the order requiring euthanasia.
[241] *See id*. § 4-2.
[242] *See id*.
[243] *See id*. §4-13(g)(3).
[244] *See, e.g.*, Hillsborough County Animal Servs. Declared Dangerous Dogs List, http://www.hillsboroughcounty.org/animalservices/programservices/dangerousdogregistry.cfm [hereinafter Hillsborough Dangerous Dogs List]; List of Dangerous Classified Animals Located in Leon County, Animal Control Div.: Dangerous and Aggressive Animals, http://www.leoncountyfl.gov.animal/dangerous.asp. As more high-profile cases hit the media, more counties are considering similar options. *See* Jason Garcia, *The Fatal Mauling of a Child Inspires Commissioners to Tighten Rules About Dangerous Animals*, ORLANDO SENTINEL, Feb. 22, 2005, at B1.
[245] *See* ATLANTIC BEACH, FLA, CODE §4-11(2)(d) (2006).
[246] *See* HILLSBOROUGH COUNTY, FLA, CODE §4-34 (2006).
[247] *See* PORT ORANGE, FLA, CODE §10-9 (2006).
[248] *See, e.g.*, Cindy Swirko, *Ban on dangerous dogs OK'd by County*, THE GAINESVILLE SUN, Jan. 25, 2006, *available at* http://www.gainesville.com (search for article title); Cindy Swirko, *County enforces euthanasia of dangerous dogs*, THE GAINESVILLE SUN, Apr. 26, 2006, *available at* http://www.gainesville.com (search for article title).
[249] No. 2002-CC-001980 (Fla. Leon County Ct. 2002).
[250] *See* Audio tape: Hearing before the Leon County Animal Control Dangerous Dog Classification Comm. (Mar. 1, 2002), Ortega v. Leon County, No. 2002-CC 001980 (Fla. Leon County Ct. 2002) [hereinafter Ortega Classification Hr'g Tape].
[251] *See id*.

[252] *See* James L. Rosica, *Ex-NRA president in dog dispute with neighbor*, TALLAHASSEE DEM., Dec. 31, 2001, *available at* http://www.tdo.com (search for article title); National Rifle Association, *Former NRA President Selected as Finalist for Florida Women's Hall of Fame*, *available at* http://www.nra.org/Article.aspx?id=1224.
[253] *See* Petition for Classification of a Dangerous or Aggressive Animal, Nov. 16, 2001, Ortega v. Leon County, No. 2002-CC 001980 (Fla. Leon County Ct. 2002) (on file with authors) [hereinafter Ortega Dangerous Dog Pet.].
[254] *See* Ortega Classification Hr'g Tape, *supra* note 250. Notably, Leon County Code section 4-36(e) states that following an initial warning to the dog owner that a dog has become a public nuisance by running at large, a subsequent violation must be supported by either personal knowledge of the animal control officer or law enforcement, *or* "at least two affidavits from different parties residing in close proximity to the alleged nuisance. . . ." Thus, according to this ordinance, the Hammers could have submitted two affidavits to support a citation for dogs running at large, rather than initiating what became an arguably suspect and unfounded petition for classification of a dangerous or aggressive animal.
[255] *See* Ortega Classification Hr'g Tape, *supra* note 250; Letter from Richard H. Ziegler, Dir., Leon County Div. of Animal Control, to Ms. Pat Ortega (Nov. 16, 2001), Ortega v. Leon County, No. 2002-CC 001980 (Fla. Leon County Ct. 2002) (notifying Ms. Ortega that the Hammers had filed a "Dangerous Animal Petition" against Ms. Ortega's dogs, and attaching a copy of the petition to the letter).
[256] *See* Ortega Dangerous Dog Pet., *supra* note 253, at 4.
[257] *See id*. at 2. Leon County Animal Control conducted a review of their records and determined that no one other than the Hammers had contacted them regarding the Ortega dogs running loose in the neighborhood, and that they had only received two complaints from the Hammers. *See* Ortega Classification Hr'g Tape, *supra* note 250.
[258] *See* Ortega Dangerous Dog Pet., *supra* note 253, at 2.
[259] *See id*.
[260] *Id*. at 3.
[261] *Id*.
[262] *See* Ortega Classification Hr'g Tape, *supra* note 250.
[263] *See id*.
[264] *See id*.
[265] *See* LEON COUNTY, FLA. CODE § 4-93(d) (2001); Ortega Classification Hr'g Tape, *supra* note 250.
[266] The veterinarian and the sheriff's designee voted to classify Angel and Buster "dangerous," while the citizen-appointee voted against classifying all three dogs dangerous. *See* Initial Classification Voting Forms of Leon County Animal Control Classification Committee Members, Mar. 1, 2002, Ortega v. Leon County, No. 2002 CC 00-1980 (Fla. Leon County Ct. 2002) (on file with Leon County Animal Control).
[267] *See* Ortega Classification Hr'g Tape, *supra* note 250.
[268] *See* Appellant's Resp. to Appellee's, Leon County, Florida's, Mot. to Dismiss, Mar. 25, 2002, Ortega v. Leon County, No. 2002-CC-001980 (Fla. Leon County Ct. 2002) [hereinafter Ortega Appellant's Response].
[269] *See id*.
[270] *See id*.; Ortega Classification Hr'g Tape, *supra* note 250.
[271] *See* Ortega Appellant's Response, *supra* note 268; Ortega Classification Hr'g Tape, *supra* note 250.
[272] Ortega Classification Hr'g Tape, *supra* note 250.
[273] *See* Request for Hr'g and Notice of Appeal of Dangerous Dog Classification, Mar. 15, 2002, Ortega v. Leon County, No. 2002-CC-001980 (Fla. Leon County Ct. 2002) [hereinafter Ortega Req. for Hr'g].
[274] *See* Ortega Classification Hr'g Tape, *supra* note 250; Audio tape: Hearing before the Leon County Animal Control Dangerous Dog Classification Comm., Hammer Mot. for Reh'g (Mar. 22, 2002), Ortega v. Leon County, No. 2002-CC 001980 (Fla. Leon County Ct. 2002) (on file with Leon County Animal Control).
[275] *See* Ortega Req. for Hr'g, *supra* note 273. Notably, during the appeal stage of the case, Ms. Hammer contacted the Classification Committee and the Leon County Board of County Commissioners by sending them several emails detailing various gruesome dog attacks that had taken place around the country. *See, e.g.*, E-mail from Marion Hammer to Judith McMurty, Leon County Animal Control Classification Comm. member (Mar. 15, 2002 12:27 PM EST) (forwarding a New York Times March 15, 2002, article entitled *Dog Mauling Prosecution Ends with Bold Letter on Neighbors*, which reported on the trial of Marjorie Knoeller, the San Francisco dog owner whose Presa Canario brutally attacked and killed a neighbor) (on file with Leon County County Attorney's Office). Ms. McMurty told Ms. Hammer that "[u]nless you have specific information pertaining to your petition filed against Ms. Ortega's dogs, please remove me from your mailing list." *See id*.
[276] *See* Ortega Req. for Hr'g, *supra* note 273; Ortega Appellant's Resp., *supra* note 268.
[277] *See* Order, Ortega v. Leon County, No. 2002-CC-001980 (Fla. Leon County Ct. Aug. 28, 2002).

[278] *See* Order Adopting and Incorporating Joint Stipulation, Ortega v. Leon County, No. 2002-CC-001980 (Fla. Leon County Ct. Feb. 27, 2003) [hereinafter Ortega Joint Stipulation]. The Leon County County Attorney's Office subsequently directed Leon County Animal Control to provide more structure to the Classification Committee hearings. Witnesses are now sworn, and a chairperson is appointed to preside over the taking of evidence. There have been no complaints of Ms. Ortega's dogs running at large after the incidents alleged in November 2001.
[279] No. 2003-CC-8411 (Fla. Leon County Ct. 2003).
[280] *See* Letter from Richard H. Ziegler, Dir., Leon County Div. of Animal Control, to Rick and Tiffany Moore (Dec. 1, 2003), Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with Leon County Animal Control) (notifying the Moores of the Classification Committee's initial classification of Shrek as "dangerous"); Petition for Classification of a Dangerous or Aggressive Animal, filed by Brenda Mundy, Oct. 14, 2003, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with Leon County Animal Control) [hereinafter Shrek Classification Pet.].
[281] *See* Shrek Classification Pet., *supra* note 280, at 3.
[282] *See id*.
[283] *See id*.
[284] *See id*.
[285] *See id*.
[286] *See id.;* Leon County Div. of Animal Control, Incident Report, Oct. 17, 2003, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (reporting that the neighbor admitted her grandchildren called Shrek off of his owners' property).
[287] *See* Defendant's Narrative, Statement of Dorothy Saudo, mother of Tiffany Moore, undated but with a facsimile transmission date of Feb. 13, 2004, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003).
[288] *See* Shrek Classification Pet., *supra* note 280.
[289] *See* Leon County Div. of Animal Control Incident Report, Nov. 3, 2003, at 1, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with Leon County Animal Control).
[290] *See id*. at 2.
[291] *See* Dangerous Animal Investigation, Statement of JoAnn Mullarkey, Oct. 28, 2003, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003).
[292] *See id*.
[293] *See* Letter from Richard H. Ziegler, Dir., Leon County Div. of Animal Control, to Rick & Tiffany Moore (Dec. 11, 2003), Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with authors and Leon County Animal Control) (providing the Moores with notice that Shrek had been permanently classified "dangerous").
[294] Aetna Smith, *Panel to Classify Canine*, TALLAHASSEE DEM., Dec. 11, 2003, at B1.
[295] *See id.*
[296] Smith, *supra* note 23.
[297] *See* Audio tape: Hearing before the Leon County Animal Control Dangerous Dog Classification Committee (Dec. 11, 2003), Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003) (on file with Leon County Animal Control).
[298] *See* Request for Hr'g to Appeal Dangerous Dog Classification, Dec. 16, 2003, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003).
[299] Additionally the Moores lost some of their income due to time spent on case preparation and attendance at hearings, meetings, and mediation.
[300] *See* Order Adopting and Inc. Jt. Stip., Aug. 27, 2004, Moore v. Leon County, No. 2003-CC-8411 (Fla. Leon County Ct. 2003). Shrek remains in the Leon County Animal Control Dangerous Dog database because the Moores have not yet completed a Canine Good Citizenship program as required in the Joint Stipulation.
[301] No. 2005-CC-2466 (Fla. Leon County Ct. 2005).
[302] *See* D. Penton, Leon County Animal Control Officer, Leon County Div. of Animal Control Incident Report, Feb. 8, 2005, Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control) [hereinafter Deuce Incident Rep.].
[303] *See* Petition for Classification of a Dangerous or Aggressive Animal, Dec. 7, 2004, Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005).
[304] *See id.*
[305] *Id*. at 1.

[306] *See* Letter from Warren K. Head to Richard H. Ziegler, Dir., Leon County Div. of Animal Control (Dec. 17, 2004), Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control).
[307] *See* Affidavit of Warren K. Head, June 24, 2005, Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control) [hereinafter Head Aff.].
[308] *See* Deuce Incident Rep. *supra* note 302, at 2.
[309] *See id*.
[310] *See* Deposition of Jim Ellison, June 9, 2005, at pp. 7, 20, Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors) [hereinafter Ellison Depo].
[311] *See id*.; Head Aff., *supra* note 307, at 2.
[312] *See* Head Aff., *supra* note 307, at 2; Ellison Depo, *supra* note 310, at 7-12.
[313] Head Aff., *supra* note 307, at 2.
[314] *See* Ellison Depo, *supra* note 310, at 24.
[315] *Id*.
[316] *See* Deuce Incident Rep., *supra* note 302, at 2.
[317] *See* Petition for Classification of a Dangerous or Aggressive Animal, Feb. 8, 2005, Sullivan v. Leon County, No. 05-CC-2466 (Fla. Leon County Ct. 2005).
[318] *See* Petition for Classification of a Dangerous or Aggressive Animal, Feb. 23, 2005, Sullivan v. Leon County, No. 05-CC-2466 (Fla. Leon County Ct. 2005).
[319] *See* Richard H. Ziegler, Dir., Leon County Div. of Animal Control, Dangerous/Aggressive Animal Initial Determination, Mar. 17, 2005, Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control).
[320] *See* Letter from Jay Summit, D.V.M., to Leon County Animal Control Classification Committee (Feb. 28, 2005), Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control). Notably, Dr. Summit rated Deuce's disposition as "excellent."
[321] *See* Audio tape: Hearing before the Leon County Animal Control Dangerous Dog Classification Comm. (Mar. 31, 2005), Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control).
[322] *See id*.
[323] *See id*.
[324] *See* Letter from Leon County Animal Control Classification Comm. to Tracy Sullivan (Mar. 31, 2005), Sullivan v. Leon County, No. 2005-CC-2466 (Fla. Leon County Ct. 2005) (on file with authors and Leon County Animal Control). The veterinarian who served on the Committee reviewing the Shrek case had resigned by this time.
[325] *See* Notice of Appeal/Pet. for De Novo Hr'g, Mar. 31, 2005, Sullivan v. Leon County, No. 05-CC-2466 (Fla. Leon County Ct. 2005).
[326] *See* Motion for Summ. J., Sullivan v. Leon County, June 22, 2005, No. 2005-CC-2466 (Fla. Leon County Ct. 2005). Section 767.12(1)(a) forbids ownership transfer of a dog once an investigation has commenced. Mr. Head had withdrawn his original petition but not yet filed his second petition with Leon County Animal Control before "ownership" of Deuce was transferred to Ms. Sullivan.
[327] *See* Order Adopting and Incorp. Jt. Stip., Sullivan v. Leon County, Aug. 3, 2005, No. 2005-CC-2466 (Fla. Leon County Ct. 2005).
[328] No. 05-18 (Marion County Code Enforce. Bd. 2005).
[329] *See* Delp Hr'g Tape, *supra* note 2. As part of her sworn testimony Ms. Delp stated that she had been offered $30,000 for her dog, Liberty.
[330] *See id.*
[331] *See* Animal Center/Code Enforce. Servs., Marion County, Fla., Interview with Lois Mulligan, Nov. 29, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 43558JK) (Marion County Code Enforce. Bd. 2005).
[332] *Id*.
[333] *See id*.; Jennifer Kelly, Dangerous Dog Investigator, Marion County, Summary of Investigation, Dec. 21, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control) [hereinafter Kelly Summary].
[334] *See* Kelly Summary, *supra* note 333.
[335] *See id.*
[336] *See id.*
[337] *See id.*

[338] *See id.*
[339] *See id.*; Jennifer Kelly, Dangerous Dog Investigator, Marion County, Aff. for Admin. Warrant, Dec. 12, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control) [hereinafter Kelly Admin. Warrant Aff.].
[340] *See id.*
[341] Kathleen Decker, Marion County Code Enforce. Officer, Action Order 453440-1, Nov. 10, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control) [hereinafter Decker Incident Report].
[342] *See id*.
[343] *See id*.
[344] *See id*.
[345] *Id*.
[346] *Id*.
[347] *Id*.
[348] *See* Kelly Summary, *supra* note 333.
[349] *See* Decker Incident Rep., *supra* note 341.
[350] *Id*.; Kathleen Decker, Marion County Code Enforce. Officer, Action Order 453440-1, Nov. 10, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) [hereinafter Decker Incident Rep.].
[351] *See* Kelly Summary, *supra* note 333.
[352] *Id*.
[353] *Id*.
[354] *See* Kelly Summary, *supra* note 333; Jennifer Kelly, Marion County Dangerous Dog Investigator, Interview with Lois Mulligan, Nov. 29, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) [hereinafter Mulligan Interview].
[355] Mulligan Interview, *supra* note 354.
[356] *See id*.
[357] Kelly Admin. Warrant Aff., *supra* note 339.
[358] *See id.*
[359] *See id*.
[360] *Id*.
[361] *See* State of Florida, County of Marion, Admin. Search Warrant (Fla. Marion County Cir. Ct. Dec. 12, 2005), Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control and Marion County Circuit Court).
[362] *See id*.
[363] Kelly Summary, *supra* note 333, at 1-2.
[364] *See id*. at 2.
[365] *Id*.
[366] *Id*. (Investigator Kelly wrote later in the report that upon notifying Ms. Delp that there was sufficient cause to classify Secret and Liberty as dangerous that Ms. Delp stated that she had already had to leave two counties because of the dogs). *See id*.
[367] *See id*.
[368] *See* Joseph Hooker, D.V.M., and Marion County Code Enforce. Bd., Temp. Maint. Agreement, Dec. 12, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control).
[369] Jennifer Kelly, Marion County Dangerous Dog Investigator, Notice of Sufficient Cause Finding, Dec. 13, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control).
[370] *See* Handwritten note from Beth Barnhart Delp to Marion County Bd. of County Comm'rs, Dec. 14, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control).
[371] As noted *supra* in note 222 and accompanying text, the Code Enforcement Board consists of nine members appointed due to their expertise in business, government, and spiritual matters (one member is a minister).

