

**JOURNAL OF
ANIMAL LAW**

Michigan State University
College of Law

APRIL 2008

Volume IV

JOURNAL OF ANIMAL LAW

VOL. IV

2008

EDITORIAL BOARD 2007-2008

Editor-in-Chief

JENNIFER MARIUCCI

Managing Editor

JOSEPH G. CALHOUN

Articles Editor

SARAH MORGAN

Executive Editor

SUZANNE WASNER

Notes & Comments Editor

CAMILLE KAM

Business Editor

MATTHEW JONES

Associate Editors

ANNA BAUMGRAS
MEREDITH CANTRALL
JENNY HUMPHREYS

JENNIFER BUNKER
RACHEL KRISTOL
ALICIA IVORY

Faculty Advisor

DAVID FAVRE

JOURNAL OF ANIMAL LAW

VOL. IV

2008

PEER REVIEW COMMITTEE 2007-2008

FERNANDO ARAÚJO

TAIMIE L. BRYANT

DAVID CASSUTO

DAVID FAVRE, CHAIR

REBECCA J. HUSS

PETER SANKOFF

STEVEN M. WISE

The *Journal of Animal Law* received generous support from the Animal Legal Defense Fund, The Michigan State University Council of Graduate Students, the Detroit & MSU College of Law Alumni Association, and the Student Bar Association of Michigan State University College of Law. Without their generous support, the *Journal* would not have been able to publish and host its inaugural speaker series. The *Journal* also is funded by subscription revenues. Subscription requests and article submissions may be sent to: Professor Favre, *Journal of Animal Law*,

Michigan State University College of Law, 368 Law College Building,
East Lansing MI 48824.

The *Journal of Animal Law* is published annually by law students at ABA accredited law schools. Membership is open to any law student attending an ABA accredited law college. Qualified candidates are encouraged to apply.

Current yearly subscription rates are \$27.00 in the U.S. for the print edition; current yearly Internet subscription rates are \$27.00 USD. Subscriptions are renewed automatically unless a request for discontinuance is received.

Back issues may be obtained from: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

The *Journal of Animal Law* welcomes the submission of articles, book reviews, and notes & comments. Each manuscript must be double spaced, in 12 point, Times New Roman; footnotes must be single spaced, 10 point, Times New Roman. Submissions should be sent to anilawj@msu.edu using Microsoft Word (or saved as "rich text format"). Submissions should conform closely to the 18th edition of *The Bluebook: A Uniform System of Citation*. Authors should provide photocopies of the title pages of all sources used and photocopies of the phrases and sentences quoted from the original sources. All articles contain a 2008 author copyright unless otherwise noted at beginning of article. Copyright © 2008 by the *Journal of Animal Law*.

PEER REVIEW COMMITTEE

Fernando Araújo is a professor of law at the University of Lisbon Faculty of Law, where he teaches Law and Economics, Philosophy of Law, and Bioethics. He is the author of the first Portuguese book on animal rights.

Taimie L. Bryant teaches Property Law, Japanese Law, Comparative Japanese Family Law, Animals and the Law, and Nonprofit Organizations. Since 1995, she has turned her attention to animal rights, focusing both on the theoretical issues of conceptualizing such rights and on legislative and other legal regulations of human treatment of animals. Professor Bryant earned a Ph.D. in anthropology from UCLA, where she focused on the substantive fields of legal and psychological anthropology while pursuing various research topics in Japan. Her principal scholarly focus has been contemporary Japanese family law.

David Cassuto is Associate Professor of Law at Pace University School of Law where he teaches Animal Law, Environmental Law, Property Law, and Professional Responsibility. Professor Cassuto has published and lectured widely on issues in legal and environmental studies, including animal law. He holds a B.A. from Wesleyan University, an M.A. & Ph.D. from

Indiana University, and a J.D. from the University of California, Berkeley, Boalt Hall School of Law.

David Favre is a professor of law at Michigan State University College of Law. He is Faculty Advisor to the Journal of Animal Law and Chair of the Peer Review Committee of the Journal. As Editor-in-Chief of the Animal Legal and Historical Web Center, he has published several books on animal issues. He teaches Animal Law, Wildlife Law, and International Environmental Law.

Rebecca J. Huss is a professor of law at Valparaiso University School of Law in Valparaiso, Indiana. She has a LL.M. in international and comparative law from the University of Iowa School of Law and graduated magna cum laude from the University of Richmond School of Law. Recent law review publications include: No Pets Allowed: Housing Issues and Companion Animals; Valuation in Veterinary Malpractice; Separation, Custody, and Estate Planning Issues Relating to Companion Animals; and Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals. Her primary focus in research and writing is on the changing nature of the relationship between humans and their companion animals and whether the law adequately reflects the importance of that relationship.

Peter Sankoff is Lecturer at the University of Auckland (New Zealand) Faculty of Law, teaching in the areas of criminal law and evidence. Peter graduated with a B.A. in broadcast journalism from Concordia University in 1992, a J.D. from the University of Toronto in 1996, and a LL.M. from Osgoode Hall Law School at York University in 2005. Upon completion of his J.D., he attained a clerkship under Madame Justice

Claire L'Heureux-Dubé of the Supreme Court of Canada. He is the co-author of *Witnesses*, a Canadian text on evidence and procedure, and numerous articles on human rights, criminal procedure and evidence. Since May 2002, Peter has been the Co-Chair of the Executive Committee of the Animal Rights Legal Advocacy Network (ARLAN). He is also Editor of the ARLAN Report, which discusses topics relating to animals and the law, and he regularly gives seminars and writes articles on animal law issues.

Steven M. Wise is President of the Center for the Expansion of Fundamental Rights, Inc. and author of *Rattling the Cage - Toward Legal Rights for Animals* (2000); *Drawing the Line - Science and The Case for Animal Rights* (2002), *Though the Heavens May Fall - The Landmark Trial That Led to the End of Human Slavery* (2005), as well as numerous law review articles. He has taught Animal Rights Law at the Vermont Law School since 1990, and at the Harvard Law School, John Marshall Law School, and will begin teaching at the St. Thomas Law School. He has practiced animal protection law for twenty-five years.

TABLE OF CONTENTS

ARTICLES

WHERE'S FIDO: PETS ARE MISSING IN DOMESTIC VIOLENCE SHELTERS AND STALKING LAWS
Tara J. Gilbreath..... 1

This article addresses two key areas of domestic violence law where disregard for the bond shared by an animal and owner places both the animal and the domestic violence victim in danger. The first of these situations is the majority of domestic violence shelters' refusal or inability to allow victims to bring their animals with them. The second is the law's blatant omission of a stalker's threat of violence, and actual violence, towards animals from coverage by the nation's anti-stalking laws. Both of these situations illustrate how refusal by the law to recognize the bond shared by human and animal place both in peril.

COMBATING ANIMAL CRUELTY WITH ENVIRONMENTAL LAW TACTICS
De Anna Hill..... 19

Many individuals and citizen groups view federal and state anti-cruelty statutes as inadequate in protecting animals and in providing sufficient remedies. Unlike animal cruelty statutes like the Animal Welfare Act (AWA), many of the federal environmental statutes provide citizen suit provisions or otherwise allow interested parties to sue for enforcement. Citizen suit provisions in environmental statutes increase accessibility of the courts to the public. There are many instances where citizens groups have filed federal environmental citizen suits against federal agencies and private facilities that would be considered by many to

be actively involved in or to have facilitated acts of animal cruelty. Animal protectionists have attempted and continue to attempt to further protection of animals by filing or supporting suits under environmental law against federal agencies and private facilitators of animal cruelty.

AN ANIMAL IS NOT AN IPOD

Diane Sullivan & Holly Vietzke 41

The law in United States categorizes animals as personal property. As a result, recovery of damages for the loss of a companion animal is often times the fair market value. This inflexible approach to companion animals fails to distinguish between personal property such as a chair and a beloved pet. Needless to say, awarding damages at fair market value serves as little or no deterrence for the tortfeasor. This is especially true in cases where the companion animal lacks pedigree or special training. However, some decisions have authorized human guardians of companion animals to plead and recover the “unique value” of the companion animal. Such decisions reflect a shift in the court’s view of companion animals, which acknowledges public policy concerns for the guardian of the companion animal. This article discusses the law in United States on companion animals and proposes legislative action in the state of Florida for the recovery of the “loss of companionship” for owners of companion animals.

COMPANION ANIMALS: AN EXAMINATION OF THEIR LEGAL CLASSIFICATION IN ITALY AND THE IMPACT ON THEIR WELFARE. ACTUALITY AND PROSPECTIVE

Annamaria Passantino 59

Animals are now defined as “sentient creatures” in European law and no longer just as agricultural products (Treaty of Amsterdam, 1997). That change reflects ethical public concern about the quality of life of animals. In Italy, an important section of the regulation of man’s relationship with companion animals is contained in the “State-Regions Agreement on Companion Animal Welfare

and Pet Therapy,” which was recognised by the Council of Ministers in DCPM 28th February 2003. The Agreement defines some basic principles whose aims are to create a greater and increasingly correct interaction between man and companion animals, to guarantee the latter’s welfare in all circumstances, to avoid their being inappropriately employed and to encourage a culture of respect for their dignity, also in the sphere of innovative therapeutic activities such as Pet-therapy. Among the various aspects examined, this agreement especially underlines the responsibilities and duties of a companion animal handler and specifies that any person who lives with a companion animal or agree to take care of one is responsible for its health and welfare and must house it and give it adequate care and attention.

The Agreement also introduced important new measures aimed at reducing the numbers of stray animals, such as the use of microchips for an official dog identification system and the creation of a computerised data bank. The Author, after having analyzed the legal status of animals under the current system and discussed the idea of extending legal personhood to such animals, considers the law for the current valuation of companion animals. Finally, the Author promotes the idea that there is a legal/rational basis for changing the way that companion animals should be valued by legal system (such as Agreement) and recommends the adoption of principles/guidelines for the care of pet evaluate these aspects of the Agreement.

COMPLEMENTING LEGISLATION: THE ROLE OF CULTURAL PRACTICES IN THE CONSERVATION OF WILDLIFE – EXAMPLES FROM GHANA

Shadrack Ahrin..... 93

Despite attempts to modernize Ghana’s wildlife laws, they remain largely ineffective and inadequate. However, in the absence of adequate wildlife legislation, the various cultural values in Africa have accepted the task of conserving Africa’s wildlife.

TO SAVE LAB ANIMALS THE LEGAL WAY: THE RIGHT TO APPEAL ON PERMITS TO PERFORM ANIMAL EXPERIMENTS

Live Kleveland, The Norwegian Animal Protection Alliance 99

In Norwegian law, animal welfare organisations have the right to appeal on permits to perform animal experiments. The author explains the reasons for the right, briefly outlines how a case of appeal develops and explains possible consequences.

CHARTING THE GROWTH OF ANIMAL LAW IN EDUCATION

Peter Sankoff 105

Although the extent to which the animal law movement has succeeded in generating meaningful change for animals remains a subject of debate, one thing about the movement cannot be disputed: it is growing at a remarkable pace, both in the United States and abroad. For one thing, there are more people working as animal lawyers and studying to earn this informal classification than ever before. Where twenty years ago individuals practicing or trying to acquire knowledge in this area operated in isolation, today's enthusiast can attend animal law conferences, participate in moot court simulations and chat with like-minded individuals on animal law related websites. Most importantly, for the student undertaking the study of law in 2008, there now exists a very strong possibility that the institution they attend offers a course in animal law or will do so in the near future.