[372] *See* Jennifer Kelly, Marion County Dangerous Dog Investigator, Notice to Appear, Dec. 14, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control).
[373] *See* Kelly Summary, *supra* note 333; Delp Hr'g Tape, *supra* note 2.
[374] *See* Kelly Summary, *supra* note 333.
[375] *See id.*
[376] *See id.*
[377] *See id.*
[378] *See id.*
[379] *See id.*
[380] *See id.*
[381] *See id.*
[382] *See id.*
[383] *Id.*
[384] *See* Sarasota County Incident Rep., Nov. 11, 2005 (compiled), Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) [hereinafter Sarasota County Incident Rep.]; Steve Fernald, Sarasota County Sheriff's Office Witness Statement, July 16, 2003, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control, Sarasota County Sheriff's Office) (reporting that Fernald stated that he had left a package at the front door and "then 1 of 4 dogs laying at [the] door bit [him] about the calf one time").
[385] *See* Brevard County Animal Servs. and Enforce., Activity Rep., Additional Info., Oct. 21, 2004, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005) (on file with Marion County Animal Control, Brevard County Animal Servs. and Enforce.).
[386] *Id.*
[387] *See id.*
[388] Sarasota County Incident Rep., *supra* note 384.
[389] *See id*; Delp Hr'g Tape, *supra* note 2.
[390] *See* Delp Hr'g Tape, *supra* note 2.
[391] *Id.*
[392] *Id.*
[393] *See id.*
[394] *Id.*
[395] *Id.*
[396] *See id.*
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *See id.*
[402] *See id.*
[403] *Id.*
[404] *Id.*
[405] *Id.*
[406] *See id.*
[407] *See id.*
[408] *See id.*, Kelly Summary, *supra* note 333.
[409] *See* Delp Hr'g Tape, *supra* note 2.
[410] *See id.*
[411] *Id.*
[412] *See id.*
[413] *See id.*
[414] *See id.*
[415] *See id.*
[416] *Id.*
[417] *See id.*

[418] *See id*.
[419] *See id*.
[420] *See id*.
[421] *See id*. The Code Enforcement Board members do not identify themselves before they speak and thus because they are not individually identified they are not specifically identified in this Article.
[422] *Id*.
[423] *Id*. This ordinance has been challenged by another dog owner in *Grunnah v. Marion County*, No. 42-2006-CC-000035 (Fla. Marion County Ct. 2006). Ms. Grunnah was successful in having the Marion County Circuit Court issue an order granting her petition for a writ of prohibition which sought to have the circuit court order the county court judge to cease acting in an appellate capacity. *See* Grunnah v. Marion County, No. 2006-CA-000699 (Fla. Marion County Cir. Ct. July 18, 2006). The circuit court determined that because neither the Florida constitution nor the Florida general laws award appellate or certioriari jurisdiction to county courts, that Ms. Grunnah was entitled to a de novo hearing. Marion County has appealed the circuit court's order to the Florida Fifth District Court of Appeal, and the appeal is still pending as of the date of publication of this Article. *See* Marion County v. Grunnah, No. 5D06-3700 (Fla. 5th DCA 2006).
[424] *See* Delp Hr'g Tape, *supra* note 2.
[425] *See id*.
[426] *See* Marion County Code Enforce. Bd., Final Order Dangerous Dog Classification, Dec. 21, 2005, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005).
[427] *See id.*
[428] *Id*.
[429] *See id.*
[430] *See id*.
[431] *See* Certificate of Registration for a Dog Classified as Dangerous, Marion County Code, Chapter 4, Section 4-13, Jan. 12, 2006, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005).
[432] *See* Brevard County Animal Servs. and Enforce., Receipt No. R06-006694, Feb. 28, 2006, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005).
[433] *See* Brevard County Bd. of County Commissioners, Animal Servs. and Enforce., Letter to Prospective Insurance Carrier (Feb. 24, 2006); Dangerous Dog Liability Insurance Verification Form, State Farm Ins., Mar. 2, 2006, Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005).
[434] *See* Brevard County Animal Servs. and Enforce., Dangerous Dog Aff., section 2(o), Marion County Animal Control Auth. v. Delp, No. 05-18 (Marion County Animal Control No. 453558JK) (Marion County Code Enforce. Bd. 2005).
[435] BLACK'S LAW DICTIONARY 737 (8th ed. 2004).
[436] *Id.* at 105.
[437] *See, e.g.*, PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE §§ 9.1, 9.6 (Thomson & West 2006).
[438] FLA. CONST., art. V, § 6(b).
[439] *See, e.g.*, City of Petersburg v. Pinellas County Power Co., 100 So. 509 (Fla. 1924); Winn Dixie v. Ferris, 408 So. 2d 650 (Fla. 4th DCA 1981) ("Only the Florida Constitution and the Legislature, where authorized by the Constitution, may confer jurisdiction on the courts of this State.").
[440] FLA. STAT. §34.01(1) (2005).
[441] *Id.* § 34.01(5).
[442] *See, e.g.*, Order, Ortega v. Leon County, No. 2002-CC-001980, at 3 (Fla. Leon County Ct. Aug. 28, 2002):

> The steadfast rules of judicial statutory interpretation are that whenever possible a Court should interpret a statute so that its effect is constitutional and the Court should interpret a statute to give credence to legislative intent. Adhering to these two rules of interpretation, this Court finds first that the legislature intends for the remedy to the dog owner to be in County Court. This is clear by its directive. Because County Court lacks appellate jurisdiction to review the decision of the Animal Control Committee, the Court must assume and therefore finds that the legislature did not use the word "appeal" in F.S. 767.12 as a term of art but rather as a descriptive term to refer to the hearing to be held. If County Court is the proper forum for FS. 767.12 to avoid constitutional infirmity, the hearing in County Court must be a de novo hearing. Therefore, this Court holds that

> a full evidentiary hearing in County Court must be held to determine if [the dogs declared "dangerous"] are "dangerous" as defined by ordinance and statute.

See also, Order, Teuche v. Brevard County, Florida, No. 05-2003-CC-045486, at 1 (Fla. Brevard County Ct. Aug. 19, 2003) ("Since the county court has no appellate jurisdiction by constitution, statute, or rule, such hearing must be a de novo evidentiary hearing appealable to the circuit court.").

[443] No. 04-09-CC, 12 Fla. L. Weekly Supp. 411 (Fla. Marion County Ct. Feb. 11, 2005). Notably, for some reason the dog owner in this case stipulated that the proceeding in county court was to be handled via certiorari review. It is important to note that the authors believe that the Marion County Ordinance, section 4-13(e), is unconstitutional because it states that "[t]he appeal shall be the traditional record review applicable to other types of appeals from quasi-judicial decisions of administrative bodies."

[444] No. 98-2563-CI-88B (Fla. 6th Cir. May 10, 1999).

[445] *See id.* at 3.

[446] *See* Young v. Dep't of Cmty. Aff., 625 So. 2d 831 (Fla. 1993).

[447] *See* Mason v. Porsche Cars of N. Am., 621 So. 2d 719 (Fla. 5th DCA 1993), *rev. denied*, 629 So. 2d 134 (Fla. 1993).

[448] LEON COUNTY, FLA. CODE §4-93(d)(3) (2006).

[449] *See, e.g., supra* text accompanying note 290.

[450] *See* Audio tape: Hearing before the Orange County Dangerous Dog Classification Comm., Mar. 10, 2005, Orange County Animal Servs. v. Wetherington, No. 05-73-93 (Fla. Orange Co. Animal Serv. 2005) [hereinafter Wetherington Hr'g Tape].

[451] *See id.*

[452] Obviously, the parties are not required to be represented by attorneys at the hearing, but many dog owners recognize the significance of their interest and choose to have one.

[453] *See* Wetherington Hr'g Tape, *supra* note 450.

[454] County of Pasco v. Riehl, 620 So. 2d 229, 230 (Fla. 2d DCA 1993), *aff'd*, County of Pasco v. Riehl, 635 So. 2d 17, 19 (Fla. 1994).

[455] *See* Smith, *supra* note 23.

[456] *See* Garcia, *supra* note 244, at B1.

[457] *See* Joe Newman, *County Adopts Tougher Dog Law*, ST. PETERSBURG TIMES, Feb. 17, 1999, at B1.

[458] *See, e.g.*, BREVARD COUNTY, FLA. CODE § 14-49(f)(5) (2006) (requiring $100,000 in liability insurance to cover "any damage or injury which may be caused by the dangerous dog"); JACKSONVILLE, FLA., CODE § 462.406 (2006) (requiring $100,000 in liability insurance or, in the alternative, a $100,000 surety bond "conditioned upon the payment of damage to persons and property caused by the dangerous dog"). It is not an easy feat for the owner of a dog classified dangerous to obtain liability insurance. *See, e.g.*, Bruns, *supra* note 175, at 4B.

[459] *See, e.g.*, Ortega v. Leon County, No. 2002-CC 001980 (Fla. Leon County Ct. 2002).

[460] *See* Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979).

[461] *See* Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985) ("A government must have the flexibility to set enforcement priorities on its police power ordinances . . . .").

[462] 679 So. 2d 1260 (Fla. 3d DCA 1996).

[463] *See id.*

[464] *See id.* at 1261.

[465] *See id.* (noting that the local ordinance stated that such acts "shall" require the local government to classify the dog as "dangerous").

[466] *Id.*

[467] 468 So. 2d 955 (Fla. 1985).

[468] *See id.* at 956 (stating that "certain 'discretionary' governmental functions remain immune from tort liability").

[469] LEON COUNTY, FLA. CODE § 4-93(d)(3) (2006).

[470] ALACHUA COUNTY, FLA. CODE § 72.16(e) (2006).

[471] *See, e.g.* Jones v. City of Jacksonville, No. 06-AP-75 (Fla. Duval County Ct. 2006). In *Jones*, an animal control officer initially classified the Jones' two pit bulldogs "dangerous" based upon an attack in which the Jones's pit bulls were allegedly identified as two dogs who bit a neighbor who intervened in a fight between the neighbor's dog and two other dogs. *See* Letter from Howard Gunter, Humane Investigator, Jacksonville Animal Care & Control, to Mr. & Mrs. Gary Jones (Sept. 6, 2006), Jones v. City of Jacksonville, No. 06-AP-75 (Fla. Duval County Ct. 2006). The next day, the Jacksonville Animal Care and Control Division Chief, David Flagler, imposed a death sentence on the Jones's dogs. *See* Letter from David R. Flagler, Div.Chief, Jacksonville Animal Care & Control, to Gary Jones (Sept. 7, 2006), Jones v. City of Jacksonville, No. 06-AP-75 (Fla. Duval County Ct. 2006). On September 27, 2006--

two days before he would preside over the formal hearing--Mr. Flagler wrote to the Jones Family that "[t]he bottom [] line is that I have determined that your dogs are too dangerous to the citizens of Jacksonville to be allowed back into the community." *See* Letter from David R. Flagler, Div. Chief, Jacksonville Animal Care & Control, to Juanita Jones (Sept. 27, 2006), No. 06-AP-75 (Fla. Duval County Ct. 2006) (on file with authors). On September 29, 2006, Mr. Jones issued a document upholding the initial classification and the destruction order he had imposed on the Jones's dogs on September 7. *See* David R. Flagler, Dangerous Dog Appeal Hr'g, Sept. 29, 2006, Jones v. City of Jacksonville, No. 06-AP-75 (Fla. Duval County Court 2006).

The Jacksonville local ordinance states that the Chief of Animal Care and Control shall preside over the formal hearing. *See* JACKSONVILLE, FLA. CODE § 462.404 (a)(1) (2006).

[472] *See* BREVARD COUNTY, FLA. CODE §14-49(d) (2006).

[473] *See id*.

[474] *See id*.

[475] *See id*.

[476] *See id*.

[477] *See supra* text accompanying notes 2, 424.

[478] In a 2005 interview Laura Bevan, the Director of the Southeast Regional Office of The Humane Society of the United States, who helped craft the original statute, explained that the vague language was a result of compromise. *See* Interview with Laura Bevan, Director, S.E. Regional Office, HSUS, in Tallahassee, Fla. (Mar. 16, 2005) [hereinafter Bevan Interview]. Ms. Bevan explained that due to the fear that a single attack could be a fatal one, the drafters did not want to make officials wait until a dog actually attacked someone before they could declare it dangerous. They also did not want to define a dog's behavior too specifically because some behavior may then be inadvertently excluded. The hope was that people would understand what kind of behavior posed a "*real danger*." Ms. Bevan noted that in her opinion the drafters never intended for the law to be applied to some of the dogs who have been classified "dangerous" because the reported behaviors do not indicate that the dogs are truly dangerous. *See id.*

[479] *See* Shrek Classification Pet., *supra* note 280.

[480] N.R.S. 202.500(1)(a)(2) (2005) (emphasis added). Similarly, in Delaware, a dog may be declared potentially dangerous if he "chased . . . a person . . . in an apparent attitude of attack *on 2 separate occasions within a 12-month period*." Del. Code Ann. tit. 7, § 1736(a)(3) (2005) (emphasis added).

[481] LA. REV. STAT. § 14:102.14(A)(1) (2005). California's *potentially* Dangerous Dog definitions include the same provision. *See* CAL. AGRIC. CODE § 31602(a) (2005).

[482] CAL. AGRIC. CODE § 31602(a) (2005); LA REV. STAT. § 14:102.14(1) (2005).

[483] Laura Bevan, director of the Southeast Regional Office of the Humane Society of the United States, stated that she supports including an "intermediate" category in the statute. *See* Bevan Interview, *supra* note 478.

[484] *See* MINN. STAT. § 347.50 (2005).

[485] *Id.* § 347.50 (emphasis added).

[486] *Id.* § 347.50. Minnesota's statute also defines a potentially Dangerous Dog as one that "has a known propensity . . . to attack unprovoked, causing injury or otherwise threatening the safety of humans or domestic animals. *Id.* A catch-all provision like this should not be included within the Florida statute. The general language would suffer from the same vagueness problems as the current apparent attitude prong.

[487] *See* CAL. AGRIC. CODE § 31602 (2005).

[488] MINN. STAT. § 347.551 (2005).

[489] *See id.* § 347.53.

[490] *See id.* § 347.54-56.

[491] CAL. AGRIC. CODE § 31644 (2005) (emphasis added).

[492] *See* FED. R. EVID. 1101(a); FLA. STAT. § 90.103 (2005) (Florida Evidence Code).

[493] *See* Interview with Charlie S. Martin, Attorney, McLeod Law Firm, in Orlando, Fla. (Mar. 10, 2005) (following the Wetherington Dangerous Dog classification hearing).

[494] *See* FLA. STAT § 120.52(1)(c) (2005) (subjecting counties and municipalities to the Florida Administrative Procedure Act only if they are expressly made subject to it by general or special law).

[495] *See* Booker Creek Pres., Inc. v. Pinellas Planning Council, 433 So. 2d 1306, 1308-09 (Fla. 2d DCA 1983).