NOTES & COMMENTS

THE HUMANE METHODS OF SLAUGHTER ACT: DEFICIENCIES AND PROPOSED AMENDMENTS

Jennifer L. Mariucci

Michigan State University College of Law 149

This note touches on the Humane Methods of Slaughter Act and the deficiencies in the current version that undermine the statute's intended purpose of ensuring a humane slaughter for all animals. This note analyzes the statute, compares it to comparable statutes from around the

world, and suggests alterations to ensure that the statute fulfills its goal. This note also includes proposed statutory language that implements suggested changes.

2007-2008 CASE LAW REVIEW

Jemifer Bunker 183

WHERE'S FIDO: PETS ARE MISSING IN DOMESTIC VIOLENCE SHELTERS AND STALKING LAWS

TARA J. GILBREATH*

"He who is cruel to animals becomes hard also in his dealings with men. We can judge the heart of a man by his treatment of animals."¹

I. INTRODUCTION

Many people respond to a woman's choice of remaining with her batterer by asking "Why doesn't she just leave?"² There are many well-recognized reasons a woman may choose to stay, ranging from fear of punishment to money to her children. There is, however, one potential reason a domestic violence victim may

* Tara Gilbreath, born Memphis, Tennessee, attended Carnegie Mellon University (B.S., 2004) and Tulane Law School (J.D. candidate, 2008). Tara also completed coursework in "Women, Violence, and the Law" at Harvard University. In addition, she has clerked for the Tulane Law Domestic Violence Clinic for two summers, working intimately with survivors of domestic violence, and served as a student attorney for the 2007-2008 academic year. Tara is currently clerking with Gainsburgh, Benjamin, David, Meunier, & Warshauer, a top plaintiffs' firm in New Orleans, Louisiana. She is also proudly owned by two Shih-tzus, Henry and LuLu.

¹ Immanuel Kant, *Duties in Regard to Animals* 23, 24 (Tom Regan ed., *Animal Rights and Human Obligations* 1989).

² For the purposes of this article, a feminine pronoun will be used when describing victims of domestic violence and stalking. Recognizing that both men and women are victims of domestic violence, in the United States a woman is far more likely to be a victim of domestic violence than a man. In fact, studies have shown that one in four women will be victim of domestic violence during her lifetime. Thus, for the limited purpose of this article, the use of the feminine pronoun will be used.

choose to stay that has largely been ignored by domestic violence advocates and by the law. That reason is her pet.

The emotional bond shared between humans and animals positions pets above mere property, thus, pets are not as easily left behind as furniture, or even antique heirlooms. Furthermore, there is a well-recognized link between domestic violence and animal abuse, such that a woman may not only stay to be with her pet, but may also choose to stay to protect the animal from her batterer as well.

In the United States today, pets play a greater role within a family than that of property. A majority of homes that own pets consider them to be a member of the family, and many celebrate a pet's birthday in much the same way they do for any other family member.³ The same bond exists in households where domestic violence, is present. In fact, the bond may even be more important to a victim of domestic violence since pets are often an important source of comfort and emotional support. In fact, pets may be the only source of love and companionship a victim has available to her.

Ironically, this same bond may place the animal in greater risk of abuse at the hands of a batterer wishing to exert power and control. Through abusing a pet, a batterer exerts power not only over the animal, but also over his victim vicariously, as the victim experiences the abuse of the animal through sympathy.

Victims of domestic violence are not only forced to choose whether to stay or to go based on a multitude of other important reasons, but they now too are faced with the decision whether to leave their animal at the mercy of their batterer, or to stay and protect their pet. There are numerous studies and anecdotal reports verifying that batterers threaten or harm pets. It is a direct result that women may remain with the batterer, or postpone entering a domestic violence shelter, because of concern for pets they would be forced to leave behind.⁴

³ See Charlotte Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 6 (1998). This cite does not seem to support the information.

⁴ See Catherine A. Faver & Elizabeth B. Strand, *To Leave or to Stay? Battered Women's Concern for Vulnerable Pets*, 18 J. INTERPERSONAL VIOLENCE 1367, 1367 (2003).

Nationwide, state and federal laws have failed to provide assistance to domestic violence victims by ignoring a victim's bond with her companion animal.⁵ Laws governing protection orders, stalking, and abuse fail to acknowledge that bond: they in effect leave the victims' animals out of the equation.

This article will address two key areas of domestic violence law where disregard for the bond shared by an animal and owner places both the animal and the domestic violence victim in danger. The first of these situations is the majority of domestic violence shelters' refusal or inability to allow victims to bring their animals with them. The second is the law's blatant omission of a stalker's threat of violence, and actual violence, towards animals from coverage by the nation's anti-stalking laws. Both of these situations illustrate how refusal by the law to recognize the bond shared by human and animal place both in peril.

II. ANIMALS: MERE PROPERTY

Animals have been and continue to be considered personal property. While animals once shared this historical status with women and children, women and children have had this distinction erased from the law through their respective reform movements. Animals, however, remain property and thus their interests are weighed against the "possessory, use, and enjoyment interests of their owners."⁶

In fact, even in the face of contradictory evidence, most courts continue to define animals as property regardless of the bond shared with humans. In *Obershlake v. Veterinary Assoc. Animal Hosp.* plaintiff dog owners brought a veterinary malpractice suit against a veterinary hospital.⁷ When the plaintiffs dropped off their dog to have her teeth cleaned, the veterinarian also attempted to spay the dog, even though she had been spayed as a puppy.⁸ The plaintiffs' case cited numerous articles

⁵ For purposes of this article the term "companion animal" is defined as domesticated animals kept for their companionship value including, but not limited to dogs, cats, hamsters, ferrets, guinea pigs, and chinchillas.

⁶ Lacroix, *supra* note 3, at 7.

⁷ See *Oberschlake v. Veterinary Assoc. Animal Hosp.*, 785 N.E.2d 811, 812 (Ohio Ct. App. 2003).

⁸ See *id.* at 812.

contending that limiting recovery for the harm done to pets “ignores the fact that the relationship between a human and his companion animal is no more based upon economics than is any other family relationship.”⁹ Yet, the court affirmed the hospital’s award of summary judgment based solely on an Ohio statute defining animals as merely personal property.¹⁰

Some courts have begun to change this strict interpretation by holding that animals are not merely property, but occupy a higher status. In New York, a court held in *Corso v. Crawford Dog and Cat Hosp., Inc.*, that “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”¹¹ The defendant in that case, a pet funeral business, mistakenly placed a cat’s body in a casket meant for the plaintiff’s dog’s body. In so holding, the court awarded the plaintiff a greater sum of damages than was possible if the animal was only deemed worth its commercial value. The commercial value of the plaintiff’s dog’s body was exceedingly minimal, and yet, because the court recognized the special status of animals, the court awarded the plaintiff seven hundred dollars.

In addition, a Vermont court held in *In re Estate of Howard H. Brand* that regardless of an animal’s categorization as personal property, “observation and logic illustrate the unique quality of the living breathing property in comparison to most other forms of inanimate property.”¹² While these courts have begun to recognize that animals are not just property, they are in the minority among courts.

Some animal rights advocates have proposed a new “middle ground” property classification for animals. Under the new system, animals would be classified as “sentient property.” Proponents argue this classification would grant a recognizable right to animals, and yet still fall short of declaring animals as

⁹ 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, 93 (1998).

¹⁰ See *Oberschlake*, 785 N.E.2d at 812.

¹¹ *Corso v. Crawford Dog and Cat Hosp.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

¹² Sonia Waisman, Pamela Frasch & Bruce Wagman, *Animal Law: Cases and Materials* 595 (3rd ed. 2006).

“legal persons.”¹³ However, courts and legislatures have refrained from either adopting or imposing this new property classification, and thus animals remain property.

Because animals have traditionally been and continue to be thought of as property, pets and the bond they share with their human companions are often ignored by the law. Examples where the bond has been ignored range from tort law to property law to estate planning. But, it is the ignoring of the animal-human bond in the area of domestic violence that poses a great threat to both animals and humans alike.

III. LINK BETWEEN ANIMAL ABUSE AND DOMESTIC VIOLENCE

The link between abuse against animals and abuse against humans is long documented both in psychological and sociological studies as well as anecdotal reports. A 1983 study of New Jersey families with documented child abuse found that, in sixty percent of the cases, at least one family member had physically abused nonhumans.¹⁴ Another study, focusing on residents of a battered woman's shelter in South Carolina, showed that almost half of 107 women who owned pets reported their pets had also been victimized through threats or physical harm by their batterers.¹⁵ A third study found an even higher percentage of animal abuse in homes with domestic violence. That study, focusing on women entering a shelter, showed that almost three-quarters reported their batterers' had threatened or actually harmed one of their pets.¹⁶

The commonality between animals and victims of domestic violence is they both experience abuse inflicted by a batterer's attempt to exercise power and control.¹⁷ In fact,

¹³ See Animal Legal Reports Services, *Sentient Property: A Novel Proposal for Animal Law: More than Property, Less than Persons*, <http://animallegalreports.com/press.asp> (last visited Oct. 30, 2007).

¹⁴ See Waisman, Frasch & Wagman, *supra* note 12, at 529.

¹⁵ See Faver & Strand, *supra* note 4, at 1368.

¹⁶ See Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 103 (2001).

¹⁷ See Lacroix, *supra* note 3, at 7. this cite is not exactly what is said in the original source.

relationships between the batterer and a pet and between the batterer and his woman partner can be “characterized by economic dependenc[y], strong emotional bonds and an enduring sense of loyalty.”¹⁸ Nevertheless, batterers threaten, abuse, or kill their animals for a myriad of reasons. These include the desire to:

confirm power and control over the family, [t]o isolate the victim and children, [t]o force the family to keep violence a secret, [t]o perpetuate the context of terror, [t]o prevent the victim from leaving or coerce her/him to return, [to] punish the victim for leaving, [and] [t]o degrade the victim through involvement in the abuse.¹⁹

A batterer may abuse his victim or a pet in order to achieve one, many or all of these goals.

The link between victims of domestic violence and the abuse of animals is not solely established through their commonalities as victims of abuse. In fact, battered women whose pets have been the target of abuse also stated the pet was an important source of emotional support.²⁰ A 2000 study of women living in a shelter showed that victims who reported their pets had been abused also noted their pets had been a crucial source of emotional support.²¹ The authors of the study believed one possible interpretation of their findings was that batterers targeted the animals because they provided important emotional support for their human victims, and therefore abusing the animal was a successful weapon in abusing the women as well.²²

While laws may not yet reflect the unique and emotional bond between humans and animals in their operation, the link between violence against animals and violence against humans is already taking root. That link becomes even more important in the

¹⁸ *Id.*

¹⁹ The Humane Society of the United States, *First Strike Campaign 2003 Report of Animal Cruelty Cases*, at 3 (2003) <http://files.hsus.org/web-files/PDF/2003AnimalCrueltyRprt.pdf> (last visited Oct. 30, 2007).