[496] For examples of these final orders, see *In re* The Matter of Confiscation for Euthanasia of "Nina" and "Big Dog" Owned by Sara Ervin, Nos. 03-CM-013850 & 03-CM-013849 (Hillsborough County Animal Control Feb. 23, 2005) (on file with Hillsborough County, Fla.); *In re* The Matter of Classification of "Mystique" Owned by Taylor Hoeffner, as a Dangerous Dog, No. HC 04-2606 (Hillsborough County Animal Control Feb. 16, 2005) (on file with Hillsborough County, Fla.); *In re* The Matter of Classification of "Juno" Owned by Susan Marsian-Bolduc and

Pascal Bolduc, as a Dangerous Dog, No. HC 04-3091 (Hillsborough County Animal Control Jan. 6, 2005) (on file with Hillsborough County, Fla.).
[497] *See* Booker, 433 So. 2d at 1308-09.
[498] *See* FLA. STAT. § 120.57(1)(a) (2005).
[499] McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 577 (Fla. 1st DCA 1977).
[500] *See* FLA. STAT § 120.57(1)(b) (2005).
[501] FLA. STAT § 120.57(1)(c) (2005).
[502] *See* Dogs Deserve Better, http://dogsdeservebetter.com (last visited April 18, 2007).
[503] *See id.*
[504] *See* Garcia, *supra* note 244.
[505] *See* DELISE, *supra* note 1, at 14.
[506] *See id.* at 11 (describing "possessive aggression" as a situation in which a dog is guarding his food or toys and noting that young children are the most susceptible to this kind of aggression).
[507] *See, e.g.*, Garcia, *supra* note 239 ("Pit bulls are the worst offenders, ... They don't belong in a civilized society.") (quoting retired teacher Donald Simmonds).
[508] *See id*. (noting that the Orlando City attorney thought that "any breed-specific action would be pre-empted by the legislature").
[509]For example, five of the eight dogs listed as "dangerous" on the Leon County Animal Control Web site are pit bulls or bull dogs. *See* Leon County, Animal Control Div., Dangerous and Aggressive Animals, http://www.co.leon.fl.us/animal/dangerous.asp).
[510] *See* DELISE , *supra* note 1, at 65-80.
[511] *See id.*
[512] *See* FLA. STAT. § 767.11(5) (2005).
[513] *See, e.g.*, Maricopa Animal Care and Control, Maricopa County, Ariz http://www.maricopa.gov/pets; Animal Care and Control of New York City, http://www.nycacc.org/; Palm Beach County Animal Care and Control, Palm Beach County, Fla. http://www.pbcgov.com/pubsafety/animal/; Ed Boks, *Care or Control?, available at* http://www.bestfriends.org/nomorehomelesspets/pdf/careorcontrol.pdf.
[514] *See, e.g.*, Nathan Winograd, *Reforming Animal Control, available at* http://www.nokillsolutions.com/pdf/Reforming%20Animal%20Control.pdf.
[515] Ms. Ortega, a single, working mother, had installed an electric fence but it was not working properly despite several attempts to fix it. Consequently, the dogs were able to dig out of the yard. Ms. Ortega had also inadvertently left some items near a part of the fence that the dogs were using to climb over, but Ms. Ortega was not aware of this because she was not at home when the dogs escaped the yard, and they were always back in the yard when she returned home. Ms. Ortega also had a then-teenage son who was careless in not letting the dogs out of the front door when he opened it for friends to enter. Ms. Ortega was able to control the dogs from escaping by having the fence repaired by a professional, moving the items away from the fence, keeping the dogs in the house during the day, and keeping them supervised in the yard while they are outside. *See* Ortega Jt. Stip., *supra* note 278.
[516] *See* FLA. STAT. § 767.12(d) (2005) (setting forth state "appeal" procedures). Each dog owner must check his or her local ordinances for more information on filing an "appeal" in his or her county court. Most local ordinances can be readily accessed at Municode's free library (http://www.municode.com).
[517] *See* Cunliff, *supra* note 48, at 14.
[518] *See id*.
[519] *See id*.
[520] *See id*.
[521] *See id*.
[522] *See* Interview with Scott Pliskin, D.V.M., in Tallahassee, Fla. (Nov. 11, 2006) [hereinafter Pliskin Interview].
[523] *See id*.; Cunliffe, *supra* note 48, at 14.
[524] *See* Pliskin Interview, *supra* note 522.
[525] *See* Diane Jessup, *Why do Some Dogs Bite? Chasing, Biting, Killing: Natural Behaviors*, http://www.workingpitbull.com/whydodogsbite.htm (last visited April 18, 2007).
[526] *See id*.
[527]*See* Pliskin Interview, *supra* note 522.
[528] *See id*. Dr. Pliskin noted that the removal of a dog's teeth can be a very complex procedure due largely to the root length of the teeth. However, Dr. Pliskin stated that "if we were to ask the dog whether he would rather be dead or without teeth, he would probably say 'pull those suckers.'" *Id*. Dr. Pliskin further noted that after the teeth were pulled the dog's diet would have to be softened so that it could be consumed. *See id*.

[529] The authors suggest this procedure should be considered in cases in which dogs, such as Beans (profiled in footnote 25), have been declared "dangerous" but who have not bitten or harmed anyone yet nonetheless have been sentenced to death. Additionally, in situations in which a dog has been declared "dangerous" for attacking or biting another's animal, teeth removal may be a reasonable alternative to the death sentence. The decision of whether or not teeth removal is appropriate should be made on a case-by-case basis.

[530] On the date the original draft of this Article was completed--October 17, 2006--the U.S. population was projected to reach 300 million. It is expected to hit 400 million by 2043. *See* Stephen Ohlemacher, *U.S. Population Passes 300 Million Mark*, Oct. 17, 2006, *available at* http://abcnews.go.com (search for article title).

CHANGING THE TAX SYSTEM TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

EDEN GRAY

I. INTRODUCTION

Meat consumption in the United States equaled 221.4 pounds per capita in 2004.[1] To satiate American appetites, the food industry slaughters over ten billion land animals for food each year.[2] Large farming operations use factory farms to raise the majority of these slaughtered animals.[3] Unlike labor intensive traditional farms, factory farms are capital intensive.[4] The capital intensive nature of factory farming allows for cheaper production of a greater number of animals.[5]

Cheaper production via factory farm results in lower consumer prices; however, this cheaper production method also causes billions of animals to suffer immense injury, stress, and disease each year.[6] Factory farms force animals to live in tight confinement.[7] For example, egg-laying hens live in battery cages which provide each hen less floor space than the area of a regular sheet of notebook paper.[8] Crowded tightly with other hens, the birds cannot engage in many natural habits, such as nesting, perching, spreading their wings, dustbathing, and even walking.[9] The cruelness of the battery cage system has led many countries to ban their use.[10] Other animals, including pigs, dairy cows, turkeys, and calves, also endure harsh and brutal treatment and suffer tight confinement on factory farms.[11] In fact, approximately 10% of farm animals raised for food die on the farm and therefore never reach the slaughterhouse.[12] Exemptions for common farm practices within the animal cruelty laws of most states prevent the conditions endured by farm animals from being defined as animal cruelty under the law.[13] Furthermore, the federal Animal Welfare Act does not protect farm animals[14] and the federal

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[1] Nat'l Agric. Statistical Serv., U.S. Dep't of Agriculture, *Statistical Highlights 2004 and 2005 Tables – Livestock*, http://www.usda.gov/nass/pubs/stathigh/2005/tables/livestock.htm#meat [hereinafter NASS, *Statistical Highlights*] (last visited Apr. 17, 2007).

[2] The Humane Soc'y of the U.S., *The Dirty Six: The Worst Practices in Agribusiness*, http://www.hsus.org/farm/resources/pubs/the_dirty_six.html [hereinafter HSUS, *The Dirty Six*] (last visited April 17, 2007) (equating the total number of farm animals killed each year to over one million per hour).

[3] *See* The Humane Farming Ass'n, *Factory Farming*, http://www.hfa.org/factory/index.html (last visited April 17, 2007).

[4] *Id*.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] HSUS, *The Dirty Six*, *supra* note 2.

[9] *Id.*

[10] Compassion in World Farming Trust, *Laid Bare . . . The Case Against Enriched Cages in Europe* 3 (2002), http://www.ciwf.org/publications/reports/laid_bare_2002.pdf (citing the 1999 Laying Hens Directive which bans barren battery cages in the European Union from 2012).

[11] HSUS, *The Dirty Six*, *supra* note 2.

[12] The Humane Farming Ass'n, *supra* note 3.

[13] *Id.*

[14] Animal Welfare Act, 7 U.S.C. § 2132(g) (2000).

Humane Methods of Slaughter Act does not apply to poultry,[15] even though chickens, turkeys, and other birds represent 95% of the animals slaughtered each year.[16] As large agricultural organizations regularly make significant campaign contributions and strongly lobby Congress, extensive federal regulation is unlikely in the near future.[17] Thus, the factory farmers themselves principally determine the level of humane treatment given to farm animals.

Factory farming, in addition to causing the immense suffering of numerous animals, results in serious costs to society.[18] First, large farming operations with low production costs squeeze out small farms relying on labor intensive practices.[19] Remaining small farms, forced to reduce prices to remain competitive, lose profits quickly.[20] Rural communities depending upon the sustainability of small farms suffer economically as small farm businesses fail.[21] Second, American consumers lose as the number of animals produced on factory farms grows. To keep costs low, factory farms tightly confine animals.[22] To ward off the ill effects of this tight confinement and to accelerate growth, animals receive doses of growth hormones and antibiotics, such as penicillin and tetracycline.[23] Widespread use of antibiotics in farm animals creates new strains of bacteria resistant to typical antibiotics used in humans and thereby poses a great threat to human health.[24] Third, factory farms generate significant animal waste which harms land, air, and water quality.[25] Further, toxic gases produced by animal waste wreak havoc on agricultural workers and nearby residential areas.[26] Raising animals more humanely will reduce these societal costs.

Changes to the tax system can be used to effect humane treatment of farm animals. The federal government often utilizes the tax system to influence social policy.[27] In fact, the federal government currently uses tax polices as financial incentives for farms to engage in technological change and economics of size.[28] Tax policies also stimulate farms to substitute capital investment for labor.[29] Various tax incentives and penalties, such as providing additional credits and disallowing certain deductions, can be used to encourage farm owners to treat farm animals humanely.

Changing the tax system will mitigate the harm caused to farm animals by the current void in state and federal protection. Part II of this paper describes the inhumane treatment suffered by billions of farm animals each year, the inadequacy of current federal and state laws,

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[15] Humane Methods of Slaughter Act, 7 U.S.C. §§ 1902-07 (2000).
[16] The Humane Soc'y of the U.S., *Farm Animal Legislation*, http://www.hsus.org/farm/camp/lit-leg/legislation.html [hereinafter HSUS, *Farm Animal Legislation*] (last visited Apr. 17, 2007).
[17] The Humane Farming Ass'n, *supra* note 3.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See* USDA Advisory Comm. on Small Farms, U.S. Dep't of Agriculture, *Building on A Time to Act* 2 (Feb. 2003), *available at* http://www.usda.gov/oce/smallfarm/reports/advrpt2-building.pdf [hereinafter USDA, *Building*].
[22] The Humane Farming Ass'n, *supra* note 3.
[23] *Id*.
[24] *Id.*
[25] *Id.*
[26] The Humane Soc'y of the U.S., *Human Health and Food Safety Concerns*, http://www.hsus.org/farm_animals/factory_farms/the_pig_factory_farm/human_health_and_food_safety_concerns.html [hereinafter HSUS, *Human Health*] (last visited Apr. 8, 2006).
[27] Jay P. Kesan & Rajiv C. Shah, *Shaping Code*, 18 HARV. J.L. & TECH. 319, 382 (2005).
[28] Ron Durst & James Monke, U.S. Dep't of Agric., *Effects of Federal Tax Policy on Agriculture* IV (Apr. 2001), http://www.ers.usda.gov/publications/aer800/aer800.pdf.
[29] *Id.* at 48.

the societal costs of factory farms, and the availability of humane alternatives. Part III discusses the relationship between the inhumane treatment of farm animals and the tax system. Part IV discusses the use of the tax code to promote social policy goals and suggests tax incentives and disincentives to encourage farms to treat farm animals humanely. Part V concludes this paper by summarizing recommended changes to the tax code to effect humane treatment of farm animals.

II. FACTORY FARMS

A. INHUMANE TREATMENT OF FARM ANIMALS AND THE INADEQUACY OF CURRENT LAWS

The meat, egg, and dairy industries raise and slaughter over ten billion land animals each year in the United States.[30] Per capita, Americans consumed 85.4 pounds of chicken, 66.1 pounds of beef, 51.3 pounds of pork, 17.0 pounds of turkey, 0.5 pounds of veal, and 1.1 pounds of lamb and mutton in 2004.[31] To produce this meat cheaply, large farming operations have taken over and industrialized the animal agriculture business by running factory farms.[32] In fact, a mere 3% of total farms reaped 62% of total sales and government payments in 2002.[33] Only 15% of farms generated 89% of total sales and government payments.[34]

Factory farms profit by warehousing hundreds or thousands of animals in tightly confined spaces.[35] Animals in factory farms cannot engage in many of their natural habits, including walking in most cases.[36] For example, in the United States, more than 90% of pregnant female pigs are confined in gestation crates throughout their pregnancy.[37] These small, narrow metal stalls confine the sow so much that she can only move a step or two backward or forward.[38] The pregnant pig cannot even turn around.[39] To raise calves for veal, factory farms use similar restrictive crates along with neck chains to prevent movement.[40] Furthermore, factory farms keep cattle raised for beef in pens.[41] Factory farms cram around 100,000 animals into cattle feedlots filled with the pens.[42] Less movement fattens the animals quicker.[43] While fattening up, cattle stand in their own waste and breathe noxious fumes arising from the waste.[44] Moreover, to maximize egg production, factory farms confine egg-laying hens in battery cages,

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[30] HSUS, *Farm Animal Legislation*, *supra* note 16.
[31] NASS, *Statistical Highlights*, *supra* note 1.
[32] Farm Sanctuary, *The Facts About Farm Animal Welfare Standards* 1, http://www.farmsanctuary.org/campaign/standards_booklet_FINAL.pdf [hereinafter Farm Sanctuary, *The Facts*] (last visited Apr. 17, 2007).
[33] Nat'l Agric. Statistical Serv., U.S. Dep't of Agriculture, *Quick Facts from the 2002 Census of Agriculture*, http://www.nass.usda.gov/census/census02/quickfacts/distribution.htm [hereinafter NASS, *Quick Facts*] (last visited Apr. 17, 2007).
[34] *Id.*
[35] *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 1.
[36] *See* HSUS, *The Dirty Six*, *supra* note 2.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 1.
[42] *Id.*
[43] *See id.*
[44] *Id.*

which are small wire enclosures lined up in rows and stacked several tiers high.[45] Hens cannot move or even spread their wings due to the lack of space.[46]

The tight confinement endured by these farm animals denies them the ability to engage in natural behaviors and causes them tremendous psychological and physical suffering.[47] Animals on factory farms typically develop unnatural behaviors, such as unnatural aggression, due to the boredom, frustration, and stress of living in factory farm conditions.[48] For example, pregnant sows in gestation crates display abnormal behaviors such as feet stamping, compulsive and intense biting of the crate bars, and mourning.[49] Turkeys often develop the unnatural behaviors of feather pecking and cannibalism due to the dim and crowded conditions on factory farms.[50] Other typical factory farm practices used to facilitate tight confinement and high volume production, such as beak trimming, forced molting, and selective breeding, force further suffering upon farm animals.[51] Factory farms perform many procedures, such as tail docking, castration, and beak trimming without anesthesia.[52] Selective breeding for fast-growing animals in conjunction with the use of growth-producing antibiotics causes many farm animals to outgrow their bodies' support systems and thereby forces their bodies to struggle just to function.[53] Conditions on the factory farm result in the on-farm death of approximately 900 million of the animals raised for food.[54] These farm animals never reach slaughter.[55] However, losing inventory due to these tight confinement and other high volume production measures is more cost effective to factory farms than treating the animals humanely.[56]

Inadequate government regulation and oversight permit factory farms to perpetuate this inhumane treatment. The federal Animal Welfare Act excludes animals used in food production from its coverage.[57] Furthermore, approximately one-half of state laws on animal cruelty

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[45] HSUS, *The Dirty Six*, *supra* note 2 (noting that more than 95% of egg-laying hens in the United States are confined in battery cages)
[46] *Id.*
[47] *See id.*
[48] The Humane Soc'y of the U.S., *Frequently Asked Questions About Factory Hog Farms*, http://www.hsus.org/farm_animals/factory_farms/the_pig_factory_farm/frequently_asked_questions_about_factory_hog_farms.html (last visited Apr. 8, 2006).
[49] *Id.* (characterizing mourning behavior as "sitting motionless for hours with heads hung low or pressed against the crate, ears drooping, eyes clamped shut").
[50] The Humane Soc'y of the U.S., *The Turkey Factory Farm*, http://www.hsus.org/farm_animals/factory_farms/the_turkey_factory_farm/ [hereinafter HSUS, *The Turkey Factory Farm*] (last visited Apr. 8, 2006).
[51] *See* The Humane Soc'y of the U.S., *An HSUS Report: Animal Suffering in the Egg Industry* 1, http://www.hsus.org/web-files/PDF/HSUS_laying_Hen_Report.pdf [hereinafter HSUS, *An HSUS Report*] (last visited Apr. 8, 2006) (noting that forced molting is the purposeful starvation of hens for ten to fourteen days to induce an additional laying cycle).
[52] *See id.;* Farm Sanctuary, *The Facts*, *supra* note 32, at 5.
[53] HSUS, *The Dirty Six*, *supra* note 2; HSUS, *The Turkey Factory Farm*, *supra* note 50 (noting that factory farm turkeys have a high rate of leg and hip disorders); *see also* HSUS, *An HSUS Report*, *supra* note 51, at 1 (noting that osteoporosis affects almost all battery hens).
[54] The Humane Farming Ass'n, *supra* note 3 (noting that the 900 million death figure roughly equates to 10% of total farm animals raised for food)
[55] *Id.*
[56] *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 1.
[57] Animal Welfare Act, 7 U.S.C. 2132(g) (2000) (excluding farm animals from the definition of animal under the Act).

exempt customary farming practices,[58] even though many of these practices are considered cruel and are therefore restricted industrialized nations.[59] Besides suffering inhumane treatment on the farm, more than 95% of all farm animals often endure several parts of the slaughter process fully conscious, as the United States Department of Agriculture does not consider chickens, turkeys, and other birds "livestock" under the Humane Methods of Slaughter Act (HMSA).[60] Further, despite the HMSA's requirement that all animals be "rendered insensible to pain . . . before being shackled, hoisted, thrown, cast, or cut" or "suffer[] loss of consciousness,"[61] investigations have shown that animals of all species have endured parts of the slaughter process while conscious due to incorrect stunning.[62]

Like the government, trade associations provide no incentive for factory farms to provide animals with more humane treatment.[63] Guidelines for quality assurance published by the National Chicken Council, Milk and Dairy Beef Quality Assurance Center, National Pork Board, National Turkey Federation, and the National Cattlemen's Beef Association simply maintain the status quo.[64] These quality assurance programs, created in response to pressures from grocery stores and chain restaurants, fail to ensure that the basic needs of farm animals are met.[65] Under these guidelines, farm animals still endure hunger, discomfort, pain, fear, and distress.[66] Animals can also be denied the ability to engage in normal behaviors.[67] Although these programs encompass cruel practices, trade associations often cite these guidelines to argue against government regulation.[68] As the food industry contributes significantly to political campaigns,[69] strenuous regulation in the near future is unlikely.