²⁰ See Frank R. Ascione, Claudia Weber, & David Wood, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters of Women Who Are Battered*, 5 SOCIETY & ANIMALS 205, 218 (1997). [could not find original]

²¹ See Faver & Strand, *supra* note 4, at 1371.

²² See *id.*

context of domestic violence. An abuser's attempt to exert power and control over his victim is shared by a woman and her animal. A batterer may recognize the emotional bond between his human victim and her pet and exploit it by threatening, physically harming, or killing an animal. It is this link between the violence and the bond shared by the victims, that places both the woman and the animal in a dangerous situation if the woman ever seeks to leave her batterer.

IV. BARRING ANIMALS IN DOMESTIC VIOLENCE SHELTERS

a. Shelters under current law

Because victims of domestic violence share a kinship with their animals and because the animals, too, have a high risk of abuse while living with a batterer, a perilous situation occurs when a human victim decides to leave. If a woman is able to find support and aid from family or friends, there is a chance that she might rescue her pets as well and remove them from the violence.

Regardless, the reality for many women across the country is that there is no other option but to seek help from a domestic violence shelter. However, the vast majority, if not all, domestic violence shelters bar animals from shelter premises and neglect to even ask about family pets. In fact, a study by the Humane Society of the United States found that ninety-one percent of adult domestic violence victims mention pet abuse when they enter the shelter.²³ Despite this, only eighteen percent of shelters surveyed even routinely ask about pets when a victim enters the shelter.²⁴

Traditionally, animals have been barred from most domestic violence shelters because they can pose a risk of disease or injury to other victims living in the shelter. Allowing animals to live with humans in a shelter increases the possibility that scared animals harm their owners, other people, or other pets through biting or scratching.²⁵ Furthermore, in a shelter where living areas

²³ See The Humane Society of the United States, *supra* note 19, at 2-3.

²⁴ See *id.*

²⁵ See Centers for Disease Control and Prevention, *Animals in Public Evacuation Centers*, <http://www.bt.cdc.gov/disasters/animalspubevac.asp> (last visited Oct. 30, 2007).

are cramped, it may be difficult to properly provide care for the animals. Other shelter residents may suffer from allergies, and this situation might only get worse when they may not have access to their usual medications.²⁶ However, barring of animals from domestic violence shelters can delay or completely deter victims from leaving their batterers and entering a shelter.

While a domestic violence shelter's decision to bar animals may delay or deter victims from leaving their batterer, simply allowing women to bring their animals with them presents a myriad of legal problems, including increased liability for the behavior of those animals. In Louisiana, the owner of an animal is liable for any harm or damages caused by that animal when it can be shown the owner either knew or should have known their animal could cause damage, the damage could have been prevented by the exercise of reasonable care, and such care was not used.²⁷

While the Louisiana code places the liability on the owner of the animal, when a domestic violence shelter allows a woman to bring her pet with her into the shelter, that liability will extend to the shelter as the de facto "landlord." While most domestic violence shelters do not require a victim to pay "rent," the same relationship as between a landlord and a tenant still exists. A landlord can be held liable for injuries caused by a tenant's pet either in the common areas or if there was a reasonable foreseeability that the animal could cause injury. This same liability can be inferred onto the owner or operator of a domestic violence shelter.²⁸ A domestic violence shelter must take such liability into account when choosing whether to allow a victim to bring along companion animals.

Even potential solutions to increased liability pose additional problems for domestic violence shelters. One potential solution is for shelters to take out additional insurance to cover the added liability allowing pets would bring. However, taking out additional insurance is not a simple task for domestic violence shelters. Domestic violence victims and shelters, both, face

²⁶ *Id.*

²⁷ La. Civ. Code. Ann. art. 2321 (1996).

²⁸ J. H. Cooper, *Liability of Landlord to Tenant or Member of Tenant's Family, for Injury by Animal or Insect*, 67 A.L.R.2d 1005 (2007).

challenges when attempting to obtain insurance. While they are protected from insurance discrimination, victims and shelters are already high risks for insurance companies. This means shelters seeking additional insurance to cover companion animals could find it difficult to obtain and unaffordable.²⁹

Another potential solution for shelters wanting to allow companion animals is to ask victims entering the shelter to sign waivers relieving the shelter of liability for any harm or damage an animal causes. However, this solution could also present potential legal difficulties. A waiver, presented to a victim when she is attempting to leave her batterer, might be challenged legally based on questions of whether the victim was under duress and felt it necessary to sign any waiver to protect herself from her batterer.

b. "Safe Haven" Programs

In some areas of the country, battered women's shelters have recognized the important bond between a woman and her pet and begun to seek out alternatives to simply turning animals away from the shelter.³⁰ One such alternative that has begun to catch on across the country is "safe havens" for pets of domestic violence victims. While some programs have been in existence for decades, they were very informal and operated mostly through word of mouth.³¹ The vast majority of today's safe haven programs have only been founded in the past few years.³²

The essence of a safe haven program is that battered women shelters partner with local veterinary hospitals, foster families, animal shelters, or private kennels to allow human victims of domestic violence to relinquish pets to these facilities temporarily while victims are residing at the shelter. While safe haven programs separate a woman from her animal, they also

²⁹ Ellen J. Morrison, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 273 (1996).

³⁰ See Gentry, *supra* note 16, at 113.

³¹ See Frank R. Ascione, *Safe Haven for Pets: Guidelines for Programs Sheltering Pets from Women who are Battered*, 5 (The Geraldine R. Dodge Foundation, 2000)

http://www.vachss.com/guest_dispatches/ascione_safe_havens.pdf (last visited Oct. 30, 2007).

³² See *id.*

provide a victim with a chance to place her pet in a protected environment away from the likely abuse of her batterer.

While safe haven programs appear on the surface to be an ideal solution for battered women's shelters wishing to provide women with a safe place for their pets, these programs face many legal problems, not just for the animal, but also for the human victim. The problems range from that of whether due process is owed to a batterer before sheltering his animal, whether a batterer could find his victim through tracking his animal, and who would bear the cost of animals being sheltered. However, the two most difficult legal issues victims and shelters face when a woman enters her companion animal into a safe haven program are of ownership and confidentiality.

It is a fundamental aspect of property law that a person cannot be deprived of his private property without due process of law.³³ When a victim of domestic violence seeks to remove an animal that is either co-owned or solely owned by the batterer, there is a potential to violate the batterer's right to due process. In most households, companion animals are co-owned by the household's adults.³⁴ Under the current law that categorizes animals as only property, a batterer may be entitled to either retrieve the animal from a safe haven program or may have a claim against his human victim for the theft of his property.

The problem is further complicated by the fact that many safe haven programs, battered women shelters, and animal shelters are unsure or unadvised as to how to handle situations where a companion animal is the property of a batterer.³⁵ In fact, some agencies have even concluded that a woman might not be able to retrieve an animal once it has entered into a safe haven program if that pet was the batterer's legal property.³⁶

Thus, because some animals are considered property of the batterer, it is legally difficult to deprive him of his possessory rights to the animal by allowing the pet to be entered into a safe haven program. The few safe haven programs that have dealt with this situation have focused on how a victim of domestic violence

³³ See U.S. Const. amend. XIV, §1.

³⁴ See Gentry, *supra* note 16, at 113.

³⁵ See Ascione, *supra* note 31, at 38.

³⁶ See *id.* at 37.

can establish evidence that she is the sole owner of the animal.³⁷ This is done through a number of ways, including obtaining an animal license and/or proof of vaccinations or veterinary receipts in the victim's name.³⁸ Some safe haven programs have procedures to re-license the pet to the program while the victim remains in the shelter as a way of challenging ownership of the pet.³⁹ These programs make the welfare and safety of victims and their pets their utmost priority, yet they must also remain respectful of ownership issues.⁴⁰

Because the legal issue of ownership does present such a challenge to safe haven programs, the procedures established by the programs may not be enough to provide a complete, prophylactic solution. The solution should also come from the courts. While some courts may choose to push the bounds of precedent to find in the best interest of the animal and allow the safe haven to continue to protect the animal, the better solution would be for all courts to recognize that companion animals are not inanimate objects.

When a court 'determin[es] what is due process of law [it must] consider the nature of the property, the necessity of its sacrifice, and the extent to which it has . . . been regarded as within the [State's] police power.' Here, the nature of the property is that of a living animal, a sentient being. Living animals warrant removal in emergency situations because they are not like a piece of antique furniture or a boat.⁴¹

If courts could look beyond the property status of animals to recognize their sentience, then a victim of domestic violence would no longer violate the law by protecting their companion animal through entering it into a safe haven program.

The second major legal issue facing safe haven programs is confidentiality. Since many publicly funded animal shelters are required by law to keep their records open to the public, if that

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.* at 40.

⁴¹ Gentry, *supra* note 16, at 114 (quoting *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704 (1897)).

shelter also participated in a safe haven program it could provide a batterer with a means to track down either his human or animal victim. And since the time immediately following a battered woman's escape from a batterer is the most deadly, it is logical that it would be the most lethal for her pet as well. Therefore, confidentiality of identities of both human and animal victims is of utmost importance.

While there is no absolute legal solution to this issue, safe haven programs do have a number of options that can help maintain confidentiality. These include filing a safe-haven pet as already adopted in their records, and in the case of private shelters, refusing to release any information about those pets to the public. Programs can also restrict the number of individuals who interact with the animals within the shelter or utilize a fostering system to place animals in a different community than that of the batterer's residence to minimize accidental contact.⁴²

Since these options are not fool-proof, even when a shelter engages in these procedures to help maintain the secrecy of the victims, issues of confidentiality and ownership still continue to plague the safe haven programs.

c. New Legislation As the Answer

While shelters are in the best position to undertake small steps to help battered women and their pets avoid these legal pitfalls, courts and legislatures can perhaps provide the most effective relief. Since courts have not shown a propensity for categorizing animals as anything other than property, the solution may have come from the legislature. While no state legislature to date has mandated battered women shelters must allow entrance of companion animals into their facilities, that may present the best solution possible.

A comparison can be drawn to Louisiana's new law mandating the Governor's Office of Homeland Security to identify emergency disaster shelters equipped to accept and house pets.⁴³ The legislation was passed in 2006 in response to a public outcry over thousands of needless deaths of animals left behind during

⁴² Ascione, *supra* note 31, at 40-41.

⁴³ See La. Rev. Stat. Ann. §29:726(E)(20)(a)(ii)(aa) (2007).

mandatory evacuation during Hurricane Katrina. Because animals were not allowed in the shelters provided for humans, hundreds of people stayed behind to be with their animals; those left behind either died in the flood, or were forced to try and survive without food or water for up to six weeks.⁴⁴

The Louisiana legislature responded to the crisis by passing a new law, which requires emergency preparedness agencies to formulate evacuation plans to transport and temporarily shelter service animals and household pets in a humane manner.⁴⁵ The new statute provides that the Governor's Office of Homeland Security must assist in the "development of guidelines . . . which may include standards or criteria for admission to such shelters, health and safety standards, basic minimum animal care standards regarding nutrition, space, hygiene, and medical needs, protocols, and procedures for ensuring adequate sheltering, management, and veterinary staffing for such shelters."⁴⁶

Furthermore, and perhaps most important, the law limits the liability of shelters who take in animals during an emergency.⁴⁷ Under the new law, an owner or operator of a shelter that permits homeland security or other emergency agencies to use its facility to shelter both people and household pets or service animals, during an emergency without compensation, is granted limited liability, except in situations where the owner's or operator's gross negligence or willful misconduct is the proximate cause of death, injury, loss or damage occurring during the sheltering period.⁴⁸

Courts and shelters have been reluctant to change laws and protocols related to sheltering, and safe haven programs, while they present a solution, also present many legal issues. Therefore, it would be a more efficient and reasonable alternative for state legislatures to pass a law similar to the Louisiana statute that

⁴⁴ See Hurricane Katrina Animal Rescue, <http://hurricaneanimalrescue.blogspot.com/> (last visited Oct. 30, 2006).

⁴⁵ La. Rev. Stat. Ann. §29:726(E)(20)(c). The statute defines "household pets" to mean "any domesticated cat, dog, and other domesticated animal normally maintained on the property of the owner or person who cares for such domesticated animal."

⁴⁶ *Id.* at §29:726(E)(20)(a)(ii)(bb).

⁴⁷ See *id.* at §29:726(E)(20)(a)(ii)(aa).

⁴⁸ LA B. Dig., Resume, 2006 Reg. Sess. S.B. 607. (what is this source?)

authorizes shelters to take in household animals with their owners during national emergencies. The domestic violence statute would authorize animal welfare and health agencies to work with shelters to develop guidelines and standards for dealing with hygiene, medical needs, and animal care standards that would be required in the housing of animals with humans. Examples of such standards would be requiring proof of current vaccinations against rabies or vaccination upon entry, flea and tick treatment, and regular dog-walking.

The statute would also confront the critical question of the shelter's liability for the actions of the animals. Similar to Louisiana's new national emergency law, the ideal domestic violence statute would also limit a shelter's liability for any death, injury, loss or damage that occurred during an animal's stay at the shelter, except for gross negligence or willful misconduct on the part of the shelter.

A statute that encompassed all of these provisions would give victims of domestic violence a viable, reasonable, and preferable alternative to either leaving their beloved animals behind or placing them with strangers in a safe haven program. Under this statute, a victim could bring her companion pet with her for emotional support and to protect the animal from the potential abuse it would receive if left behind. The statute would serve both to benefit the human victims of domestic violence and also to protect the lives of innocent companion animals.

V. FAILURE OF STALKING LAWS TO INCLUDE ANIMALS AS THREAT TARGETS

Although domestic violence law has expanded in recent years in response to awareness to of the intense danger that stalking poses to women, the law has continued to ignore exactly how vulnerable animals are as well. Only in the past twenty years have state legislatures begun to pass statutes criminalizing stalking. Thirty-six states have recognized the widespread and extensive nature of stalking and thus adopted legislation defining the act and penalties associated with the crime. In fact, research has

determined that at least one million women and close to four hundred thousand men are stalked annually.⁴⁹

Stalking has been defined by most states legislatures to include “willfully, maliciously, and repeatedly following and harassing another person,” and those convicted can include ex-lovers, former spouses, rejected suitors, co-workers, as well as complete strangers.⁵⁰ In addition, stalking is directly tied to domestic violence. Domestic violence experts estimate as many as ninety percent of women murdered by their former lovers or spouses were stalked beforehand.⁵¹

Of the thirty-six state anti-stalking laws, including the model anti-stalking code developed by the National Institute of Justice, not one includes threats or violence to companion animals as a basis for instilling fear or harassing victims. In 1993 the National Institute of Justice developed the model anti-stalking code in order to create a legal framework for dealing with the crisis of stalking. The code defines a stalker as:

any person who: (a) purposefully engages in a course of conduct directed at a specific person that would create a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family.⁵²

In every state that has passed anti-stalking legislation, the statutes have been similar to that of the model code: every statute ignores the bond between a victim and her pets and have neglected to include threats or harm to one's animal as evidence of stalking.

Because of the emotional bond between women and their companion animals, threats and violence towards these animals are a powerful message to domestic violence victims. No one who has watched the Paramount film, Fatal Attraction, could forget the

⁴⁹ Clare Dalton & Elizabeth M. Schneider, *Battered Women and the Law* 665 (1st ed., 2001).

⁵⁰ Kathleen G. McAnaney, Laura A. Curliss, & C. Elizabeth Abeyta-Price, *From Imprudence to Crime: Anti-Stalking Law*, 68 NOTRE DAME L. REV. 819, 821-23 (1993).

⁵¹ See *id.* at 838.

⁵² Dalton & Schneider, *supra* note 49, at 669. (also cite to Code if possible)

impact of actress Glenn Close's character boiling the pet rabbit of the man she was stalking.⁵³

However, most states have ignored just how powerful a message a threat or injury to a pet can be. In Louisiana the anti-stalking statute explicitly limits acts of stalking to threats or harm towards the victim or any member of her family.⁵⁴ The statute further defines "family member" as "[a] child, parent, grandparent, sibling, uncle, aunt, nephew, or niece of the victim, whether related by blood, marriage, or adoption."⁵⁵ Louisiana has explicitly ignored the bond between victims and their animals.

But Louisiana, as stated above, is not alone. Tennessee's anti-stalking statute limits the covered parties (the statute does not expressly define family) to "the victim's child, sibling, spouse, parent or dependents."⁵⁶ Mississippi's statute goes even further than Louisiana or Tennessee, by completely limiting acts of stalking to the harassment of the human target herself.⁵⁷ Thus, while states vary as to whether or not they include threats or harm to a victim's family, all states exclude a victim's companion animals.

The refusal by both the creators of the model code and state legislatures to include companion animals in the anti-stalking laws leaves the victims and their pets vulnerable to threats and attacks of their stalkers. States should begin to amend their anti-stalking statutes to include threats and harm done to the victim's companion animals. An adequate statute would look as follows:

- (A) Stalking is the willful and repeated harassment or following of another individual that would cause a reasonable person to feel frightened, intimidated, harassed, or to suffer emotional distress and that actually causes the individual to feel frightened, harassed, or to suffer emotional distress.
- (B) Stalking includes, but is not limited, to:
 - (i) the willful and repeated unconsented contact at the victim's home, workplace, school, or any other

⁵³ See *Fatal Attraction* (Paramount Pictures 1987). (ask West)

⁵⁴ See La. Rev. Stat. Ann. §14:40.2 (2007).

⁵⁵ *Id.* at §14:40.2 (D)(2)(a)

⁵⁶ Tenn. Code Ann. §39-17-315(C)(1)(d) (2005).

⁵⁷ Miss. Code Ann. §97-3-107 (2006).

location that would cause a reasonable person to feel frightened, intimidated, harassed, or to suffer emotional distress.

- (ii) Verbal or implied threats of death, bodily injury, sexual assault, kidnapping, or any other statutory criminal act to the victim, any member of his family, any companion animal, or any person with whom he is acquainted.

This statute should incorporate provisions of existing anti-stalking statutes that are adequate in protecting human victims and families and add a new vital clause that would also protect companion animals. By including threats and harm towards companion animals, this new statute would recognize the vulnerability of companion animals when their owners are being stalked; it would act upon that recognition and protect those animals. By adopting a statute that includes companion animals, states would no longer be ignoring the incredible link between humans and their companion animals, and instead would be protecting them.

VI. CONCLUSION

The emotional bond between humans and their companion animals can provide unlimited love and support to victims of domestic violence and stalking. But that bond can also make a victim more vulnerable to her batterer or stalker. A victim of domestic violence find emotional support and love in her companion animals, something lacking in the human relationship with her batterer. A victim may feel compelled to stay with her batterer in order to remain close to her pet. A victim may also choose to stay to protect her pet. In the majority of the reports given by women entering domestic violence shelters, their batterers abused their pets as well. Therefore in situations of domestic violence, a victim's bond with her companion animal can force her to stay with her batterer, and places her in even more danger.

The same bond is also a source of vulnerability for a victim of stalking. A companion animal is an easy target for threats and physical harm. Those threats and physical injuries send a powerful message to stalking victims about their own helplessness.

Human and nonhuman victims of domestic violence and stalking not only share a common vulnerability because of this bond, but also a lack of protection under existing law. Presently, a domestic violence victim who wants to leave her batterer has to choose whether to protect herself by entering a shelter or to stay and protect her pet. Stalking victims are also unprotected by the law when it comes to their pets. A stalker can threaten or injure a victim's pet without consequences under existing anti-stalking law. The law has ignored the crucial bond between victims and their animals and because of that the law has left these victims vulnerable to their attackers.

Although the law's omission has helped to create this vulnerability for victims for domestic violence and stalking, the solution also lies in the law's purview. State legislatures have the power to correct their previous omissions and protect human victims and their companion animals. By passing new laws allowing animals entrance into domestic violence shelters and including them in anti-stalking legislation, legislatures can mitigate the vulnerability under the current law. While the law has contributed to the current problem by ignoring the importance of animals in domestic violence and stalking cases, the law can also help solve it. It is up to legislatures to correct the mistakes and to start protecting victims and their pets.

COMBATING ANIMAL CRUELTY WITH ENVIRONMENTAL LAW TACTICS

DE ANNA HILL*

I. INTRODUCTION

Many individuals and citizen groups view federal and state anti-cruelty statutes as inadequate in protecting animals and in providing sufficient remedies. The fight to protect animals has led to a more creative scheme of thought. Many individuals and groups have implemented legal tactics to combat animal cruelty with use of environmental law. Unlike animal cruelty statutes like the Animal Welfare Act (AWA), many of the federal environmental statutes provide citizen suit provisions or otherwise allow interested parties to sue for enforcement.¹

Citizen suit provisions in environmental statutes increase accessibility of the courts to the public.² The provisions usually include express language granting a private right of action that allows for judicial review of agency actions, and outlines procedural mechanics for when, where, and how review can be permitted.³

* De Anna L. Hill is an attorney from Virginia Beach, Virginia. She proudly served in the United States Army receiving numerous awards and citations. During her enlistment she graduated magnum cum laude from Troy University. In 2007, Ms. Hill graduated from Tulane University School of Law earning a Juris Doctorate and a Certificate in Alternate Dispute Resolution and Mediation. While at Tulane she was a senior editor of *Tulane Journal of Law and Sexuality*, member of the Tulane Honor Board, president of Tulane Black Law Student Association, and a member of Tulane Inn of Court. Ms. Hill currently resides in New Orleans, Louisiana with her family.

¹ See SONIA S. WAISMAN, et al, ANIMAL LAW CASES AND MATERIALS 376 (3d ed. 2006).

² See *id.* at 197.

³ See *id.*

There are many instances where citizens groups have filed federal environmental citizen suits against federal agencies and private facilities that would be considered by many to be actively involved in or to have facilitated acts of animal cruelty. Animal protectionists have attempted and continue to attempt to further protection of animals by filing or supporting suits under environmental law against federal agencies and private facilitators of animal cruelty.