B. THE SOCIETAL COSTS OF FACTORY FARMS

Aside from the suffering endured by farm animals, factory farming also results in serious costs to society, including a reduction in the number and profitability of family farms, an increase in the health risks related to meat consumption, a proliferation of damage to the environment, and a rise in threats to farm workers' health.[70] Small farms, ranches, and woodlot owners comprise approximately 93% of the total farms, ranches, and woodlots;[71] however, only

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[58] Farm Sanctuary, *The Facts*, *supra* note 32, at 2; *see e.g.*, Alaska Stat. §11.61.140(c)(3) (2005); Colo. Rev. Stat. Ann. § 18-9-201.5(1) (West 2004); Kan. Stat. Ann. §21-4310(b)(6) (1995).
[59] *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 2.
[60] The Humane Soc'y of the U.S., *Still a Jungle Out There: The HSUS Takes USDA to Court to Ensure a Humane End for Birds* (Nov. 21, 2005), http://www.hsus.org/farm/news/ournews/still_a_jungle_out_there.html (noting these birds are often "shackled by their legs, hung upside-down, cut with mechanical blades, and immersed in scalding water – all while they're fully conscious").
[61] Humane Methods of Slaughter Act, 7 U.S.C. § 1902 (2000).
[62] The Humane Soc'y of the U.S., *Slaughter and Animal Welfare*, http://www.hsus.org/farm_animals/factory_farms/slaughter_and_animal_welfare/ (last visited Apr. 8, 2006) (noting electric stunning by electricity or captive bolt are often used to render unconsciousness in the animals).
[63] Farm Sanctuary, *The Facts*, *supra* note 32, at 3.
[64] *Id.*
[65] *Id.* at 4.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 3.
[69] The Humane Farming Ass'n, *supra* note 3.
[70] *Id.*
[71] USDA, *Building*, *supra* note 21, at 4.

15% of farms reaped 89% of total sales and government payments in 2002.[72] The sustainability of small farms is critical to the maintenance of healthy rural communities, as the foundation of their economy is farming.[73] The United States Department of Agriculture finds the viability of family farms so important that it has commissioned advisory committees to research the needs of small family farms, as most of the Department's current programs and policies slant favorably toward larger farms and agricultural operations.[74] In addition to contributing to the reduction of small family farms, factory farms create considerable risks to public health and the environment.

Factory farms provide abundant doses of antibiotics to farm animals, resulting in a significant threat to human health.[75] In fact, according to one estimate, healthy livestock receive 70% of the antibiotics used in the United States.[76] Factory farm animals receive antibiotics to promote fast growth and to ward off diseases likely to arise from the crowded and unsanitary conditions present on factory farms.[77] The overuse of antibiotics in farm animals produces bacteria resistant to antibiotics.[78] For example, directly following the approval, licensing, and use of the powerful antibiotic Fluoroquinolone in poultry, strains of salmonella and campylobacter resistant to Fluoroquinolone were found in animals and humans.[79] Since the initial use of the antibiotic in poultry, several countries have reported outbreaks of salmonellosis and campylobacteriosis resistant to treatment with Fluorquinolone.[80] In fact, the U.S. Food and Drug Administration estimates that the use of this antibiotic in poultry affects at least 5000 Americans annually.[81]

As many of the antibiotics given to farm animals are also prescribed to humans and the number of current and new antibiotic drugs is limited, resistant bacteria dangerously threaten humans.[82] Workers caring for the farm animals face a heightened risk of becoming infected with the resistant bacteria and then spreading the bacteria to others.[83] Another threat of widespread infection arises from the potential contamination of waterways and groundwater with bacteria seeping from manure lagoons or manure-spread fields.[84] Persons consuming undercooked meat or food contaminated with raw meat juices face a significant threat as well, as most meat sold in grocery stores comes from animals raised on factory farms.[85] Threats arising from the abundant

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[72] NASS, *Quick Facts*, *supra* note 33 (indicating further than only 3% of farms generated 62% of total sales and government payments).
[73] *See* USDA, *Building*, *supra* note 21, at 1.
[74] *Id.* at 1-2.
[75] The Humane Farming Ass'n, *supra* note 3.
[76] Suzanne Millman, The Humane Soc'y of the U.S., *The Emerging Threat of Anti-biotic Resistance: A Hidden Cost of Factory Farming*, http://www.hsus.org/press_and_publications/humane_society_magazines_and_newsletters/all_animals/volume_4_issue_1_spring_2002/the_emerging_threat_of_antibiotic_resistance_a_hidden_cost_of_factory_farming.html (last visited Apr. 19, 2007).
[77] *Id.*
[78] *Id.*
[79] World Health Org., *Use of Antimicrobials Outside Human Medicine and Resultant Antimicrobial Resistance in Humans* (Jan. 2002), http://www.who.int/mediacentre/factsheets/fs268/en/.
[80] *Id.*
[81] *Id.*
[82] Millman, *supra* note 76 (naming penicillin, tetracycline, and erythromycin as examples of antibiotics prescribed for both human and farm animal use).
[83] *Id.*
[84] *Id.*
[85] *Id.*

dosing of farm animals with antibiotics prompted the European Union to ban the use of certain antibiotics in animal feed.[86]

Environmental contaminants produced by factory farms also increase the risk of health problems for factory farm workers and residential neighbors.[87] Factory farming operations produce significant amounts of animal waste: in 1996, the cattle, pork, and poultry industries in the United States generated 130 times more waste than generated by the U.S. human population.[88] Although animal manure is a valuable fertilizer, the quantity of manure produced drastically exceeds needs.[89] Over application of manure drives pollutants into rivers, streams, groundwater, and air.[90] The clustering of factory farm operations in close proximity to each other and to the slaughterhouse increases the potential for environmental contamination.[91] Another pollution risk arises from the potential for manure lagoons to burst or overflow.[92] Twenty-five million gallons of animal waste spilled into the New River after the bursting of an eight acre hog waste lagoon in North Carolina in 1995.[93] The burst killed ten million fish and forced the closure of 364,000 acres of coastal wetlands used for shellfishing.[94] Individuals living near factory farms and factory farm workers also face health risks due to the emission of pollutants, such as hydrogen sulfide, ammonia, and methane, into the air.[95] For example, residents near a swine factory farm in Minnesota suffered dizziness, nausea, vomiting, and blackouts as a result of high levels of hydrogen sulfide.[96] Testing of ten local operations showed five exceeded public health limits for hydrogen sulfide, some by up to fifty times the standard.[97]

Overall, factory farms raise significant social costs, including threats to public health, damage to the environment, and the loss of family farms.[98] However, humane alternatives to factory farming have the potential to reduce these societal costs.

C. AVAILABILITY OF HUMANE ALTERNATIVES

Economically feasible humane alternatives to the cruel methods typically used by factory farms are available.[99] These alternatives treat animals more humanely and decrease the health and environmental threats associated with factory farming.[100] For example, instead of cramming animals into pens and utilizing confined feeding systems, farmers can let the animals graze

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[86] *EU Bans Farm Antibiotics*, BBC NEWS, Dec. 14, 1998, http://news.bbc.co.uk/2/hi/europe/234566.stm.
[87] HSUS, *Human Health*, *supra* note 26.
[88] The Humane Farming Ass'n, *supra* note 3 (indicating that those industries generated 1.4 billion tons of animal waste which equals approximately 5 tons of waste for every person in the United States).
[89] Natural Res. Def. Council, *America's Animal Factories: How States Fail to Prevent Pollution from Livestock Waste*, http://www.nrdc.org/water/pollution/factor/cons.asp (last visited Apr. 19, 2007).
[90] *Id.*
[91] *Id.*
[92] *Id* (noting that lagoons lined with clay can still leak several thousand galloons per acre per day).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* (noting that "[h]ydrogen sulfide is a toxic gas associated with the decomposition of swine manure").
[97] *Id.*
[98] The Humane Farming Ass'n, *supra* note 3.
[99] The Humane Soc'y of the U.S., *Sustainable Agriculture and Organic Farming*, http://www.hsus.org/farm_animals/inside_farming/sustainable_agriculture_and _organic_farming/ (last visited Apr. 8, 2006).
[100] *Id.*

openly in pastures.[101] Manure from the animals fertilizes the pastures.[102] Matching the number of animals to the land's carrying capacity and utilizing rotational grazing techniques ensures the sustainability of the land and diminishes environmental and health threats by inhibiting the over application of manure.[103] Further, by grass-feeding their farm animals, farmers will reduce outlays for farm equipment and fuel.[104] Moreover, freeing the animals from crammed quarters will decrease incidence of disease and thereby allow farmers to cut the number of antibiotics given to the farm animals.[105] Restricting the use of antibiotics to situations where an animal is actually ill has the potential to lower the risk of creating and passing antibiotic resistant bacteria from animals to humans.[106]

In addition to diminishing the societal costs associated with factory farming methods, the implementation of humane alternatives responds to growing consumer demand.[107] Customers increasingly demand and pay premiums for organically grown and raised products, such as crops and livestock.[108] In fact, several farming industry associations have developed animal welfare certification programs in response to heightened consumer demand for improved animal welfare and pressure from the restaurant and grocery store industries.[109] Unfortunately, rather than improving the treatment provided to farm animals, standards established by the farming industry basically maintain the status quo.[110] To achieve true improvement in farm animal welfare, several common factory farming practices need to be halted. For this reason and to decrease health risks, many European nations will be banning the use of battery cages from 2012[111] and the use of certain antibiotics.[112] If similar bans cannot be enacted in the United States due to political pressure by the farming industry on agricultural committees within Congress, then other measures, such as amending the tax system, should be taken to encourage the implementation of humane alternatives.

III. INHUMANE TREATMENT AND TAXES

The federal tax system currently impacts several aspects of the farming industry in America,[113] including encouraging the use of livestock production methods which detrimentally impact the treatment of farm animals. Federal tax policies, especially policies enacted through the income tax, the self-employment tax, and the estate and gift taxes, impact "farm profitability, the number and size of farms, the organizational structure of the farm sector, and the mix of land,

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] World Health Org., *supra* note 79 (indicating that a rising threat of vancomycin resistant enterococci prompted European countries to ban the use of vancomycin, an animal growth promoter. After the ban, the prevalence of antibiotic resistant Enterococcus in animals and food dropped sharply.).
[107] Catherine Greene & Amy Kremen, U.S. Dep't of Agric., *U.S. Organic Farming in 2000-2001: Adoption of Certified Systems* 2, 22-24 (Feb. 2003), http://www.ers.usda.gov/publications/aib780/aib780.pdf.
[108] *Id.*
[109] *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 2-3.
[110] *Id.*
[111] Compassion in World Farming Trust, *supra* note 10, at 3.
[112] *EU Bans Farm Antibiotics*, *supra* note 86.
[113] Ron Durst, U.S. Dep't of Agric., *Federal Taxes* (Nov. 3, 2005), http://www.ers.usda.gov/Briefing/Federal Taxes/.

labor, and capital inputs used in farming."[114] In general, federal income taxes comprise the major portion of farmers' total federal tax burden.[115]

Although three basic size categories of farming operations exist, most of the federal income tax burden falls on intermediate and commercial farms.[116] While approximately three-fourths of all rural residence farms report a tax loss, over half of all intermediate and commercial farms report taxable profits.[117] In fact, in 2000, intermediate and commercial farms reported over 90% of all farm profits.[118] Small farm sole proprietorships, on the other hand, reported an aggregate net farm operating loss equaling $9 billion for tax purposes.[119] Although these sole proprietorships reported a net operating loss, their taxable gross farm business income equaled over $91 billion.[120] The great disparity between gross farm income and net farm operating losses indicates the farmers claimed significant deductions. While intermediate and commercial farms pay taxes on farming profits, smaller farms use net farm operating losses to offset their non-farm income.[121] Tax policy changes which impact farm income and farm investment will therefore affect both small and large farms.[122]

Tax relief measures enacted by Congress in the last few years benefit all farmers considerably, especially commercial farmers.[123] Farm animals, however, stand to lose. Overall, the average tax rate on farm income and investment declined from 18% in 2000 to 14% in 2005.[124] Although the legislation impacted several areas of the tax code, changes relating to capital investment[125] primarily threaten to affect farm animals negatively by encouraging further development of factory farms and the industrialization of livestock agriculture. The major changes encouraging capital investment include a preferential capital gains tax rate of 15% and an increased immediate expensing provision for capital purchases.[126] The preferential capital gains tax rate allows capital gain income to be taxed at a preferential rate, regardless of the rate applied to the taxpayer's ordinary income.[127] The immediate expensing provision allows for

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[114] *Id.*

[115] Ron Durst, U.S. Dep't of Agric., *Federal Taxes: Federal Tax Policy & Farmers* (Apr. 4, 2005), http://www.ers.usda.gov/Briefing/FederalTaxes/FederalTaxPolicy.htm [hereinafter Durst, *Federal Tax Policy*] (indicating income taxes on farm and non-farm income accounts for almost two-thirds of farmers' federal tax burden, social security and self-employment taxes account for almost one-third, and estate taxes account for a little more than 1%).

[116] *Id.*; *see also* Ron Durst, U.S. Dep't of Agric., *Changing Federal Tax Policies Affect Farm Households Differently* (Nov. 2005), http://www.ers.usda.gov/AmberWaves/November05/Features/ChangingFederalTax.htm [hereinafter Durst, *Changing Federal Tax Policies*] (defining intermediate farms as farms where farming is the primary occupation and sales are less than $250,000, defining commercial farms as farms with sales greater than $250,000, and defining rural residence farms as lifestyle, retirement, and limited resource farms).

[117] Durst, *Federal Tax Policy*, *supra* note 115.

[118] *Id.*

[119] *Id.* (noting that "[t]he net loss consisted of $8.3 billion in profits reported by about one third of all farm sole proprietors and $17.3 billion in losses reported by the remaining two thirds" and "[n]early $10 billion of this loss can be attributed to rural residence farms").

[120] *Id.*

[121] Durst, *Changing Federal Tax Policies*, *supra* note 116.

[122] *See id.* (noting, however, that smaller farms will be "primarily affected by the changes in individual marginal income tax rates, standard deduction and other exemption amounts, and those policies affecting the tax treatment of income from nonfarm sources").

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* (noting the preferential capital gains tax rate is 5% for taxpayers in a tax bracket of 15% or lower).

[127] *See id.*

faster write-off of capital purchases by permitting a significantly greater deduction in the year of purchase than depreciation deductions alone would allow.[128] Because of the time value of money, a greater deduction in the current year is worth more than deductions in future years. Commercial farms, who already invest heavily in capital assets, stand to benefit exceedingly from these legislative changes.[129] As capital investments increase, farms will become more capital intensive. Without restrictions on which capital investments receive preferential treatment under this legislation, farms will likely choose investments which allow for higher volume and faster production at a lower cost. Therefore, more and more farm animals will be forced to endure the suffering ubiquitous on factory farms.

Like the federal tax system, state tax systems may also encourage capital investments that detrimentally impact farm animals. For example, in 2001, California enacted legislation which provides a tax exemption for agricultural equipment purchases.[130] California's Board of Equalization administers the exemption and has some discretion over which purchases are exempted under the legislation.[131] Since 2001, the Board of Equalization has allowed an exemption for the purchase of battery cages used to confine egg-laying hens.[132] The Humane Society of the United States recently filed suit to enjoin this subsidization of inhumane treatment as a violation of California's animal cruelty laws.[133]

In 2005, the Wisconsin legislature considered a similar tax bill which also stood to further inhumane treatment of farm animals.[134] This bill created an income and franchise tax credit for livestock farm modernization or expansion equal to 10% of the amount paid.[135] The legislation did not limit this preferential treatment to capital investments furthering humane treatment of livestock.[136] Therefore, like the legislative changes made to the federal and the California tax systems, the Wisconsin tax bill would promote the growth of factory farms by encouraging farmers to make additional capital investments to further high volume production methods.