II. ANIMAL ADVOCATES FACE LIMITATIONS IN ANTI-CRUELTY LEGISLATION

Animal cruelty laws exist at both the state and federal levels. The AWA serves as the principal legislation at the federal level.⁴ At the state level, every state has enacted its own unique law prohibiting animal cruelty. Most of the state criminal statutes are misdemeanor offenses.

Though there is both federal and state legislation regarding animal cruelty, there is no universal definition for animal cruelty. Generally, animal abuse is considered socially unacceptable behavior that intentionally causes unnecessary pain, suffering, or distress to and/or death of an animal.⁵ This definition excludes socially acceptable treatment, such as hunting, some veterinary practices, and certain agricultural practices.⁶ Animal advocates would like to expand upon this definition to the extent that many of the practices presently excluded from protection would be covered and there would be few or no exemptions for parties involved in conduct that intentionally harms animals.⁷

⁴ 7 U.S.C. § 2132 (2004).

⁵ See Frank Ascione, *Animal Abuse and Youth Violence*, Sept. 2001, http://www.ncjrs.gov/html/ojjdp/jjbul2001_9_2/contents.html.

⁶ See *id.*

⁷ See FactoryFarming.com, *The Truth Hurts*, <http://www.factoryfarming.com/index.htm> (last visited Apr. 15, 2007); See also NABR.org, *Animal Law Section*, <http://www.nabr.org/animallaw/Proposal/NYCBarProposal.htm> (last visited Apr. 15, 2007).

The AWA is the most extensive federal statute regarding animals.⁸ The Act requires minimal standards of care and treatment for certain animals bred for commercial sale, used in research, transported commercially, or publicly exhibited.⁹ It does not regulate the billions of animals intended for food or fiber.¹⁰ It does, however, prohibit dogfights, bear or raccoon baiting, and similar animal-fighting ventures.¹¹ The AWA is enforced by the United States Department of Agriculture (USDA).¹² The USDA's Animal and Plant Health Inspection Service administers the AWA, its standards, and its regulations.¹³ The USDA has a "long and notorious reputation for ineffective enforcement."¹⁴ Much of this failure can be attributed to under-funding and a lack of interest on the part of the USDA.¹⁵ Audits have shown instances where the USDA did not effectively use its enforcement authority, did not aggressively collect fines from violators and arbitrarily lowered penalties, failed to re-inspect facilities that had serious violations, and continuously requested inadequate amounts of congressional funding.¹⁶ This has led to a decrease in incentives to comply with the AWA. Even worse, auditors found, "[a]t times, poor enforcement of the AWA has actually limited the ability of states to enforce their own laws to protect certain animals and to protect the public."¹⁷ The USDA is not interested in enforcing the AWA and its inaction has further crippled an already limited statute.

⁸ See National Center for Animal Law, <http://www.lclark.edu/org/ncal/description.html> (last visited Apr. 15, 2007).

⁹ See *id.*

¹⁰ See 7 U.S.C. § 2132(g).

¹¹ See *id.* §§ 2131, 2132; See also National Center for Animal Law, *supra* note 8.

¹² See U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, <http://www.aphis.usda.gov/lpa/pubs/awact.html> (last visited Apr. 10, 2007).

¹³ See *id.*

¹⁴ Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act (2003), [http://www.nabr.org/animal law/Proposals/NYCBARProposal.htm](http://www.nabr.org/animal%20law/Proposals/NYCBARProposal.htm).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ *Id.*

Further, the AWA does not have a citizen suit provision to allow citizens to seek recourse through the courts.¹⁸ Under current case law, “an enforcement action brought directly under the AWA is likely to be dismissed for failure to state a claim upon which relief can be granted, as the courts have held that the AWA provides no implied private cause of action.”¹⁹ Citizens seeking to avoid this result have sued under the Administrative Procedure Act.²⁰ The Administrative Procedure Act provides that any person suffering a legal wrong, or that any person who is adversely affected, has a right to file a suit against a government agency and permits a reviewing court to compel agency action.²¹ This approach is limited because the suit is filed against the government agency and not against the party who allegedly violated the AWA.²²

Suits filed under the Administrative Procedure Act are subject to dismissal for lack of standing.²³ Standing is a threshold question that must be satisfied to prevent a case from being dismissed.²⁴ Standing is satisfied when it is shown that the litigant is entitled to have the court decide the merits of the issue.²⁵ This can be shown once the constitutional requirements have been met.

The Supreme Court defined the constitutional requirements as (1) the plaintiff has suffered, or is in imminent danger of suffering, an injury in fact; (2) the plaintiff’s injury is traceable to the defendant’s conduct; and (3) a favorable ruling would remedy the problem of which the plaintiff complains.²⁶ “Since the early 1970’s, environmental issues-and their close cousin, animal issues-have been at the forefront of the debate over proper use of standing doctrine by the judiciary.”²⁷ Many significant animal protection cases are brought in federal court and

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See* WAISMAN, *supra* note 1, at 474.

²⁵ *See id.*

²⁶ *See id.* 184.

²⁷ *Id.* at 183.

therefore have to satisfy Article III standing requirements to prevent dismissal.²⁸

There are recent cases filed under the Administrative Procedure Act that have survived prudential and constitutional scrutiny: *Animal Legal Defense Fund v. Glickman and Alternatives Research & Development Foundation v. Glickman*.²⁹ In both cases, the plaintiff was able to show an aesthetic injury from witnessing acts of animal cruelty which entitled him to standing to challenge USDA regulations.³⁰ As a committee report from the New York City Bar Association concluded, “[w]hile these cases are an enormous step in the right direction, they demonstrate that the development of citizen’s standing on a case-by-case basis in the courts under the Administrative Procedure Act will certainly result in unpredictable, inconsistent, and spotty access to the courts.”³¹

As previously stated, states are equipped with anti-cruelty statutes as well. State anti-cruelty laws are criminal laws enforced by the District Attorney or state humane enforcement agencies. Despite the fact that an act of cruelty has been criminalized by the law, it still may not be investigated or prosecuted.³² Law enforcement and prosecutors face numerous obstacles that restrict their ability to handle animal abuse cases promptly and thoroughly.³³ For example, many police officers are not trained on the proper techniques to handle animal abuse cases, and some officers bring personal bias towards animals by regarding animals as expendable property.³⁴ Departments and prosecutors are forced to prioritize cases due to lack of funding and may be inclined to put animal law cases at the bottom.³⁵

²⁸ See *id.* at 184.

²⁹ See 154 F.3d 426 (D.C. Cir 1998); See also Report of the Committee, *supra* note 14.

³⁰ See Report of the Committee, *supra* note 14.

³¹ See *id.*

³² See WAISMAN, *supra* note 1, at 474.

³³ See *id.*

³⁴ See *id.* at 475.

³⁵ See *id.*

There is minimal case law for prosecutors to reference, and many of the courts are not interested in animal cruelty cases.³⁶ The agencies with the authority to enforce the laws are too overwhelmed to respond effectively to an animal cruelty complaint, and they do not have adequate funding to bring cases to court.³⁷ Many of these agencies focus on domestic animals like cats and dogs rather than farm animals.³⁸ As a result, state anti-cruelty statutes are not effectively enforced.

In addition, the anti-cruelty statutes pose more obstacles to ensuring the wellbeing of animals. Many anti-cruelty statutes are significantly weakened by exemptions.³⁹ Whole classes of animals are excluded from state protection, such as wildlife or farm animals, animals used for medical or research purposes, animals used in entertainment venues, such as rodeos, circuses, and zoos, and animals and specific practices used agricultural industries.⁴⁰

III. FOUR ENVIRONMENTAL LAWS USED BY MANY ANIMAL ADVOCATES IN COMBATING ANIMAL CRUELTY

The Clean Water Act, Clean Air Act, the Migratory Bird Treaty, and the National Environmental Policy Act have been at the forefront of many lawsuits filed by both environmental and animal advocacy organizations.

A. *Understanding the Clean Water Act*

The Clean Water Act was enacted to “restore and maintain chemical, physical, and biological integrity of the Nation’s waters.”⁴¹ The Clean Water Act prohibits the discharge of any pollutant into United States waters except in accordance with

³⁶ See David Wolfson, *Farm Animals and the Law*, http://www.satyamag.com/may97/farm_animals.html (last visited Apr. 10, 2007).

³⁷ See *id.*

³⁸ See *id.*

³⁹ See WAISMAN, *supra* note 1, at 475.

⁴⁰ See *id.*

⁴¹ 33 U.S.C. § 1251(a) (2004).

certain restrictions.⁴² Pollutants discharged from “point sources” are permitted through a regulated system under the National Pollution Discharge Elimination System.⁴³ The Clean Water Act established a program to issue permits limiting the amount of discharge from point sources.⁴⁴ Point sources are “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”⁴⁵ The Environmental Protection Agency (EPA) administers the permit program, but a state may apply to the EPA for authority to administer the program.⁴⁶ Once the state assumes the authority, the EPA takes on a supervisory role. If the EPA determines that a state is not administering the program in compliance with federal standards, the EPA must provide an opportunity to cure, and if the issue is not resolved, the EPA must withdraw the state’s authority.⁴⁷ The Clean Water Act provides for citizens’ suits to enforce the EPA’s nondiscretionary duties.⁴⁸

*B. Exploring the Method In Which Clean Water Act
Has Been Implemented in the Fight Against
Animal Cruelty*

Animal protectionist groups may dedicate many man hours investigating animal cruelty at facilities like Concentrated Animal Feeding Operations (CAFO), but find it difficult to file any resulting animal cruelty claims because farm animals are excluded from the AWA and state statutes. A secondary effect from an environmental suit may eliminate the cruel practices or at least increase the quality of life for animals. Organizations like the Humane Society for the United States (HSUS) and the Sierra Club have used environmental laws to file suits against CAFOs.

⁴² See *id.* § 1311(a).

⁴³ See *id.* § 1342.

⁴⁴ See *id.* §§ 1311, 1312.

⁴⁵ See *id.* § 1362(14).

⁴⁶ See *id.* § 1342(b).

⁴⁷ See *id.* § 1342(c)(3).

⁴⁸ See *id.* § 1365(a)(2).

CAFOs are industrial-style animal-production sites that have replaced the majority of traditional family farms.⁴⁹ These industrial-style animal factories increase animal production through genetic manipulation and chemical and drug additives in the feed.⁵⁰ The animals are concentrated in giant confinement barns that “crowd animals together in inhumane conditions ripe for disease.”⁵¹ Specifically, broiler chickens are housed in industrial barns containing 25,000 birds that are bred to have heavy breasts that inhibit their ability to stand.⁵² These birds tend to die of thirst because they are unable to reach water.

Broiler birds are not the only farm animals that suffer a painful plight; dairy cows, hogs, egg laying hens, and beef cows are also subject to deplorable confinement, chemical and drug injections, as well as castration, tail docking, beatings, and de-beaking.⁵³

CAFOs are also large contributors to water pollution and noxious gas.⁵⁴ CAFOs create “one of the nation’s most dangerous water pollution problems.”⁵⁵ According to the Environmental Protection Agency, hog, chicken and cattle waste has polluted 35,000 miles of rivers in 22 states and contaminated groundwater in 17 states.⁵⁶

Livestock produce an enormous amount of waste--about 500 million tons of manure a year. But the corporate livestock industry’s waste disposal practices – spraying it onto croplands or storing it in open-air waste pits called lagoons- often

⁴⁹ See SierraClub.org, Inhumane Treatment of Farm Animals, <http://www.sierraclub.org/factoryfarms/factsheets/inhumane.asp> (last visited Apr. 10, 2007).

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See SierraClub.org, Protect America’s Water from Factory Farm Pollution, <http://www.sierraclub.org/factoryfarms/factsheets/inhumane.asp> (last visited Apr. 10, 2007).

result in leak, spills and runoff that pollute ground and surface water and create a health risk to people and wildlife. That's why the Sierra Club is calling for a moratorium on new large CAFOs until our clean-water protections are strengthened, and the massive pollution from current facilities is eliminated.⁵⁷

One of the Sierra Club's four major campaigns is protecting America's waterways from factory-farm pollution.⁵⁸ The Sierra Club recommends filing suit against CAFOs under the Clean Water Act or the Clean Air Act using the citizen suit provision.⁵⁹ The Sierra Club suggests that just filing suit opens a lot of doors and shows the agencies, politicians, and CAFO owner or grower the public's concerns are serious. The Sierra Club also believes that that a joint claim from a group of plaintiffs is more likely to prevail: "The problem with a lawsuit is that you may have to show that you have been harmed--which means waiting until after something negative has occurred. Recent cases, however, have prevailed on the basis of a 'presumptive nuisance' which means that certain things can be presumed to be a nuisance and there is no need to wait until it actually happens."⁶⁰

The Sierra Club has filed suit against CAFOs under the Clean Water Act on several occasions. While not all of the suits have yielded holdings in favor of the Sierra Club, there have been cases that have resulted in beneficial results for the environment and animals. Other organizations like the HSUS and the Concerned Area Residents for the Environment have filed suits under the Clean Water Act against CAFOs.

The HSUS, the nation's largest animal protection organization, is combating animal cruelty in New York by filing

⁵⁷ *Id.*

⁵⁸ See SierraClub.org, Keep Animal Waste Out of Waters, <http://www.sierraclub.org/factoryfarms/> (last visited April 10, 2007).

⁵⁹ See SierraClub.org, Strategies to Keep CAFOs Out, <http://www.sierraclub.org/factoryfarms/resources/strategies.asp> (last visited Apr. 10, 2007).

⁶⁰ *Id.*

suit under the Clean Water Act.⁶¹ In March 2007, the HSUS successfully expanded its lawsuit against the Hudson Valley Foie Gras farm for violating the Clean Water Act.⁶² Hudson Valley Foie Gras raises and slaughters ducks to produce the French delicacy *foie gras*--fatty liver.⁶³ The birds are force-fed abnormal amounts of food through a pipe shoved down their throats.⁶⁴ This causes their livers to expand to more than ten times its natural size.⁶⁵ This practice causes extreme and inhumane suffering for the birds and produces large amounts of fecal and slaughter waste.⁶⁶

Less than one year ago, the State of New York granted the facility \$400,000 in tax funds to expand.⁶⁷ In August 2006, the HSUS filed suit against the state for granting the subsidy, and, in September 2006, sued Hudson Valley Foie Gras for hundreds of violations of the federal Clean Water Act.⁶⁸ New York defended granting the subsidy by insisting that the facility was in compliance with all federal and state laws.⁶⁹ The HSUS and other animal advocate groups filed suit against New York State to prohibit the production and sale of foie gras as an adulterated food product.⁷⁰ In February 2007, New York fined Hudson Valley Foie Gras \$30,000 for violating state environmental law over 800 times.⁷¹ The facility was facing up to \$37,500 *per* violation.⁷² The penalty issued equated to less than \$50 per violation.⁷³ In March 2007, in federal court, the Humane Society successfully expanded its

⁶¹ HSUS.org, State Fines Foie Gras Factory Farm in Response to HSUS Lawsuit, http://www.hsus.org/farm/news/pressrel/state_foie_gras_factory_030607 (last visited Apr. 10, 2007).

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

ongoing lawsuit against Hudson Valley Foie Gras for violation of the federal Clean Water Act to ensure appropriate penalties are assessed and to include the new legal violations identified by the state.⁷⁴ The matter is still pending in federal court.⁷⁵ As a result of this litigation, there are two bills before the New York State Assembly and Senate that would outlaw force-feeding birds to produce fatty livers.⁷⁶

Filing suit against the Hudson Valley Foie Gras shed light onto animal cruelty practices that were being sanctioned by the State of New York, resulting in enough public awareness to stimulate bills that would completely eliminate the practice in the state.⁷⁷ A favorable action in the federal court would force the facility to comply with federal regulations mandated in the Clean Water Act. Speculation can be drawn on how compliance with the Clean Water Act would impact the act of force-feeding birds: it may not end the force-feeding, and result in only environmental benefits for surrounding waterways. Compliance with the Clean Water Act would force *foie gras* farms to apply for a permit, adhere to the “Total Maximum Daily Load” stipulations, and report the amount of waste to either the EPA or the state authority.⁷⁸ Compliance with the Clean Water Act may require the facility to reduce the amount of waste produced, resulting in a decreased amount of birds that are force-fed and slaughtered for their fatty livers. Because the lawsuit was filed under the Clean Water Act, there will only be secondary benefits, if any, for the force-fed ducks.

In *Concerned Area Residents for the Environment et al. v. Southview Farm*, the plaintiffs used the citizen’s provision under the Clean Water Act, as well as, nuisance, negligence, and trespass claims to challenge the defendant’s practice of storing and disposing of liquid manure on its large dairy farm in western New York.⁷⁹ Southview Farm is the largest dairy farm in the State of New York with 2,200 heads of cows, heifers, and calves.⁸⁰

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ 33 U.S.C. § 1251 (303)(d) (2004).

⁷⁹ 34 F.3d 114 (2d Cir. 1994).

⁸⁰ *Id.* at 116.

Southview does not use traditional pasturing practices.⁸¹ Instead, the animals are kept in barns except for the three times a day they are milked.⁸² The enormous amount of fecal waste produced is not handled in the traditional farming husbandry practice of spreading the manure with a manure spreader.⁸³ Instead, the waste is stored in four-acre storage lagoons with a capacity of approximately six to eight million gallons of liquid waste.⁸⁴ A separator works in conjunction with the lagoons.⁸⁵ It pumps the manure over a mechanical device which drains off the liquid and passes the solid waste out through a compressing process.⁸⁶ The solid waste is then dropped into bins for transport while the liquid runs through a pipe into the lagoons via gravity.⁸⁷ The separated liquid was used for washing down the barns where the cows are housed.⁸⁸ Southview's records show that millions of gallons of manure were applied to its field.⁸⁹

The plaintiffs filed suit against Southview, alleging the facility was subject to compliance with the Clean Water Act and had eleven violations, which included liquid manure draining directly into a stream that ultimately flows into Genesee River.⁹⁰ The district court granted judgment in favor of the defendants, holding that as a matter of law the facility was not a CAFO subject to compliance because, on a portion of the farm, crops were grown.⁹¹ The plaintiffs appealed.⁹²

The appellate court held the facility had over 700 cattle that were *not* put out to pasture; under definition of the Clean Water Act the facility was a CAFO, and therefore, one type of point source under the Act.⁹³ As a CAFO, Southview was not

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 116-17.

⁹¹ *Id.*

⁹² *Id.* at 117.

⁹³ *Id.* at 117-18

subject to any agricultural exemptions.⁹⁴ The Clean Water Act requires that point sources obtain a permit for discharges which was not done in this instance.⁹⁵ The district court's ruling was reversed and remanded for further proceedings.⁹⁶

As in the Foie Gras case, the matter presented before the court was constrained to the Clean Water Act. The actual animal cruelty involving poor treatment of the cows was irrelevant to the proceedings. Southview will have to comply with the Clean Water Act because as a CAFO it is a point source, but will it have to change its practices towards the cows? It all depends on how the CAFO wants to handle reducing and controlling the amount of pollutant it expels. There is a level of uncertainty that accompanies a victory for animal advocates under environmental laws.

C. Understanding the Clean Air Act

The Clean Air Act regulates sources of air pollution. Its primary objective is to establish federal standards for various pollutants from stationary and mobile sources and to provide regulations for polluting emissions by state implementation plans.⁹⁷ Also, the amendments are designed to prevent significant deterioration in certain areas where air quality exceeds the national standards, and to obtain improved air quality where federal standards are not met.⁹⁸ EPA is supposed to report to Congress newer methods to achieve greater visibility and to issue regulations to achieve that objective.⁹⁹ The Clean Air Act has a citizen-suit provision that gives citizens a right to the courts when they have been harmed or aggrieved by an air polluter.¹⁰⁰

⁹⁴ *Id.* at 118.

⁹⁵ *Id.*

⁹⁶ *Id.* at 123.

⁹⁷ See 42 U.S.C § 7491 (2003); See also Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, http://www.fws.gov/laws/laws_digest/clenair.html (last visited Apr. 17, 2007).

⁹⁸ See Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, *supra* note 97.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

*D. Exploring How the Clean Air Act Can Be Related
To Animal Cruelty*

A CAFO emits pollution that threatens animal welfare.¹⁰¹ The emissions are often so noxious that the pathologies produced are “painful, stressful and even fatal to animals and agriculture workers.”¹⁰² Swine facilities have the potential to produce the most deadly fumes.¹⁰³ The waste disposal systems in swine facilities drops the waste through slats on the floor into a large pit, where massive amounts of waste release more than forty poisonous gases, including ammonia and hydrogen sulfide.¹⁰⁴

An Iowa State University report notes that nearly 60% of workers in swine confinement facilities commonly suffer respiratory effects ranging from headaches to shortness of breath. When manure pits are agitated before emptying, hydrogen sulfide levels can rise to lethal levels within seconds. Exposure to hydrogen sulfide during pit agitation has accounted for the deaths of several confinement workers.¹⁰⁵

Three-quarters of all ammonia emitted in the United States comes from animal agriculture.¹⁰⁶ Poultry factory farms are contributors to ammonia emissions.¹⁰⁷ The ammonia is the result of wet litter and high temperatures that promote bacterial growth, releasing the noxious gas.¹⁰⁸ Research shows that ammonia levels of 50 parts per million in a single poultry house is above normal and will seriously impact bird growth and significantly

¹⁰¹ See Susanne Abrormaitis, *EPA Offers Large Producers Amnesty on Clean Air Act Violations*, Feb. 17, 2005,

http://www.hsus.org/farm/news/ournews/epa_amnesty.html.

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

compromise animal welfare.¹⁰⁹ The excessive amounts of ammonia can cause “respiratory disease, gastrointestinal irritation, foot/hock and breast blisters, eye infection, blindness and even death.”¹¹⁰ The exposure to ammonia can cause trachea and lung lesions that can render birds more susceptible to bacterial infections such as *E. coli*.¹¹¹ “Many factory farms set up operations in an area with the full expectation of closing down within ten years, because they know the high levels of ammonia and other noxious gases will corrode the very foundation of the barns,” says Robert Haddad, Director of Farming Systems for the HSUS.¹¹²

By the very nature of a CAFO, crowded indoor quarters with hundreds or thousands of animals crammed in, producing enormous amounts of fecal waste daily, an opportunity of “harm” will surely arise--giving way to a citizen suit under the Clean Air Act. Animal advocacy groups can and have filed such a suit under the Clean Air Act. Much like the results in a Clean Water Act lawsuit, there is some question as to how beneficial the suit is to the animals in question.