IV. PROPOSED TAX SYSTEM CHANGES TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

A. SOCIAL POLICY & TAXES

Governments often use the tax system to further social policy, in spite of criticisms that the tax system should be used only to raise revenue.[137] In particular, the U.S. Congress pursues

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[128] *Id.* (indicating that 2001 legislation increased the amount which could be immediately expensed from $25,000 to $100,000 with the $100,000 value to be adjusted for inflation in the following years).
[129] *Id.*
[130] The Humane Soc'y of the U.S., *The HSUS Files Suit to End California's Battery Cage Tax Break* (Feb. 1, 2006), http://www.hsus.org/farm/news/ournews/hsus_sues_ca_battery_cage_tax_break.html.
[131] *Id.*
[132] *Id.*
[133] *Id.* Especially pertinent to the lawsuit is the fact that California's cruelty laws, unlike most states' cruelty laws, do not exempt common farming practices.
[134] Assemb. 145, 2005-2006 Leg., Reg. Sess. (Wis. 2005), *available at* http://www.legis.state.wi.us/2005/data/AB-145.pdf.
[135] *Id.*
[136] *See id.*
[137] Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687 (2002).

social goals through the federal tax system.[138] For example, charitable organizations do not pay federal income tax.[139] By exempting these charities from paying income taxes, the government recognizes that the charities' missions are important and that funds raised by the charity should be used to achieve those missions rather than to build the public treasury.[140] Aside from blanket tax exemptions, Congress also promotes social goals through the use of tax credits and deductions.[141] For example, the Hope Scholarship Credit and Lifetime Learning Credit directly reduce tax liability for qualifying taxpayers.[142] These credits, which encourage the attainment of post-secondary education,[143] indicate the government's goal of creating a more educated citizenry. Congress also encourages home ownership[144] and donations to charity[145] through itemized deductions in the federal tax code.[146] Furthermore, Congress may disallow deductions for socially undesirable behavior, such as criminal activities.[147] For example, the code explicitly denies a trade or business expense deduction for illegal bribes, illegal kickbacks, and other illegal payments.[148] The code also denies any deductions or credits for trade or business expenses when the trade or business consists of trafficking in illegal substances.[149]

As the above examples illustrate, Congress utilizes various mechanisms within the federal income tax to promote social policies. These mechanisms can be broadly separated into two categories: tax incentives and tax disincentives.[150] Both categories provide mechanisms for the government to control externalities.[151] The government promotes activities with positive external benefits by reducing the tax cost of those activities.[152] The government discourages activities with negative external benefits by increasing the tax cost.[153]

Tax incentives, also known as tax expenditures, encourage activities by reducing tax liability.[154] The term tax expenditure arises from the fact that the reduction in tax liability is effectively a substitute for spending by the government to subsidize the activity directly.[155] The government often prefers to regulate and promote desired activities through tax expenditures instead of government spending for several reasons.[156] First, administrative control of tax expenditures lies within the Treasury Department and the Internal Revenue Service, whereas administrative control of government spending lies within agencies that may be strongly

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[138] *Id.*
[139] I.R.C. § 501 (2000); *see also* Joanne M. Pyc, *Changing the Animal Legal Paradigm Using the United States Tax Code*, 30 CAP. U. L. REV. 947, 951 (2002).
[140] Pyc, *supra* note 139, at 951.
[141] *Id.* at 951-52.
[142] I.R.C. § 25A (2000).
[143] *See id.*
[144] *See* I.R.C. § 163(h)(3) (2000) (allowing a deduction for acquisition and home equity indebtedness on qualified residences owned by the taxpayer); *see also* I.R.C. § 121 (2000) (allowing exclusion of gain from sale of a taxpayer's principal residence).
[145] *See* I.R.C. § 170 (2000).
[146] Pyc, *supra* note 139, at 952.
[147] *Id.*
[148] I.R.C. § 162(c)(2000).
[149] I.R.C. § 280E (2000).
[150] *See* Cavanaugh, *supra* note 137, at 687.
[151] *Id.* at 688.
[152] *See id.*
[153] *See id.*
[154] Kesan & Shah, *supra* note 27, at 380.
[155] *Id.*
[156] *Id.* at 380-81.

influenced by industry groups.[157] Furthermore, eligibility for the tax savings will likely be limited to taxpayers who truly meet the eligibility requirements, as the Treasury Department and the Internal Revenue Service tend to interpret the tax code strictly to maximize tax revenues.[158] Second, regulation through the tax code is less visible than direct government spending.[159] A responsible agency actively manages direct government spending programs; the tax expenditure, on the other hand, is situated amongst other code provisions in the voluminous Internal Revenue Code.[160] Moreover, politicians who regard themselves as fiscally conservative often prefer tax expenditures to major government spending programs.[161] Finally, as opposed to direct spending programs which are perceived as providing benefits to a select few, tax expenditures are perceived as encouraging private decision-making.[162] Types of tax expenditures or incentives include exclusions, deductions, deferrals, and credits.[163]

In contrast to tax incentives, tax disincentives discourage socially undesirable behavior by increasing the tax liability associated with the behavior.[164] Common tax disincentives include denial of deductions and credits.[165] The government may also impose excise taxes, or additional fees, to discourage socially undesirable activity.[166] For example, a "sin tax" is imposed on purchases of alcohol[167] and pollution taxes are imposed on certain pollutant discharges.[168]

B. PROPOSED CHANGES TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

The government has several tax mechanisms at its disposal to encourage farm owners to treat farm animals humanely. First, the government can create a tax credit for purchases of equipment and erection of buildings which further humane treatment. This tax credit would be structured similarly to the previously mentioned tax credit legislation considered in Wisconsin;[169] however, the credit would be explicitly denied for purchases of equipment furthering inhumane treatment, such as battery cages and gestation crates. Second, the government can grant an increased level of immediate expensing for capital investments which further humane treatment of farm animals. Similar to the tax credit option, the expensing provision should list specifically the items not eligible for the preferential treatment. Third, similar to the "sin tax" on alcohol,[170] an excise tax can be levied on purchases of inhumane equipment, such as battery cages, veal crates, and gestation creates. Fourth, trade and business expense deductions can be denied or limited for the maintenance costs of inhumane equipment

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[157] *Id.* at 380.
[158] *Id.* at 381.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Cavanaugh, *supra* note 137, at 711.
[164] Kesan & Shah, *supra* note 27, at 343.
[165] *See* Pyc, *supra* note 139, at 952.
[166] *See* Kesan & Shah, *supra* note 27, at 343-44.
[167] *See* David J. DePippo, Comment, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 545-47 (2002).
[168] Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 114 (1999).
[169] *See supra* Part III.
[170] *See supra* Part IV.A.

and for the purchase of growth producing hormones and non-therapeutic antibiotics.[171] This disincentive is comparable to the code sections denying trade and business expense deductions for certain illegal payments.[172] For humane treatment of farm animals to be achieved with these proposed measures, the change in tax liability must be great enough to make switching to humane methods more cost efficient than maintaining the status quo.

Farm industry trade associations will likely oppose these proposed tax measures. In doing so, the associations will point to current trade association humane treatment certification standards. Unfortunately, as mentioned previously, these certification standards basically maintain the status quo of inhumane treatment.[173] Notwithstanding the likelihood for opposition from the trade association, the first two options have a greater chance of being enacted by the Legislature. As tax incentives, the tax credit and immediate expensing options encourage farming operations to switch to more humane methods to receive the tax benefit. These options would be more palatable to the industry trade associations because, unlike the second two options which are tax disincentives, they do not directly penalize current inhumane farming methods. Further, the legislators themselves could more easily defend a decision to provide a benefit to those who treat farm animals humanely than a decision to impose additional costs on currently utilized livestock production methods.[174] Thus, implementation of tax incentives, such as a tax credit and an increased level of immediate expensing, should be the initial step in changing the tax code to effect humane treatment of farm animals.

V. CONCLUSION

Billions of farm animals face slaughter each year to satisfy American appetites. For most of these animals, life on the farm means tight confinement, restricted movement, and abundant doses of antibiotics and growth promoting hormones. In addition to forcing immense suffering on the farm animals, factory farms inflict significant costs on society, including the decline of family farms, an increase in health risks, and a rise in environmental damage. Viable humane alternatives are available and demanded by consumers. However, federal laws, state laws, and the current tax system turn a blind eye to much of the inhumane treatment endured by farm animals. In fact, many governmental policies, as recognized by the United States Department of Agriculture, favor large farming operations.[175] The tax system offers several mechanisms for effecting the humane treatment of farm animals. Two tax incentives, a tax credit for purchases furthering humane treatment and an increased level of immediate expensing for capital investments furthering humane treatment, should be the first changes made to the tax code to effect humane treatment of farm animals. If these measures are successful, tax disincentives,

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[171] The tax treatment of expenses for feeding, handling, and caring for animals, including the cost of antibiotics, depends upon the animals' use. Amounts expended for work, breeding, dairy, or sporting animals are capitalized and depreciated, unless the animals are included in an inventory under section 1.61-4 of the Treasury Regulations. Treas. Reg § 1.162-12(a) (as amended in 2000). Amounts expended for animals in fattening operations (i.e. fattening for the purpose of slaughter for human consumption) are currently deductible. *See id.*; I.R.S. Mkt. Segment Specialization Program Guideline: Gen. Livestock (Apr. 2000), *available at* 2000 WL 753768 (I.R.S.).

[172] *See supra* Part IV.A.

[173] *See supra* Part II.A.

[174] The general public's desire for humane treatment of farm animals, illustrated through such acts as buying cage-free eggs and pressuring retail chains for more organic options, particularly enhances the defensibility of a decision to provide a special tax benefit to farmers who treat animals humanely. *See supra* Part I.

[175] *See supra* note 74 and accompanying text.

such as an excise tax on inhumane equipment purchases and a denial of deductions for upkeep of inhumane equipment, should be put forth for consideration. All in all, these tax code changes have the potential to improve life on the farm for the billions of animals abused and slaughtered by the food industry each year.

PETS: PROPERTY AND THE PARADIGM OF PROTECTION

BROOKE J. BEARUP*

"All animals are equal, but some animals are more equal than others."[1]

I. INTRODUCTION

Humans are unique because of the enormous range of emotions they are able to express, their inclination towards technical thinking, their vast ability to communicate and their capabilities for justification, compassion and hate. Homo sapiens, as animals, are still prone to utilize survival instincts and have yet to defy many evolutionary principles. Humans continue to function in similar ways to their ancient ancestors, as do most mammals and members of the animal kingdom. Yet humans manifest the belief that they are beyond evolution, that they have outgrown their 'evolutionary roots,' that because of their position at the 'top of the food chain' they possess the power to manipulate and control every creature that falls below them in the hierarchy of beings. As such, and unfortunately so, humans often do not give equal respect to the diversity of other animals who inhabit this planet. These other animals are used for labor, food, scientific research and companion purposes, but generally they are considered 'lesser beings' because of they lack those capacities that make humans 'special.' While humans remain human all other animals are relegated to the category of *property*. But are these other animals more than inanimate property?

According to statistical data, in the United States there are roughly 77.5 million cats and 65 million dogs held as domestic pets.[2] Significantly problematic is when human's mistreat their animals and pets. Any type of animal abuse is reprehensible, but we as a society have forcibly domesticated animals and cause them to rely on human generosity to meet their needs for shelter, hydration, sustenance, and company. Historically, many animals that are currently considered pets were actually once untamed animals (farae naturae) who were forced to fend for themselves in the wilderness. By bringing these animals into our homes we have greatly reduced their instinctive, self-preservation behaviors. As such, many domesticated animals are not capable of caring for themselves in a non-domesticated, "natural" setting. Basically these animals have been reduced to pure reliance on their owners for survival. This absolute reliance is similar to that of a young child, an organism who is completely unable to care for itself and forced to relying entirely on others for necessities.

Pets are held captive, their physical freedom is restrained by collars and leashes, fences and cages. Pet owners exercise complete dominion and control over their animals, as property or

* I want to thank my parents for their enduring support over the past 3 years, I am especially appreciative to my father for acting as a personal 'editor.' I would also like to thank Professor David Favre for his assistance with this article and publication of the journal.

[1] George Orwell, *Animal Farm*, *available at* http://www.quotationspage.com/quotes/George_Orwell (last visited March 27, 2006).

[2] *See generally* United States Pet Ownership Statistics provided by the American Pet Products Manufacturers Association (APPMA) 2003-2004 National Pet Owner's Survey, *at* http://www.hsus.org (last visited March 22, 2006).

chattels, relegating them to live within the bonds and convenient legal fictions concocted by society. Thus, because the public, through its actions has "domesticated" animals, often to animals' detriment when forced to live with cruel, abusive and neglectful owners, we must afford animals, the same legal remedies that we would afford any other helpless creature, like an infant child.

Society lacks sufficiently integrated, and reliable mechanisms to monitor domesticated animals' wellbeing. The United States Constitution is the primary backbone used to govern its citizens, but we apply the Constitution's tenets only to human animals. To help protect animals from harm and further, to promote necessary public policy that discourages preferential treatment for humans over other animal species, the Constitution, specifically the Fourth Amendment, requires re-conceptualization. Primarily, by changing animals categorization in society from 'mere' property to an alternative quasi-property classification, it is then possible to promote better animal care and treatment by allowing stricter standards for animal ownership and maintenance. Also, changing animals from 'property' to a quasi-property, or some other entirely new classification, potentially allows reduced restrictions when domesticated animals are removed from owners who are suspected of abuse and mistreatment.

This paper will address the issues of improved treatment of domesticated animals and their proposed rights based on a re-conceptualized view of animals as property . In addition, it discusses how this new categorization or transmogrification of animals carries the potential to affect search and seizure of abused animals under the Fourth Amendment. Section Two provides a historical analysis of evolution of legal property definitions and addresses how society should distinguish between animals, especially domestic pets, and other more traditional forms of property. In Section Three develops a constitutional analysis of why animals fall outside the scope of the Fourth Amendment as it relates to an individual's property. Finally, Section Four contains suggested policy recommendations with regard to the seizure of abused and mistreated animals in order to protect the animals' rights of well-being while continuing to respect the constitutional rights of the individual pet owners.

II. PROPERTY ANALYSIS

A. THE DEFINITION OF PROPERTY AND ITS HISTORICAL EVOLUTION

Chattel, the legal terminology for moveable and transferable personal property, has embraced various meanings throughout history.[3] Personal chattel "may be called so in two respects: one because they belong immediately to the person of a man . . . [T]he other for that being any way injuriously withheld from us."[4] When an individual owns property, a "thing," or chattel that person exercises dominion and control over the object and possesses the ability to sell, lease or otherwise transfer that property.[5] The basic definition with relation to property has remained virtually the same, however what objects included under the property definition umbrella have evolved nearly consistently with society's morals and principles. Simply stated, property is something that belongs to us, whether it be a car, computer or chicken coop. Does this mean a person can do what he will with his property without any adverse consequences? Not necessarily. While the United States Constitution confers broad property rights to its citizens, common principals and statutory laws exist to maintain the social order and stability.

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[3] BLACK'S LAW DICTIONARY 251 (8th ed. 2004).
[4] *Id*.
[5] 4 AM. JUR. 2D ANIMALS § 5 (1964).

Prior to the Thirteenth Amendment which states, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," Caucasian citizens were legally entitled to own slaves.[6] Slaves were treated as less than human. They were mere "property." As such, they were subject to torture, rape and other abuses at the hands of their owners.[7] United States society continued to progress technologically and morally as reflected in its Constitution, and as consequence:

> The . . . United States Civil War led to the end of chattel slavery in America. Lincoln's Emancipation Proclamation of January 1, 1863 was a symbolic gesture that proclaimed freedom for slaves within the Confederacy, although not for those in the strategically important border states of Tennessee, Maryland and Delaware. However, the proclamation made the abolition of slavery an official war goal and it was implemented as the Union retook territory from the Confederacy. Legally, slaves within the United States remained enslaved until the final ratification of the Thirteenth Amendment to the Constitution in December of 1865, eight months after the cessation of hostilities in the Civil War.[8]

It is nearly impossible to imagine subjugating another human to a life of servitude in today's culture, yet slavery was a notorious presence in this nation's history and, unfortunately, it continues as a practice in many countries and cultures throughout the world.

Similarly, in England, serfdom was the forced labor of agrarian workers on wealthy land owners property, in return for their protection and the privilege to work the landowner's property.[9] "Serfs differed from slaves in that serfs were not property themselves and could not be sold apart from the land which they worked."[10] Yet serfs, like animals, were similarly treated as something less than human.[11]

Additionally, in the newly developing United States in the 19th Century, men traditionally treated their wives and children as personal property.[12] Women under the dominion and control of their husbands or fathers possessed few rights of their own, as a continuation of English common law, which found a receptive audience in the United State's cultural ideals.[13] A wife's primary duties were to care for her family and home. For a time a woman was not even capable of owning her own property.[14] The role and lack of legally recognizable rights relegated women to a category that was similar to chattel. Over time women gained important rights that put them on nearly equal footing with men, although major legal and practical differences still separate or distinguish the legal rights of the sexes (e.g. dower).

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[6] U.S. CONST. amend. XIII.
[7] Wikipedia The Free Encyclopedia, *History of Slavery in the United States, available at* http://en.wikipedia.org/wiki/History_of_Slavery_in_the_United_States (last visited March 13, 2006).
[8] *Id*.
[9] Wikipedia The Free Encyclopedia, *Serfdom, available at* http://en.wikipedia.org/wiki/Serf (last visited March 14, 2006).
[10] Serfdom, *supra* note 9.
[11] *Id*.
[12] Women's International Center, *Women's History in America, available at* http://www.wic.org/misc/history.htm (last visited March 13, 2006).
[13] Women's History in America, *supra* note 11.
[14] *Id*.