However, the Clean Air Act may have a stronger impact on a CAFO than the Clean Water Act. Controlling the amount of noxious gas in the air would mean producing less fecal waste, which directly impacts the amount of animals a facility could have. Controlling the amount of fecal waste expelled into the waterways, for compliance with the Clean Water Act, could be accomplished by producing less waste or implementing a different disposal method. Compliance with the Clean Air Act could result in better ventilation for animals, larger quarters, different waste disposal, and possibly fewer animals in a facility. This would not stop other forms of animal cruelty, but it may increase the quality of life for some animals.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Id.*

E. Understanding the Migratory Bird Treaty Act

The Migratory Bird Treaty Act was enacted to put an end to commercial trade of birds and their feathers.¹¹³ The Treaty decreed migratory birds and their parts, including eggs, nests, and feathers, are fully protected.¹¹⁴ The Treaty is domestic legislation that implements the United States' commitment to four international conventions for protection of shared migratory bird resources: Canada, Japan, Mexico, and Russia.¹¹⁵ Each convention serves to protect a selected species of birds that are common to both party-countries during the birds' annual life cycle.¹¹⁶

The Migratory Bird Treaty Act is a criminal statute and does not provide a citizen suit provision.¹¹⁷ A private party who violates the Act is subject to prosecution by the Department of Justice.¹¹⁸ Because of the absence of a citizen suit provision, a citizen wanting to file suit to prevent a federal agency from taking arbitrary and capricious final agency action under the Act would have to file under the Administrative Procedure Act (APA) to gain access to the courts.¹¹⁹ If the prohibitions of the Migratory Bird Treaty Act apply to the federal agencies, "private parties could seek to enjoin Federal actions that take migratory birds, unless such take is authorized pursuant to regulations developed in accordance with 16 U.S.C. 704, even when such Federal actions are necessary to fulfill Government responsibilities and even when the action poses no threat to the species at issue."¹²⁰

¹¹³ See A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, <http://www.fws.gov/migratorybirds/internltr/treatlaw.html> (last visited Apr. 12, 2007).

¹¹⁴ See 16 U.S.C. § 703(a) (2004).

¹¹⁵ See *id.*; See also A Guide to the Laws, *supra* note 115.

¹¹⁶ See A Guide to the Laws, *supra* note 115.

¹¹⁷ See Wildlife and Fisheries, 50 C.F.R. § 21 (2006).

¹¹⁸ See DEPT. OF INTERIOR, MIGRATORY BIRDS; TAKE OF MIGRATORY BIRDS BY THE DEPARTMENT OF DEFENSE (2004), <http://www.fws.gov/migratorybirds/issues/dodmbtarule/MBTATakeProposedRuleFinal.pdf>.

¹¹⁹ See *id.*

¹²⁰ *Id.*

F. Understanding the National Environmental Policy Act

National Environmental Policy Act (NEPA) was enacted “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”¹²¹ NEPA requires federal agencies to incorporate environmental values into their decision making process.¹²² The agencies must consider the environmental impact of any proposed action and reasonable alternatives.¹²³ To ensure these requirements are met, federal agencies must submit an Environmental Impact Statement--a detailed statement--which EPA will review and comment on.¹²⁴ The EPA maintains a national filing system for all EISs. “NEPA does not mandate protection of the environment. Instead, it requires agencies to follow a particular process in making decisions and to disclose the information/data that was used to support those decisions.”¹²⁵ NEPA is not equipped with a citizen suit provision.¹²⁶ All citizens wanting to file suit because of NEPA violation have to file under the APA to gain access to the courts.¹²⁷

¹²¹ 42 U.S.C. § 4321 (2000).

¹²² See National Environmental Policy Act, <http://www.epa.gov/compliance/nepa/index.html> (last visited Apr. 11, 2007).

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ The U.S. Department of the Interior Bureau of Land Management, National Environmental Policy Act of 1969, <http://www.blm.gov/wo/st/en/infor/nepa.2.html> (last visited Apr. 8, 2007) (explaining the National Environmental Policy Act and how it is applied).

¹²⁶ See National Environmental Policy Act, *supra* note 122.

¹²⁷ See *id.*

G. An Application of NEPA & Migratory Bird Treaty Act

In 2005, the Fund for Animals, the HSUS, the Animal Rights Foundation of Florida, and several private citizens filed a suit against the U.S. Department of Interior and, subsequently other federal agencies for violating the Migratory Bird Treaty Act, NEPA, and the Endangered Species Act.¹²⁸ The lawsuit was in response to federal efforts to manage the nation's population of double-crested cormorants (species of bird).¹²⁹ According to federal administrative records, the cormorant was responsible for \$25 million annually lost in catfish production, mostly in the Mississippi Delta.¹³⁰ The plaintiffs petitioned for declaratory and injunctive relief.¹³¹ Both parties motioned for summary judgment.¹³²

The Fish and Wildlife Service is the federal agency with authority to regulate the double-crested cormorant via the Migratory Bird Treaty Act.¹³³ Although the species is not protected by the Endangered Species Act, it is federally protected under the 1972 amendment to the Convention for the Protection of Migratory Birds and Game Mammals.¹³⁴ Under the statute, protected birds may not be taken except as authorized by regulation implementing the Migratory Bird Treaty Act.¹³⁵ "Take" means to hunt, kill, trap, capture, pursue, or collect or attempt to do any of the before-mentioned.¹³⁶

The court found that the Fish and Wildlife Service based its analysis on a "considerable body of then-available knowledge, while acknowledging certain open questions that merited future research and monitoring."¹³⁷ The plaintiff's claim that the Final Environmental Impact Statement violated NEPA by failing to

¹²⁸ See *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 399 (2005).

¹²⁹ See *id.* at 400.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.* at 407.

¹³⁴ See *id.* at 400.

¹³⁵ See *id.*

¹³⁶ See *id.*, citing 50 C.F.R. § 10.12.

¹³⁷ See *id.* at 433-34.

include an adequate compilation of relevant information was rejected.¹³⁸ The court held that Fish and Wildlife Service's approach to managing species population under public resource depredation order did not contradict the intent or any provision of the Migratory Bird Treaty Act, since the agency determined when, to what extent, if at all, and by what means taking of birds was permissible, and adopted suitable regulations.¹³⁹ As for the Endangered Species Act claim, the court found that there was no violation: the cormorant was not protected under the Endangered Species Act and the Fish and Wildlife Service's actions were not likely to jeopardize the continued existence of endangered or threatened species.¹⁴⁰ Summary judgment for the defendants was granted.¹⁴¹

While the court did not render a favorable judgment for the plaintiffs involved, this case is a good example of how citizens and organizations can successfully gain access to the courts via Administrative Procedure Act to sue for violations under the Migratory Bird Treaty Act and NEPA. It is also an example of how organizations interested in the wellbeing of animals have to focus on other issues in order to file suit under environmental law. Instead of focusing on the thousands of cormorants that would be killed unnecessarily by a change in policy, the plaintiffs focused on administrative requirements under NEPA and pertaining to Migratory Bird Treaty Act.

Since neither NEPA nor the Migratory Bird Treaty Act have citizen suit provisions, the plaintiffs had to use the Administrative Procedure Act to gain access to the courts.¹⁴² Perhaps the plaintiffs could have presented a similar argument of aesthetic injury, as in *Animal Legal Defense Fund v. Glickman*.¹⁴³ This presumes the plaintiffs witnessed acts of animal cruelty, such as cormorant killings. A more feasible argument may have been that there was a presumptive nuisance. This would have allowed the plaintiffs to argue that killing cormorants could be presumed to be a nuisance and there was no need to wait until it actually

¹³⁸ See *id.* at 434.

¹³⁹ See *id.* at 410.

¹⁴⁰ See *id.* at 426-27.

¹⁴¹ See *id.* at 434.

¹⁴² See National Environmental Policy Act, *supra* note 123.

¹⁴³ 154 F.3d 426, 428 (D.C. Cir 1998).

happened.¹⁴⁴ It is mere speculation as to whether a presumptive nuisance argument would have prevailed, but such an argument would have focused more on the harm of killing cormorants than Fish and Wildlife Service administrative procedure.

IV. CONCLUSION

The fight for environmental justice may benefit the goals of animal advocates. Both environmental groups and animal advocates recognize the harm that can be inflicted on the environment and farm animals by government agencies, private persons, and CAFO facilities. It is clear from research that the system is not perfect, and that it takes creative legal tactics in the war against animal cruelty.

Applying tactics such as filing suit under environmental laws may result in some benefits, but they require the plaintiffs to focus on environmental issues. An animal advocacy organization desiring to assist the plight of farm animals in CAFOs would have to focus on sewage run-off or other impacts on surrounding waterways to file suit under the Clean Water Act. The same organization would have to focus on noxious gases and fumes to state a claim under the Clean Air Act.

NEPA and Migratory Bird Treaty Act suits force the plaintiffs to sue the government agency with authority to enforce or regulate applicable laws and not the entity causing the harm. None of these tactics focus directly on animal cruelty.

Positive results stemming from lawsuits filed under environmental legislation have secondary benefits for suffering animals. While this may improve quality of life for the animals in question, it may not end all of the suffering from animal cruelty. This was shown in the case involving the *foie gras* factory, where the actual birds may not gain much benefit from the factory having to comply with the Clean Water Act. As with the cormorants in the Fish and Wildlife Service case, a more favorable decision may have resulted if the case were focused on the senseless extermination of cormorants rather than on the administrative practice of the Fish and Wildlife Service.

¹⁴⁴ See Strategies to Keep CAFOs Out, *supra* note 59.

Environmental law is feasible to use in litigation pertaining to animal cruelty, but the remedies ultimately may not be beneficial to the movement against animal cruelty. Such litigation draws focus away from the actual harms experienced by animals and may weaken appreciation of the seriousness of these harms imparted to politicians, the public and commercial animal entities. There must be an equal balance to make sure that the actual cruelty is not forgotten or does not fade into the background while we search for creative and innovative legal tactics to force private actors and the federal government to comply with present law, as well as implement new laws that give greater access to the courts.

AN ANIMAL IS NOT AN IPOD

DIANE SULLIVAN & HOLLY VIETZKE*

Those of us who teach animal law know one pervasive theme that resonates throughout our courses: American society's convenient classification of animals as property, worth nothing more than a piece of merchandise – and a low-priced one at that. That treatment inevitably leads to the most basic question of how a society as great as ours can equate life – any life, much less man's best friend – with a piece of furniture or even the latest iPod. Our animal law textbooks are replete with decision after decision that make all too clear that the law does nothing to genuinely protect animals, nor does it recognize their true value and special place in our homes and within our families. Our legal system just does not recognize the bond between people and their companion animals,

* Diane Sullivan is a professor of law at the Massachusetts School of Law. She teaches Contracts, the Uniform Commercial Code, Issues Impacting Women, and Animal Law. She is also a faculty advisor to the school's student chapter of the Animal Legal Defense Fund. She is an author and editor of a book entitled *Please, Can We Keep the Donkey?*, which is a collection of animal rescue stories published by Lantern Books and due out this spring. She has also written several op-ed pieces that have appeared in various major newspapers including the *Atlanta Journal-Constitution*. In addition to her teaching duties, Ms. Sullivan serves as moderator and producer of MSLAW's *Educational Forum* television series.