It is important to understand how the legal and social categorization of slaves, serfs, and women has evolved historically. Two cognizable groups, once deemed chattel, gained significant statutory rights. While previously marginalized as merely "property," almost completely subjugated to the unlimited interests and control of the owner, they now possess the same rights to which they were formerly subjugated. Also to be considered is the scheme of legal personhood.[15] 'Person' is generally assumed to mean a human being, but corporations additionally receive the designation for purposes of jurisprudential standing and other legal necessities.[16] A corporation is a business façade, despite being based on its person members, while animals are a living creatures. Why should a conceived entity receive protections and privileges that an animal does not?

A final category to contemplate are the rights of children. Under Greek and Roman law, unborn children enjoyed little protection; prosecution of abortion was based conceptually on "a violation of the father's right to his offspring."[17] Moreover, a Roman father could sell his children or put them to death if he chose to do so, without cause.[18]

Children as individuals have certain, inalienable rights, but family (or parental autonomy) is related primarily to the rights parents possess with respect to the wellbeing and upbringing of their children. In MEYER V. NEBRASKA, 262 U.S. 390 (1923) the Justices inferred that parents have specific enumerated and un-enumerated privileges and liberties, some specifically with regard to raising their children:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated.

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[19]

Clearly children are not property in the same sense that slaves and women were considered chattel, but because society considers children unable to make rational and informed decisions regarding their personal welfare, parents and other members of society are allowed to step in and make decisions on the child's behalf. It appears that, for a time when the child is a juvenile, certain of the child's rights are transferred to the parents or another informed guardians. Yet, while, "the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . [and] the individual has certain fundamental rights which must be respected," society still places a limitation on children's rights and liberties because it is an appropriate means to ensure children are kept safe and healthy, are sufficiently educated, are instilled with proper morals and ethics to independently function as citizens when emancipated.[20]

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[15] Mary Midgley, *Persons and Non-Persons in* IN DEFENSE OF ANIMALS 52-62 (Peter Singer ed., 1985).
[16] *Id*.
[17] Roe v. Wade, 410 U.S. 113, 131 (1973).
[18] Forsyth, CUSTODY OF INFANTS § 8 (1850).
[19] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
[20] *Id*. at 402.

What this history tells us is that the notion of "property" evolves with morality and sophistication in thought of a progressive culture.

B. ANIMALS AS 'PROPERTY'

Domesticated animals receive the same designation under United States law as personal property.[21] However, animals differ from 'typical' property because they are not inanimate objects. If you kick your television set you only succeed in hurting your foot and probably damaging your T.V., to boot. But that swift kick does not cause the appliance any physical pain. A television set is inanimate property. In contrast, if you kick a domesticated pet you can cause serious damage *and* physical pain to the animal. Similarly, humans are fully capable of wounding wild animals, but the distinction remains that domesticated animals reflect a reduced instinctive for self defense or self preservation because they are accustomed to the presence of people, if not fully dependent on humans, and thus the animal is not frightened by human presence. As discussed previously, domesticated animals rely on their human owners for food, water and shelter, they become companions in the home, not "objects." They are trained to be obedient and not to 'bite the hand that feeds them."

Animals communicate in different forms than humans, but their doing so does not reduce their abilities to feel, sense or experience emotions. According to the People for the Ethical Treatment of Animals, animals "[A]re individuals with feelings, they experience love, happiness, loneliness and fear, just as . . . [p]eople do."[22] A dog's wagging tail or a cat's soft purr are proof that a reciprocal relationship exists between a pet and its owner, that distinguishes this form of 'property' from another.

Property laws are derivative of man's convenience.[23] "Rights are either legal or metalegal. They are either conceived and created by law; or they exist as aspects of reality prior to their legal annunciation, and are merely recognized by law. Whatever rights are accorded man . . . [A]re granted solely on the grounds that they will further some real human good: they will somehow serve to enhance the quality of life, to make life richer, better, more satisfactory."[24] Society chose to place animals in a position of subjugation, often to eradicate their freedom and to bestow them with no, or far fewer legal rights than humans. In the environment, the ecological hierarchy of the "food chain" determines which species trump one another, but that is a natural and evolutionary, not a cultural, decision. In his book, *The Origin of Species*, Charles Darwin hypothesized that the best, fittest and most superior of organisms would survive and repopulate future generations.[25] Humans have evolved into arguably the most intelligent of all species. Yet at what cost? Does intelligence permit the near total domination and utilization of lesser evolved organisms?

It has been theorized that animals deserve a new status: equitable self ownership.[26] This innovative category would provide certain, significant impacts on domesticated animals, "First,

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[21] 4 AM. JUR. 2D ANIMALS § 5 (1964).
[22] PETA Vegetarian Starter Kit, *Everything You Need to Eat Right for Your Health, Animals and the Earth*. People for the Ethical Treatment of Animals. Norfolk Virginia. *See also* http://www.PETA.org (last visited March 17, 2006).
[23] David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 478 (2000).
[24] Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18:1 AM. J. JURIS. 1 (1973)
[25] Charles Darwin, *The Origin of Species: By Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life*, New York, F.Ungar Pub. Co., (1956).
[26] Favre, *supra* note 21, at 485.

the animal would have access to the legal system, at least in what has historically been the realm of equity, for the protection and assertion of his or her interests. Secondly, the human holder of legal title would, like a traditional trustee, fulfill fiduciary obligations to the equitable owner of the animal, that is the animal himself."[27] Further, equitable self ownership for animals would shift the position of the animal owner from trustee to guardian, would allow the self owned animal to hold equitable interests in other property, enjoy additional expanded property rights, and would be able to access tort law principles to protect their individual interests.[28] Self-ownership for animals can exist in the same sense that it exists for infant children. Parents do not have title or ownership of their infant child, but they retain physical possession and control over the being.[29] Professor and author, Steven M. Wise, suggests:

The paradigm of all nonhuman animals as legal things has presented formidable obstacles to the development of personhood for nonhuman animals under the common law, indeed throughout Western law. But the modern rule of the legal thing hood of nonhuman animals was borrowed from ancient laws whose foundations have been destroyed and whose mechanical application today violates modern notions of fundamental principles of justice.

> The legal thing hood of nonhuman animals has existed continuously since the dawn of law . . . It has cumbered nonhuman animals for so long because even the most fundamental legal rights of beings will go unrecognized by a society that accepts a hierarchical cosmology in which those beings are seen as inherently inferior or that fails to connect law to the values of liberty and equality.[30]

Changing the status of nonhuman animals to one where the animals possess equitable self ownership of themselves is fundamental to encouraging social justice and concomitantly helps to recognize and facilitate animal protection rights.

C. AN ANALOGY

It is helpful to analogize domestic animals to young children.[31] As stated before, domesticated animals and children are both incapable of meeting their requisite needs for hydration, sustenance, shelter and health care. Both domesticated animals and (infantile) children need a more sophisticated voice to speak on their behalf because both are physically powerless to verbally communicate. If either an animal or infant are abused, the only manner of communicating the mistreatment is based on physical (and possibly emotional) evidence. A dog cannot tell you that his owner kicks him daily, nor can a child tell you that he is the victim of abuse or neglect.

Imagine for instance, that as you walk past a neighbor's home you observe their 10 month old infant sitting alone in the backyard. The child looks frail and there is no food or bottle in sight. The child is exposed to the elements. The child is crying loudly. But no one rushes from the house to check the infant's condition. Most passersby would consider this negligence on

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[27] *Id*. at 474.
[28] Favre, *supra* note 21, at 502.
[29] *Id*. at 483.
[30] Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471,476, 545 (1996).
[31] For the duration of the paper the term "children" or "child" will refer to an individual of such an age that they are incapable of being self sufficient.

behalf of the parents or the child's guardian, if not outright child abuse. Society aims to protect children primarily because of their inability to pursue self-help. A child has little or no means for self protection, sustenance or escape if being mistreated.

What would be different about a domesticated animal in the same circumstances? Consider the same situation, but instead the creature in the backyard is a 10 month old puppy. The puppy looks frail. There is no food or water dish in sight. The puppy is whining and chained. It is unprotected from the elements. Here, the reaction is different because many people do not consider animals and pets to deserve the same attention and care that an infant child requires or deserves. But viewing the situation from the standpoint that both creatures are mistreated, neither possess the ability to exit the situation, cannot verbally request help, are incapable of defending themselves from harm or inattention, why should one situation inspire outrage and the other barely a passing concern, if not irritation at the barking? Perhaps if we re-conceptualized domesticated animals as being self-owned, and elevate them to more than mere personal property, the societal response would be different.

III. A CONSTITUTIONAL ANALYSIS

A. DUE PROCESS

The privileges of both procedural and substantive due process, provided by the United States Constitution and selectively incorporated by the states through the 14th Amendment, determine the manner in which federal and state laws function and what the laws can and cannot prohibit. Due process is important in relation to property because fundamental components of liberty and democracy require the individual property owner have particularized rights prior to confiscation.

> Early in our judicial history, various jurists attempted to form theories of natural rights and natural justice that would limit the power of government, especially regarding property and the rights of persons. Opposing *vested rights* were jurists who argued that the written constitution was the supreme law of the State and that judicial review could look only to that document — not to the *unwritten law* of *natural rights.* Opponents further argued that the *police power* of government enabled legislatures to regulate the holding of property in the public interest, subject only to specific prohibitions of the written constitution.[32]

Addressing the due process issues regarding removal of mistreated domestic animals assures that citizens' essential civil liberties will not be disregarded by government. Due process requires legislation to be fair and reasonable in content and to further a legitimate governmental objective.[33] The Court in WOLFF V. MCDONNELL declared, "The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[34] In order to ensure that an individual's substantive due process rights are not violated law enforcement officers' actions

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[32] Wikipedia The Free Encyclopedia, *Substantive Due Process: Development and Use as Legal Doctrine, available at* http://en.wikipedia.org/wiki/Due_process (last visited April 23, 2006).
[33] BLACK'S LAW DICTIONARY 538-39 (8th ed. 2004).
[34] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

should not be "arbitrary, egregious [or] outrageous as to shock the contemporary conscience."[35] Hence, if an officer intends to confiscate a domesticated animal he believes is being mistreated and abused by its owner, the officer should have a reasonable belief of the mistreatment and should not base his assumption on arbitrary or inadequate information.

There are many people in society who would argue that because animals are classified as personal property, there should never be rationale for confiscating a pet. Yet, every state has passed laws that forbid animal cruelty.[36] The typical state statute requires that an animal be provided with adequate care, shelter and food; that the owner not neglecting the needs of the animal; the animal be maintained in sanitary conditions and inflicting unnecessary pain and suffering of the animal be avoided.[37] Therefore, a law enforcement officer does not violate an individual owner's substantive due process rights when an animal is seized when it manifests signs of abuse by the owner. This seizure by the law enforcement officer hardly constitutes arbitrary, egregious and outrageous action prohibited by the Fourth Amendment.[38]

However, entering upon a animal owner's real property with the intention of seizing the resident's personal property requires a reasonable belief of illegality held by the law enforcement officer. Yet, as noted later, the fluid concepts of reasonable belief and the emergency doctrine often serve to frustrate the timely enforcement of animal cruelty laws.

Procedural due process requires that an individual be provided notice and an opportunity to be heard before he or she is deprived of a protected property interest. "[A] person must be afforded opportunity for some kind of a hearing, except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event."[39] Additionally, "the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings."[40] Because domesticated animals are currently deemed personal property under law, in order to confiscate an individual's property (the harmed pet) all aspects of constitutional procedural due process must first be met. An explicitly stated law must be violated before property can be confiscated without warning. This is problematic in the sense that, regardless of the evidence that an animal is being abused and mistreated by its owner, it is extremely difficult to remove the animal from its owner unless the owner is provided advance notice of a potential deprivation of his or her property interests and subsequent to confiscation of that property a timely trial must be held. In family law, the process leading up to termination of parental rights includes: a filed report with the appropriate state agency, a follow up investigation, provision of assistive services for the parents and child, initial intervention either through summary seizure or temporary custody of the child, and finally termination of parental rights by the State.[41] A similar process should be applicable to animals; abuse intervention through seizure or temporary custody prior to official termination of ownership rights would be both reasonable and equitable. Further, this confiscation of the pet would allow investigators to document the abuse and build a case for trial.

The notice aspect of procedural due process with regard to animals is beneficial because it serves to warn the owner that others are aware of his continuing animal mistreatment; he is

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[35] County of Sacramento v. Lewis, 523 U.S. 833, 841 (1998).
[36] *See* Animal Rights Law: Anti-Cruelty Statutes, http://www.animal-law.org/statutes/ (last visited March 22, 2006), contains anti-cruelty statutes of the fifty states and the District of Columbia.
[37] MICH. COMP. LAWS ANN. § 750.50 (1970).
[38] *Id*.
[39] Boddie v. Connecticut, 401 U.S. 371, 379 (1971).
[40] *Id*.
[41] In Re Juvenile Appeal, 455 A.2d 1313 (1983).

then left with the option to either amend his behavior or to continue his mistreatment, but suffer the consequent deprivation of his property and the possibly other related legal consequences. Alternatively, the notice aspect can be irrelevant if the owner does not heed the warning and continues to abuse his animal.

The hearing aspect of procedural due process is important to the owner because it allows the person to offer an explanation for his actions. The problem arises when individuals want the hearing PRIOR to confiscation of their threatened animal, usually by claiming that their notice was insufficient. According to MATHEWS V. ELDRIDGE, a balancing test is to be applied with relation to the timing and scope of the required due process hearing.[42] The Eldridge test provides that the required due process hearing for potential property deprivation does not necessarily need to occur prior to the deprivation of the protected property.[43] Whether, and to what extent, a prior evidentiary hearing should occur is determined by weighing: one, the importance of the individual interest involved; two, the value of specific procedural safeguards to that interest; and three, the government's interest in fiscal and administrative efficiency.[44] As a general principle, society should not tolerate the torture and abuse of animals, whether they are wild, domesticated, or used for animal husbandry. Thus, while there exists a valid individual interest that a person's property is not arbitrarily confiscated, there is an equally valid interest that an animal not remain in an environment where it is needlessly subjected to mistreatment and cruelty. If as a culture we wish to protect innocent beings and maintain their physical and emotional wellbeing to the greatest extent possible, it goes against public policy to let an individual's interest to personal property override the animal's interest to be free from harm.

The second prong of the test relates to weighing the value of the procedural safeguards. It also favors of a hearing after deprivation.[45] If an individual mistreats his domesticated pet or animal then he is already aware of the fact that he is doing something wrong and inhumane. Perhaps this implicit knowledge rises to the level of 'moral notice' because any sane person understands that beating, withholding sustenance from, or tormenting an animal is prima facie cruel. Yet, in addition to the 'moral notice' argument, generally an individual has some form of prior notice before deprivation either through neighbor complaints, visits from members of the American Society for the Prevention of Cruelty to Animals (ASPCA) or warnings by law enforcement personnel.[46] Therefore, when balancing property rights against the welfare of an animal, the value of a hearing prior to deprivation in addition to previous notice does not outweigh the interests of removing the animal from an existing abusive environment.

The third prong of the Eldridge test considers the government's interest in fiscal and administrative efficiency.[47] This is likely the most difficult prong to justify because government, in a larger sense, has never, historically, articulated an especially significant rationale to protect domesticated animals. However, an expansive interpretation of the police power doctrine (which notes that government possesses broad rights to protect health, safety, welfare and uphold morals) would allow a presumption that it is in the government's best interests to withhold property from individuals who mistreat their domesticated animals or at least temporarily remove

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[42] Mathews v. Eldridge, 424 U.S. 319 (1976).
[43] *Id*.
[44] *Id*.
[45] *Mathews*, 424 U.S. at 319.
[46] The American Society for the Prevention of Cruelty to Animals originated nearly 130 years ago with the goal of preventing and rectifying abuse towards animals. The ASPCA has a Humane Law enforcement department to investigate and educate about animal abuse. For more information *see*, http://www.aspca.org/
[47] Mathews, *supra* note 44.

the animals from that abusive environment. In short a legitimate government interest is advanced, both fiscally and administratively, if confiscation of mistreated animals is allowed prior to a due process hearing.

B. SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT AND THE EXIGENT CIRCUMSTANCE OR EMERGENCY DOCTRINE

The Fourth Amendment of the United States Constitution mandates that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated . . . but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[48] Standard search and seizure policy is that a judge must issue a search warrant for the specified premises and only then may law enforcement officers search the premises according to the limitations of the signed warrant, though "it goes without saying that the Fourth Amendment bars only *unreasonable* searches and seizures."[49] Yet, the United States Supreme Court has recognized "that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant."[50] If law enforcement officers are under a reasonable belief that the extant situation constitutes an emergency, they may abandon the legal need to obtain a warrant in order to protect human life.[51]

The so called 'Exigent Circumstances' or 'Emergency Doctrine' primarily allows police or other designated authorities to avoid the procedures and the time that it takes to obtain a warrant to search an individual's premises or property. In UNITED STATES V. CERVANTES, the Court noted that, "The emergency doctrine allows law enforcement officers to enter and secure premises without a warrant when they are responding to a perceived emergency . . . [the doctrine is] based on and justified by the fact that, in addition to their role as criminal investigators and law enforcers, the police also function as community caretakers."[52] To justify a warrantless search, certain criteria must first be met:

> One, the police must have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance *for the protection of life or property*. Two, the search must not be primarily motivated by intent to arrest or seize evidence. Three, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.[53]

Analyzing the Fourth Amendment and its common law exception of the Exigent Circumstances or the Emergency Doctrine together, various interpretations exist that could apply to the confiscation of animals from abusive environments. One approach is that the doctrine only applies to human emergencies. Thus, a domesticated pet that suffers in an abusive setting would not qualify as an emergency situation, even though the animal's life may be at stake. An alternative approach would be to provide to the term "emergency" a broader scope, so as to

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[48] U.S. CONST. amend. IV.
[49] Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989). (Emphasis author's own)
[50] Michigan v. Tyler, 436 U.S. 499, 509 (1978).
[51] *Tyler*, 436 U.S. at 509.
[52] United States v. Cervantes, 219 F.3d 882, 888-89 (9th Cir. 2000).
[53] *Id*. at 888. (emphasis author's own)

include all situations where any life is threatened, be it human life or animal life. Furthermore, as noted above in the CERVANTES, *supra*, criteria, the historic emergency exception to the Fourth Amendment requires protection of "life *or property*."[54]

The current approach, which is the least optimal manner to view an emergency situation, is that the animal itself is (under current common law) personal property of the owner undeserving of immediate protection. A more enlightened alternative is to view the animal as a living being whose life should be valued, protected and which possesses a right to 'well being.'

C. CURRENT LEGAL CONTEXT FOR THE PROBLEM

All states have enacted laws that prohibit cruelty towards animals.[55] Yet, due to the limiting statutory language used or the inability or lack of resources to enforce the laws, or a combination of the two, animal abuse still occurs.[56] Current animal anti-cruelty laws are too lenient in their consequences and further, are not sufficiently enforced. In SCOTT V. JACKSON COUNTY, 403 F.Supp.2d 999 (2005) the plaintiff, owner of some 400 plus rabbits, brought an action against the County for violation of her constitutional due process rights. According to the facts in the record, animal control officers were sent to inspect the rabbits at the behest of a concerned neighbor.[57] During their visit to the premises on May 8, 2001, officers found the rabbits in "deplorable condition[s]" with little to no water or food.[58] The officers gave aid to the rabbits after unsuccessfully attempting to contact the rabbits owner.[59] The officers returned the next day and related the neighbor's complaint and their concerns to the plaintiff with regard to the rabbits' conditions; one of the officers issued the plaintiff a citation for animal neglect and informed her that the rabbits would continued to be monitored by the County.[60] As a matter of procedural due process, the plaintiff had sufficient notice at this point, May 9, 2001, that her animals were in desperate need of immediate remedial care. Over the course of the next three months (from May 2001 to August 2001) animal control officers repeatedly returned to inspect the rabbits; during this time the owner refused to expend additional resources, or time, to maintain her animals. On August 1, 2005, "sheriff's deputies served the warrant and seized approximately half of the rabbits on the property."[61] This was the first instance of seizure on behalf of the government, although law enforcement agents were previously informed as to the rabbits' mistreatment and abuse, beginning as early as May 8, 2005. The Court commented: "Here, Animal Control officers determined that seizure of the rabbits on August 1, 2001, was necessary to prevent further neglect of the animals, given their conditions and the plaintiff's repeated failure to provide adequate shelter, food, water or veterinary care."[62] Yet, if there was adequate knowledge of the abuse inflicted on these rabbits, why was the county forced to wait nearly three months to seize rabbits known to be dying from dehydration, lack of sustenance and

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[54] *Id*. (emphasis author's own).
[55] *See* Lewis, *supra* note 30.
[56] *See generally* The Humane Society of America (HSUS) First Strike Campaign 2003 Report of Animal Cruelty Cases, http://files.hsus.org/web-files/PDF/2003AnimalCreultyRprt.pdf#search='animal%20cruelty%20statistics (last visited March 22, 2006).
[57] Scott v. Jackson County, 403 F.Supp.2d 999, 1003 (2005).
[58] *Id*.
[59] *Id*.
[60] *Id*. at 1004.
[61] *Scott*, 403 F.Supp.2d at 1004.
[62] *Id*. at 1007.

defective shelter? Perhaps the law enforcement agents were reluctant to confiscate the rabbits because they were concerned about claims of due process violations by the owner. Removing the rabbits before issuance of a warrant would have exposed the agents up to legal liability.

In MCCLENDON V. STORY COUNTY SHERIFF'S OFFICE, 403 F.3d 510 (2005) reports and complaints about the owner's neglect of her horses began to filter into the Sheriff's office in May 2001 and continued through July 2001.[63] On June 6, 2001, two animal control officers inspected the McClendon's property.[64] The officers found "over crowded pens . . . dangerous barnyard conditions . . . lack of water . . . [and] signs of serious illness."[65] Further, the owner did not have appropriate or proper equipment and supplies to care for the horses. As such many of the horses appeared malnourished.[66] These sheriff's officers, like in SCOTT, *supra*, made repeated visits and inspections of the property and the horses, but they continued to find no improvement in the animal's living conditions.[67] After the issuance of a warrant, the two animal control officers, a local veterinarian, a livestock inspector and deputy sheriffs arrived to seize the mistreated horses.[68] Unfortunately, "two horses had died [and] their bloating carcasses" remained in the immediate vicinity of the herd.[69] Here, again, helpless and innocent animals had to suffer and eventually die prior to the government stepping in to prevent the cruelty they knew was occurring. More than a month passed between the initial visit to the plaintiff's horse farm and the actual seizure of the abused animals. It is irrational and unnecessary that, despite knowing that several horses received negligent treatment, or no treatment at all, and that they were likely suffering greatly, animal control officers or other law enforcement officers were unable or unwilling to halt the mistreatment because of legal formalities, such as obtaining a warrant to remove the owner‘s property.

Similarly, in STATE V. KLAMMER, 41 N.W.2d 451, 455 (1950) 28 of the defendant's 36 horses died from mistreatment, mainly starvation, over a period of eight weeks. On November 22 the owner of the equines received a letter from the Minnesota Society for the Prevention of Cruelty that shared a concern about the condition of the animals and informed defendant Klammer of the pertinent Minnesota laws.[70] The court found there to be evidence beginning roughly around October 1, that Klammer had knowledge of the lack of adequate food for the horses and further, had continuous knowledge thereafter until their deaths in mid-January of the following year.[71] 'Caged' animals were left to painfully starve to death because 'the law,' or a notion of the law as written, would not allow the immediate seizure of the owner's "property."

Likely the most prevalent problem presented in the context of current law are owner's claims that his due process rights are violated upon seizure of his animals. Many individuals claim improper or unreasonable search and seizure when government officers or officials intervene to protect potentially abused or mistreated animals. Legislatures claim that constitutional integrity insists a citizen's rights to life, liberty and property are of utmost

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[63] McClendon v. Story County Sheriff's Office, 403 F.3d 510, 513 (2005).
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 514 (the Animal Control officers returned to the plaintiff's property at various times over the course of a five week period. On July 12, 2001 they brought a livestock inspector with them on a visit to assess the condition of the horses).
[68] *McClendon*, 403 F.3d at 515.
[69] *Scott*, 403 F.3d at 515.
[70] State v. Klammer, 41 N.W.2d 451, 454 (1950).
[71] *Id*. at 451.

importance. Even marginally invading or temporarily suspending these citizen's rights is viewed as a misapplication of justice or lead to a deprivation of liberties that significantly infringe on guarantees integral to United State's interpretation of freedom and democracy. Because of the current state of the law which is heavily weighted in favor of human rights to property the abuse and mistreatment of domesticated animals will continue unabated. Only by employing innovative legal mechanisms can the threat to animals be brought under control. But in order to do so, there must be major policy change to otherwise fundamental constitutional rights.

IV. POLICY RECOMMENDATIONS

"'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat constitutional concepts . . . Purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[72] Our current theory of liberty entails that each individual is inherently guaranteed certain freedoms and rights. But as science, technology and morals progress and evolve, our definitions of concepts that we hold so dear must accordingly change. Men creates laws to temper anarchy, to promote social benefits and to permit and prohibit individuals' behavior. Law and policy serve necessary purposes in society, but because men create laws, they must also learn to recognize when such laws need alteration or refinement. Perhaps the original intent of the animal property laws was valid at a particular point in history, but "only a stagnant society remains unchanged;" the United States prides itself on being a country that is capable of self-transformation and modernization.[73] As such, the states should consider the implementation of the following policies: (i) amend the current status of animals to eliminate their categorization as property; (ii) enforce qualified immunity for approved members of society who rescue abused animals; (iii) create an evidentiary presumption of reasonable belief on behalf of law enforcement officers or other qualified individuals when they seize a mistreated pet; (iv) broadly apply the exigent circumstances doctrine to allow for legal searches and seizures without a judicial search warrant; and (v) upon a judicial finding of animal cruelty by its owner, entry of an order for forfeiture of the animal without compensation. Each of these policy changes are addressed in the following sections.

A. NEW STATUS

Many would claim that what most distinguishes humans from animals is the ability for higher reasoning and our verbal communication of knowledge. Clearly there are numerous variations from species to species, but all animals, human or not, possess hearts that beat, contain blood which flows, and lungs which breathe. Physical forms may differ, certain senses may be more acute and defined, and the capacity for knowledge differs based on the animal. Regardless of the vast array of characteristics that make animals different, the traits we share make us all the same in the most important sense, "[a]nimals are not like in inanimate objects . . . Animals feel pain, have emotions, give and return love."[74] In support of this generality, consider why people love their pets: "[because they] represent some of the best human traits, including loyalty, trust, playfulness and love. At the same time, [they] typically lack the worst human traits including

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[72] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1998).
[73] *National Mutual Ins. Co*., 337 U.S. at 582.
[74] Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 582 (1998).

avarice, apathy, pettiness and hatred."[75] Therefore, it seems illogical that merely based on man's perception of self-importance, animals are considered lesser beings, incapable organisms and un-evolved.

Thomas G. Kelch, in advocating toward a non-property status for animals concludes that, "That animals are property and, thus, do no have rights is a concept of ancient lineage that is expressed in our common law. But the common law is not an impotent steed fenced by history; it has the liberty and, in fact, the duty to migrate to higher ground when facts and moral awareness dictate."[76] The time has come that such facts and moral awareness now dictate that man, as the creator of the legal fiction and the definer of his 'property interests' move towards a new conceptualization of property, one that explicitly does not include animals within the scope of its meaning. Steven Wise posits in his book, *Drawing the Line*, that animals possessing practical autonomy are "entitled to personhood and basic liberty rights if [they] can desire; can intentionally try to fulfill [their] desires; and possess a sense of self-sufficiency to allow [them] to understand, even dimly, that it is [they] who want something and it is [they] who [are] trying to get it."[77] Arguing the self-awareness or sophisticated conscience of an animal poses the functional problems of measurement. These characteristics of personal comprehension are not attributes that can be tested in a laboratory, or even elements that can be witnessed on a daily basis. But that animals desire is clear. That animals intentionally attempt to fulfill their needs is observable. That animals realize they are trying to obtain something to please themselves is rational and knowable. If autonomy means having a concept of one's self as a being, then animals surely meet this requirement.

The opposing argument would cite the infeasibility of such an approach, to amend the concept of animals as property, due to the magnitude of the change and likely land on the side of legal inertia. But an appraisal of history verifies that such event have previously occurred. Slaves, once considered property, gained a much higher legal status as citizens with equal rights. Women, once treated as property, now possess the same rights as men. Children, while incapable of personal care, are still entitled to the same benefits and liberties designated by the Constitution. It is not too great a stretch in jurisprudence or legal norms to extend the care and protections afforded to infants to animals.

The most difficult aspect is the mental challenge associated with such a legal change. Human society expects certain things from animals. To give animals the same rights as humans would compel individuals to extinguish their previous callous notions of the term 'property.' With regard to length of time, history additionally dictates that such changes can occur, they just happen gradually, step by step. To eliminate a property status for animals will not be easy because the changes required are to more than just legal policy and procedure. Rather changes in values, perceptions and ideologies are required. "A move from the traditional view of animals as property to one recognizing the rights of animals is monumental . . . [t]he elements necessary for change presently exist. Thus, the proposal [bestowing a non-property status on animals], while appearing radical, actually fits within traditional views of appropriate changes to common law."[78]

Another alternative, though less indicative of societal progress, would be perhaps to implement a system of guardianship for animals. As noted above, an animal, like a child, can be

[75] *Id*. at 540.
[76] Kelch, *supra* note 73, at 533.
[77] Steven M. Wise, *Drawing the Line*, 32 (2002).
[78] Kelch, *supra* note 68, at 585.

self-owned and merely subject to the possession and control of a human.[79] For issues such as legal standing, a guardian, next friend, legal representative or social worker can speak on behalf of the animal.[80] Moreover, states could consider electing animal ombudsmen to speak on behalf of animal rights and welfare.

Altering the definition of a major property concept will not immediately occur, but that is not reason enough to abandon the effort. Citizens will need to assimilate to the idea, but with the nurturing of policy officials and corresponding changes in the law, animals will eventually be able to claim a non-property status. Hopefully one day society will recognize animals as purely self-owned beings. Achievement of equality of interests will guarantee animals and humans the same moral footing and thus, similar legal rights.[81]

B. CREATING EXCEPTIONS TO THE FOURTH AMENDMENT AS IT APPLIES TO DOMESTICATED ANIMALS

Given that the current law does not recognize animals as anything other than personal property, and the probability that animals may not achieve a non-property status in the near future, it is necessary to address the issue of mistreatment and abuse under the current laws. To encourage animal control officers and other police to swiftly remove the animals from the abusive environment, a new policy to promote enforcement is required, including qualified immunity. Presently, the test for qualified immunity requires that the court determine whether the plaintiff's constitutional rights were violated by the defendant and whether the claimed violated right "was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[82] Individuals who are abusing their pets will claim that government seizure is wrong because the animal is their personal property and that their constitutional rights were violated. Guaranteeing qualified immunity to officials who search for and seize abused pets will reinforce to society the significance of the act itself. If officers realize they will be protected for saving the life of a dog or cat, it may influence their society's system with regard to nonhuman animals. The cloak of qualified immunity will persuade law enforcement agents to act immediately upon a suspicion of animal mistreatment. Further, they will not need to fear civil repercussions for the removal of the animal from the owner, which in turn eliminates timely negotiations or rationalizations with the recalcitrant pet's owner. Overall, qualified immunity will fortify the current anti-cruelty laws and hasten enforcement of any new laws that are enacted by the states.

In many cases of animal abuse, law enforcement personnel are notified by a concerned neighbor or another person who senses a domestic pet is in danger of mistreatment. In the cases discussed above, despite evidence of abuse, neglect and harm, officers were forced to wait before seizing the animals, presumptively because they did not have a warrant or the owner would not sign the animal over to the officers. Unfortunately, in most of the cases where the seizure is halted until a later date, the animals are forced to suffer further torment, pain and sometimes even death.

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[79] Favre, *supra* note 29.
[80] David Favre, Professor, Speech at Harvard University Conference on Chimpanzees: A New Tort - Substantial Interference with a Fundamental Interest (2002).
[81] David Favre, *A Dialogue on Animal Rights*, ANIMALS: WELFARE, INTERESTS, AND RIGHTS 455 (2003).
[82] Saucier v. Katz, 533 U.S. 194, 201-02 (2001).

Current law finds that "an officer's subjective intent is never relevant under a Fourth Amendment analysis, so long as an objective basis for the seizure exists."[83] Accordingly, law enforcement officers should be able to seize animals based on a reasonable belief they are being harmed by their owners; the officer need not know with personal certainty that abuse is occurring so long as there is objective evidence of mistreatment or a lack of well-being. The standard applied by the officer to assess the level of harm to the animal should be an independent personal evaluation under the particular circumstances, specifically, whether the animal's owner is in violation of current anti-cruelty laws. A typical situation under the standard of assumed reasonable belief would allow an officer to confiscate a pet if the officer, in his or her best judgment and good faith, thought the animal was being abused. The animal would then be inspected by a qualified veterinarian and, based on the expert diagnosis, either impounded by the police or returned to the rightful owner. It is unnecessary for officers to have specialized training with animals because, for the most part, it is generally obvious when an animal is in pain or malnourished. After examination by an experienced veterinarian claims of animal abuse could be nearly conclusively made.

Automatically assuming an officer possesses a reasonable belief of animal abuse will expedite the process of removing the animal from a harmful environment, and such presumption eliminates the likelihood for future abuses by clearly sending a message as to the gravity of the situation. The pet owner will also recognize that, upon a finding of abuse, he or she will be legally reprimanded, through fines or jail time, and their 'personal property' will be taken without compensation by the government.

Associated with the assumption of reasonable belief on behalf of law enforcement officials is the expansion of the *exigent circumstances* doctrine. If an officer perceives an emergency situation, he or she is authorized to act without an warrant issued in order to protect life and property.[84] Depending on an individual's interpretation, the doctrine as it stands could be reasonably construed to include the protection of animal welfare. If exigent circumstances is construed broadly, an officer who believes property (in these circumstances a domesticated pet) to be in danger, may seize the property to ensure its safety. Also, because 'life' is not specified or defined under the doctrine, an officer could act to save the life of an animal he perceived to be in jeopardy.

Exigent circumstances, or emergency, should be read to include any situation where an animal has been the subject of mistreatment, might be further abused, or could die as a result of cruel treatment or neglect. Potential statutory language could read:

> "In cases where officers have reasonable grounds to: (1) believe there is an emergency at hand and an immediate need for their assistance for the protection of life, not solely limited to human life, or property, including animate property; 2) when the search is not motivated primarily by subjective intent to arrest or seize evidence, unless the evidence is a living creature and its seizure serves to protect the being; and 3) when there is reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched and potential evidence to be seized."[85]

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[83] *Saucier*, 533 U.S. at 210.
[84] Cervantes, *supra* note 47, at 888.
[85] Scott, *supra* note 56, at 1008. (language adopted from Cervantes factors listed in Scott.)

Increasing the scope of public interest to include animal welfare is not an outrageous goal. Thus, "[i]f immediate action is necessary to protect the public interest, a hearing is not required prior to the exercise of police power, provided adequate post-deprivation procedural safeguards exist."[86] An animal can be seized immediately so long as its owner eventually entitled to a hearing to ensure that his or her due process rights are met.[87]

The problem that parallels this line of reasoning is that many people do not believe that animal abuse is an emergency or even a cognizable offense. Their claim is that, as property, animals do not deserve any additional rights; therefore, their care or lack thereof does not constitute an emergency situation. Yet, coupling the language of the exigent circumstances doctrine together with the anti-cruelty animal statutes in each state would authorize an officer to seize domesticated animals without a search warrant to prevent harm or alternatively, to prevent violation of anti-cruelty statutes.

As a first remedy, an abusive animal owner may lose his or her property. "Forfeiture is the divestiture of property without compensation, the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty [and consequently], title is instantaneously transferred to another, such as the government, a corporation, or a private person."[88] In SCOTT, *supra*, after the seizure of the plaintiff's rabbits, Animal Control was unable to euthanize the sick rabbits or offer for adoption the survivors because an order of forfeiture was never entered.[89] If the circumstances had been different and an order of forfeiture had been submitted the rabbits pain could have been alleviated sooner and the healthy rabbits would been placed with loving families. The lack of the remedy of forfeiture prolonged the rabbits' suffering and ultimately the cost to the county to provide them care.

Owner forfeiture raises the question of deprivation without related compensation. When real property is taken, generally the owner is remunerated for his loss.[90] It is illogical, however, to pay someone because they have abused their pet and consequently the animal is removed from their home. Further, when the state seizes an animal it is responsible for the cost to maintain and care for the animal. Therefore, upon a likely finding of animal cruelty in a civil forfeiture proceeding, an order for forfeiture of the property should be entered by the court, but without money paid to the owner. At the civil proceeding an animal expert, such as a veterinarian, should be present to testify regarding the animals' physical status.

B. SHIFTING THE BURDEN OF PROOF

The general presumption of a trial court is that upon search or seizure without a warrant, the burden is on the state.[91] Current law requires that the court perform an analysis which views the facts in a light most favorable to the abusive pet owner.[92] The municipality and law enforcement officers are responsible to prove with sufficient clarity the abuse that the animal received. The owner then must merely rebut the evidence without offering affirmative proof

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[86] Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (1989).
[87] *Id*.
[88] BLACK'S LAW DICTIONARY 677 (8th ed. 2004).
[89] Scott, *supra* note 51, at 1005.
[90] *See generally* Berman v. Parker, 348 U.S. 26, 34 (1954)("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end").
[91] State v. Davis, 2005 WL 2255968
[92] McClendon, *supra* note 62, at 516.

against the government. Accordingly, the defendant, the owner who caused the abuse, carries a much easier evidentiary burden than does the government. The law finds:

> The burden of evidence . . . sometimes termed the burden of producing, or going forward with, the evidence, or the burden of procedure, shifts, or may shift, from side to side at various times during the progress of the trial. Its position at any particular time is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on that party against whom the decision of the tribunal would be given if no further evidence were introduced.[93]

Therefore, if the state prosecutes an owner under an animal cruelty statute, then it will carry the burden of producing related evidence to that effect. If the owner pursues a civil claim based on a violation of his or her constitutional rights, then as noted, the burden remains on the state to produce evidence because there was no warrant at the time the Fourth Amendment rights were allegedly violated. Even though the animal owner brings the claim, he or she is not obligated to provide any evidence except to disprove the state's claims. In either situation, the burden rests with the state. This is problematic because in all respects, the state and law enforcement officials act under the police powers doctrine, which supports "[t]he idea that private rights always must give way to the social interest in public welfare, safety, and good morals, or holding that such power is limited to or must be based on actual injuries to others."[94]

The state attempts to eliminate unnecessary violence, yet the benefit of doubt lies with the private citizen. In cases where the state removes an abused animal from the home, and the owner responds with a claim for a violation of constitutional rights, the State must make a prima facie case that the owner was abusive. To rebut such evidence, the owner should show that he did not mistreat his domestic pet and that no emergency situation existed that warranted the law enforcement official to take the animal into protective custody. By taking into custody the harmed animal, the state will possess sufficient evidence to prosecute under animal cruelty statutes. Filing suit against abusive owners in civil court, as opposed to prosecuting in criminal court, is more effective and easier to implement.

D. ISSUES OF MORALITY AND ETHICS

The famous philosopher, Descartes, once suggested long ago that animals were "soulless machines without pain, feelings, or emotions."[95] That conclusion is clearly untrue. Much of the initial rationale for state anti-cruelty laws was to promote humanitarianism.[96] The basis of the statutes "was limited to those rare situations in which humans harmed nonhuman animals merely 'for the gratification of a malignant or vindictive temper,' and not in the pursuit of some legitimate benefit for which human beings had long been entitled to use them."[97]

Although such statutes do not effective bestow rights on animals, they intend to reinforce the permitable uses for animals, while they prohibit behavior which may be harmful to the animal or to public sensibilities. The primary legal goal with regard to animals currently is to

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[93] 31A C.J.S. EVIDENCE § 126
[94] State v. Ciancanelli, 121 P.3d 613, 627 (Or. 2005).
[95] Kelch, *supra* note 68, at 557.
[96] *Id.* at 542.
[97] Kelch, *supra* note 68, at 542.

promote animal welfare. 'Animal welfare' can be basically described as the protection of animals from physical and mental harm.[98] Animal rights activists advocate for additional rights for animals, similar to those granted to humans.[99] The protection of an animal's physical wellbeing is not enough advocates assert; rather animals must be given official rights comparable to humans.

Animals deserve more than mere protection from bodily harm. They require freedom from torment, mental torture and anguish, at a minimum. Official rights will reinforce the idea that animals cannot be treated as things, that they are more than just 'property,' and like humans, they are entitled to a relative well-being. The recognition of animal rights will benefit the humans because the broad values of compassion, tolerance and equality will continue to be spread. In the sense that a singular culture can be ethnocentric, humans as a species are also homocentric. In the hierarchy of beings, in the "food chain," and standing in rank of intelligence, humans believe themselves to be at the top the chart. Yet, by accepting beings outside our species as equals, entitled to dignity, respect and well-being, comparable equality can be garnered and human values sustained. Recognizing animal rights will help equalize other cultures and give a common heritage to all living creatures.

V. CONCLUSION

It is clear that animals have many more differences than similarities to humans than to what is typically known as personal property. Animals have beating hearts. They have mothers and fathers. They produce their own young. They experience emotions. Their feelings may not be equivalent to those of the human species, but how can we judge the quality of emotion? What scale can be used to measure the value of an organism's thought? No scientific method exists to make these particular determinations; even if a discernment did exist, individuals would still disagree with the theory and process behind the results.

Regardless of this debate, animals are not inanimate objects. They should have identifiable, enforceable rights, including, the right to freedom from harm, abuse, cruelty, suffering, starvation, over breeding, inadequate shelter along with others which are immutable, although not yet legally recognized. Animals rights could lead to standing to bring legal claims, conceptually animals could earn the right to vote, could assume criminal responsibility for their actions and under the 13th Amendment would not be subject to involuntary servitude. Gradual changes in the perception of animal welfare rights will have the potential to lead to significant changes regarding their protection. Implementing even one of the policy suggestions which have been identified would benefit thousands of animals in abusive environments. In his novel, *Animal Farm*, George Orwell commented that "all animals are equal, but some animals are more equal than others."[100] Imagine what life would be like if not only all humans were equal, but all species within the universe. Someday with enough persistence and tenacity, desire and drive, domesticated pets and other animals may acquire cognizable rights that they currently lack, to enjoy their time and place on Earth like humans.

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[98] *See generally* http://www.PETA.org (last visited March 27, 2006).
[99] Kelch, *supra* note 84.
[100] Orwell, *supra* note 1.

CASE LAW SUMMARIES

KATHRYN LEONARD

Case	Citation	Summary of the Facts	Summary of the Holding
People v. Leach	2006 WL 2683727 (Mich. App.)	Defendant was convicted for the malicious killing of a rabbit while police were executing a civil court order. Defendant alleged that the cruelty statute was unconstitutionally vague.	The Court of Appeals held that the statute in question was not unconstitutionally vague. Further, the Court of Appeals held it was not unreasonable for a jury to find that Defendant's manner in killing a rabbit was "malicious", "willful", and "without just cause" despite the statutes exception for the "lawful" killing of livestock.
People v. Garcia	2006 WL 771373 (N.Y.A.D. 1 Dept.)	Defendant's conviction arises from a claim of aggravated cruelty to animals in violation of Agriculture and Markets Law. Defendant argued that goldfish should not be considered a "companion animal" under the statute and should therefore not constitute a felony charge. Defendant also argued that that because the fish was killed instantly it did not experience the "extreme pain" and was therefore not a heightened level of cruelty.	The Court of Appeals affirmed the trial court's ruling that goldfish are considered companion animals, stating that the definition of companion animals includes domesticated animals, such as goldfish. The Court of Appeals also held that the level of cruelty in the killing of the animal depends on the state of mind of the perpetrator rather than that of the victim.
Lewis v. Chovan	2006 WL 1681400	An employee of a pet	The Court of Appeals held,

	(Ohio App. 10 Dist.)	grooming establishment was injured while providing services to a dog. The employee is appealing the ruling that she is considered a "keeper" under state law, preventing her from asserting a strict liability claim against the actual owners.	based on precedent, that a person who is responsible fore exercising physical control over a dog is a "keeper" even if that control is only temporary. Therefore, because the employee is considered to be a "keeper" she has no claim for injuries under state law.
Bartlett v. State	2006 WL 1409122 (Fla.App. 4 Dist.)	Defendant was convicted for felony cruelty to animals when he repeatedly shot an opossum with a BB gun, causing the animal to suffer and ultimately requiring it to be euthanized.	The Court of Appeals held that an act which causes a "cruel death" under state law applies to even the unintended consequence of a lawful act like hunting.
State v. Sego	2006 WL 3734664 (Del.Com.Pl. 2006) (unpublished)	The Society for the Prevention of Cruelty to Animals (SPCA) seized fifteen horses in poor condition. When the owners failed to pay bills sent to them for the medical care of the horses, the SPCA claimed ownership of the horses. Defendant's claim that the daughter of the prior owners has a lien on the horses and is entitled to their return.	The court held that under the statute, if probable cause exists to believe that the animal cruelty laws have been violated by the owner the SPCA may seize the animals. Further, when the original owner failed to pay the costs incurred by SPCA for the care of the animals within 30 days, ownership of the animals properly reverted to the State.
Ware v. State	2006 WL 825184 (Ala.Crim.App.)	Defendant was indicted on six counts of owning, possessing, keeping, and/or training a dog for fighting purposes,	The Court of Appeals held that the plain language of the statute doesn't require the state to show evidence that the Defendant hosted a dog fight, nor do they have

		and one count of possessing a controlled substance. When police arrived at Defendant's house there were many emaciated and injured dogs and various evidence of a dog-fighting operation. Defendant argues that the evidence didn't prove that he actually held dog fights or participated in them.	to state when and where the dogs fought. The condition of the dogs and their demeanors was enough to demonstrate Defendant's intent that each dog shall be engaged in an exhibition of fighting another dog.
State ex rel. Griffin v. Thirteen Horses	2006 WL 1828459 (Conn.Super.)	Defendant's horses were seized after the execution a search and seizure warrant signed by the court revealed evidence of neglect and cruelty toward the animals. Defendant argued the statute did not allow seizure of the animals without prior judicial determination.	The Court held that, where officers found the mistreatment of animals while executing a search warrant, it would be implausible for officers to leave the animals at the property. They have a duty to ensure the animals receive proper treatment pending a hearing at which the owner could be heard.
Cabinet Resource Group v. U.S. Fish and Wildlife Service	2006 WL 3615512 (D. Mont. 2006).	Plaintiff challenged a Land Use Plan developed by The Forest Service regarding roads being built in National Forests, arguing that the plan violated the Environmental Species Act. The Forest Service has a duty to determine what density of road coverage is safe for grizzly bear survival when making its road plans.	The District Court held that The Forest Service's Land Use Plan did not violate the Endangered Species Act. An agency action is not required to assist in the survival of a species, only to not reduce the likelihood of survival and recovery of the species.

Defenders of Wildlife v. Kempthorne	2006 WL 2844232	A group of non-profit organizations sued the Fish and Wildlife Service (FWS) claiming that the FWS failed to obey a court order requiring them to explain their findings that certain areas were not to be considered a "significant area" of lynx habitat under the Endangered Species Act (ESA). The groups also claim that FWS further violated the ESA when they passed regulations making it easier for federal agencies to clear trees in the lynx habitat.	The District Court ordered the FWS to further explain how the areas in question were not significant to the lynx habitat. However, the court also held that the regulations making it easier to thin trees within the lynx habitat was permissible under Section 7 of the ESA.
Qaddura v. State	2007 Tex. App. LEXIS 1493	Defendant was convicted of cruelty to animals after multiple warnings from officers regarding the poor condition his animals and property were in. Defendant argued that he did not maintain the requisite intent to abuse, mistreat, and starve the animals in his care.	The Court of Appeals held that a showing of actual intent to abuse, mistreat, and starve the animals in his care was not needed to convict the Defendant. Rather, the pictures of his property and the animals as well as testimony from the officer who made frequent visits to the Defendant's property was sufficient for the jury to reasonably find the Defendant knowingly mistreating, abusing, and starving his animals.
United States v. Winddancer	435 F.Supp2d 687 (M.D.Tenn)	Defendant was indicted on six counts of possessing and bartering eagle feathers and feathers	The District Court held that the indictments were proper where the defendant was not a member of a recognized Native

		plucked from other migratory birds in violation of the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). Defendant argued that these indictments violated his rights under the Religious Freedom Restoration Act (RFRA).	American tribe for the purposes of possessing the feathers. The court further held that the defendant did not have standing to challenge the MBTA indictments when he failed to apply for a permit and such application would not have been futile.
United States v. Bengis	2006 WL 3735654 (S.D.N.Y)	Defendants pleaded guilty and were convicted of conspiracy and violations of the Lacey Act after they were involved in illegal fishing activities in waters off the coast of South Africa. The Government is now contending that defendants are responsible for paying restitution under the Mandatory Victims Restitution Act (MVRA).	The District Court held that because South African law declared that they did not have property interest in the wildlife within its waters, there was no underlying act of the defendants taking property. Therefore, the Government is not entitled to restitution under the MVRA.
Northwest Ecosystem Alliance v. United States	475 F.3d 1136 (C.A.9(Or.) 2007)	The Northwest Ecosystem Alliance wanted review of the Fish and Wildlife Service's decision to deny a petition to classify western gray squirrels in Washington state as an endangered "distinct population segment" under the Endangered Species	The Court of Appeals affirmed the decision by Fish and Wildlife Services (FWS) when they determined that FWS's findings were not arbitrary and capricious when looking at the ecological setting, the possible gap in the range and the genetic differences regarding the western gray squirrel.

		Act.	
State v. Siliski	2006 Tenn. Crim App. LEXIS 537	After Defendant was convicted of nine counts of animal cruelty, third parties brought suit to seek the return of animals they owned that were seized as a result of Defendant's conviction.	The Court of Criminal Appeals held that the trial court did not have jurisdiction in the criminal case to determine third party ownership over the animals seized in connection with Defendant's conviction.
Diercks v. State of Wisconsin Department of Administration	2006 WL 3761333 (E.D.Wis.)	Defendant pled no contest to one count of misdemeanor cruelty to animals after she was suspected of giving her dogs illegal performance enhancing drugs. Defendant now appeals the installation of a hidden surveillance camera in her dog kennel unit.	The District Court held that the Defendant's fourth amendment rights were violated when the surveillance camera was installed in her kennel. She had a certain level of privacy expectation despite the building owners having access to the kennels for random searches. This level of privacy expectation does not warrant the placement of a hidden surveillance camera in Defendant's kennel without her consent or a warrant issued by the court.