Holly Vietzke, Esq. is an assistant professor of law at the Massachusetts School of Law in Andover. In addition to directing and teaching a first-semester writing course, she teaches animal law, sports law, and sophisticated speech. Holly serves as a faculty advisor to the school's chapter of the Student Animal Legal Defense Fund, and she is an author and editor of *Please, Can We Keep the Donkey?*, a collection of animal rescue stories by students and faculty of the Massachusetts School of Law and associate editor of *The Long Term View*, a public policy journal published by the law school. She has also written op-ed pieces that have appeared in the *Atlanta Journal-Constitution*, *Hartford Courant*, *Lawrence Eagle-Tribune*, and the *Lowell Sun*.

and when that bond is severed, it completely fails to compensate for that loss.

I. COMPANION ANIMALS VERSUS OTHER ANIMALS

In any discussion concerning reform, the question often arises as to whether we should distinguish companion animals, like dogs and cats, from other animals when we argue for eliminating the property classification of animals or expanding animal rights. Clearly, it is an easier argument to limit it to companion animals, and in our experience, is a more receptive argument to the expansion of rights or the elimination of the property classification. However, such a distinction puts too great a strain on science and compassion for us to promote without reservation. Although it would be easy to give into the distinction between companion animals and other animals, to do so ignores the fact that non-companion animals, like chimpanzees, have genetic make-ups very similar to ours and have the capacity to experience great pain. To suggest that a dog has rights and value beyond property, but a chimp does not, leads to an absurd conclusion: that chimps can be seen as worthless innate objects even though dogs cannot. Chimps can experience a broad array of emotions like joy, grief, and sadness. Their genetic make-up is nearly identical to ours. So we posit this: Shouldn't a chimp have rights equal with recognition of those qualities? Isn't it morally wrong for a chimp to have its fundamental needs ignored, or for there to be no recourse or remedy to the pain and suffering it receives because we treat it as the property of humans? Of course it is. But a unique aspect of animal law is that the majority of its issues pertain primarily to companion animals. Cruelty and humane treatment of animals aside, tort law, contract law, wills and trusts law, and family law all deal with issues regarding companion animals (with the exception of a tort against livestock, which the law actually grants *more* protection to so long as it is part of one's livelihood).¹ While

¹ See generally *Katsaris v. Cook*, 180 Cal. Ct. App. 3d 256 (1986), which held that an owner of livestock was permitted to shoot a neighbor's dogs who had wandered onto his property and growled at his cattle. *Id.* at 262-63. According to the court, "the Legislature found that the public's interest in protecting farm animals outweighed the dog owners' right to permit

environmental and constitutional law issues (such as the Endangered Species Act and the Marine Mammal Protection Act) do address the rights of non-companion animals, in arguably higher profile manner (who has not heard that tuna nets also trap dolphins?), the property classification of animals affects—and hurts—companion animals more than it does our non-domesticated friends. Therefore, while animal welfare groups have done a good job raising the awareness of the plight of the giant panda and the previously endangered bald eagle, the greatest strides yet to be made involve companion animals.

Comment [JB1]: Wasn't the author previously arguing that companion animals are given more protection and that we need to be worried about non-companion animals, such as chimps?

II. PROPERTY CLASSIFICATION

As wrong as it is, animals are considered property in the eyes of the law despite the fact we all know animals feel pain, display emotion, exhibit loyalty and sadness, and (in some cases) share most of our genetic make-up. We could argue for judicial notice of this. Based on our common knowledge of animals, the need to eliminate animals as property is a crucial requirement to the expansion of animal rights. We think this argument is beyond dispute.

Most of us remember reading the historically embarrassing *Dred Scott*² decision, in which the court discusses that black African slaves were “bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.”³ So, slaves were considered property and specifically, the property of their owners. The property classification of slaves was wrought with problems: How can one “free” property? How can property be a beneficiary of a will or trust? Ironically, however, slaves were held responsible for crimes. It is interesting that “property” could be punished for a crime, but clearly this distinction was made to support the economic interest of the slave owner.

their animals to roam freely on land occupied by livestock,” *id.* at 263, and “[a]ny conduct necessary to the killing of a trespassing dog will be within the privilege,” *Id.* at 266.

² See *Scott v. Ford*, 60 U.S. 393 (1846).

³ *Id.* at 407.

Similarly, a woman was considered nothing more than the chattel of her husband.⁴ And with respect to children, windswept across the Atlantic came the well established notion that children, like wives, were considered property, and the courts dragged their heels—and still do in certain situations—in recognizing basic rights of children. It seems courts still worry about running roughshod over parental rights. There is also resistance from commercial interests, which brand animals as chattel. Animals are defined as property because it is convenient—and profitable. This allows them to be exploited, harmed and used for experimentation and entertainment, all with impunity.

As we make the argument that just as the African slave did, animals, women, and children deserve a non-chattel status, we recognize human personhood status may be too quick a leap to gather the requisite momentum to win this battle today. It has been suggested that a midway approach is to classify animals as sentient property.⁵ Sentient property has the capacity to feel pain, which, as anyone who has trimmed a dog's nails too short can attest, clearly animals have. Although this approach is underinclusive, perhaps it would advance the ball toward a "personhood" status for animals.

Approximately 20 cities—and even one entire state—have taken the leap of considering animals as more than just mere property.⁶ Boulder, Colorado; West Hollywood, San Francisco, and Berkeley, California; Amherst, Massachusetts; Windsor, Ontario; and Rhode Island⁷ are among the locales that passed measures to change the status of people from owners to guardians of their companion animals. While this is good news for the perception that animals are more than inanimate objects, the

⁴ See *Burdano v. Amperse*, 14 Mich. 91, 92 (1866).

⁵ See SENTIENT PROPERTY: A Novel Proposal for Animal Law: MORE THAN PROPERTY, LESS THAN PERSONS, Animal Legal Report Services, July 28, 2004, <http://www.animallegalreports.com/press.asp>.

⁶ Oregon Veterinary Medical Association, *Owner vs. Guardianship*, <http://www.oregonvma.org/news/owner.asp> (last visited Feb. 4, 2008).

⁷ See Jon Katz, *Guarding the Guard Dogs: Are You a Dog "Owner" – Or a Dog "Guardian"?*, SLATE, <http://www.slate.com/id/2096577/> (last visited Feb. 4, 2008); <http://www.vet.upenn.edu/bellwether/v62/article2.shtml> (last visited Feb. 13, 2008).

classification of guardianship does carry with it some drawbacks. For example, guardians—in the legal sense—do not take "title" to the "property," must be appointed by the court, and have only the powers prescribed to them by statute.⁸ Of course, given the fact that no one else is likely to claim "ownership" or contest the guardianship, these legal technicalities are largely irrelevant in this context.

There is another possibility. Perhaps the best solution is that set forth by David Favre. Favre suggests applying the principles of trust and property law to split the "ownership"—or title—between the animal and the human. Under the equitable self-ownership theory,⁹ the animal would gain equitable title, and its human would retain legal title, much like a trustee would have.¹⁰ In this scenario, the animal would have the right to protect its own interests, which would give it standing (a current problem with the property classification), and the human would have the responsibility to make sure he or she acts in the animal's best interest.¹¹

III. THE EFFECT OF THE PROPERTY CLASSIFICATION ON TORT LAW

Perhaps the property classification is most limiting in the recovery for harm done to the animal. There is no question that a parent can recover for negligent injuries inflicted on her child, but the same is not true if the parent—or child—sees her Yorkshire terrier hit by a reckless driver. This is because, with a property classification, the law sees the animal as nothing more than chattel, and the recovery for damaged chattel is simply the fair market value of its worth. But anyone who has ever enjoyed a pet knows that the cost of the pet is hardly a fair measure of its worth. A 2005 survey revealed that 75% of pet owners consider pets to be part of their families.¹² The law must catch up with the emphasis our society now places on its pets.

⁸ See RESTATEMENT (SECOND) OF TRUSTS § 7 (1959).

⁹ See David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

¹⁰ See *id.* at 476.

¹¹ See *id.* at 496-97.

¹² This survey of 1,518 people was conducted by Harris Interactive on behalf of The Hartz Mountain Corporation, Pet age.com, *Pets as Part of*

Shirley S. Abramson, Chief Justice of the Wisconsin Supreme Court, in her concurring opinion in *Rabideau v. City of Racine*,¹³ wrote, "the plaintiff's only remedy is for loss of property."¹⁴ She suggests that the issue of damages beyond property loss for companionship, love, and the like belongs with each state's legislature.¹⁵ In her concurring opinion, the Chief Justice writes, "I wish to emphasize that this case is about the rights of a pet owner to recover in tort for the death of her dog. Scholars would not classify this case as one about animal rights."¹⁶

As much as we have great respect for this Chief Justice having appeared before her progressive court, this conclusion is wrong. Concluding that the plaintiff's only recovery is for "property loss" reflects a continuation of the view that animals have no intrinsic worth and fails to recognize the human/animal bond. Admittedly, the Wisconsin Court did not rule out the possibility of recovery for intentional, rather than negligent, infliction of emotional distress.

A handful of states have enacted statutes providing recovery for damages for intentional or negligent harm to animals. In California, for example, one may recover for "wrongful injuries to animals" as a result of gross or willful negligence.¹⁷ Tennessee, the first state to permit such recovery, allows up to \$5,000 for the death of a pet caused by the negligent or intentional act of another.¹⁸ It is important to note that the Tennessee legislature made a distinction between negligent and intentional acts in that if the death was a result of negligence, it must have occurred on the pet owner or caretaker's property, or under the supervision of such. This caveat therefore exempts deaths caused by negligent veterinary care.

In Ohio, one who maliciously or willfully, without the owner's consent, injures another's farm or domestic animal can be

the Family, <http://www.petage.com/news070508.asp> (last visited Feb. 4, 2008).

¹³ 627 N.W. 2d 795 (2001).

¹⁴ *Id.* at 807.

¹⁵ *Id.*

¹⁶ *Id.* at 806.

¹⁷ See Cal. Civ. Code Ann. § 3340 (West 2007).

¹⁸ See Tenn. Code Ann. § 44-17-403 (2007).

ordered to pay restitution to the owner.¹⁹ The statute specifically exempts veterinarians. Illinois provides redress for aggravated acts of cruelty or torture for which the owner is entitled to recover up to \$25,000 “for each act of abuse or neglect to which the animal was subjected.”²⁰

One of the best examples of the wrongness of the property classification of animals is the denial of emotional distress damages when a person’s pet is killed during transport by an airline carrier. The pet’s owner (guardian) will typically recover the baggage liability limit of \$1,250.00 as though a helpless dog killed at the hands of an airline during a flight is the same as a missing bag of luggage containing a couple of suits and pairs of shoes.

In our animal law class, we discuss the case of *Gluckman v. American Airlines, Inc.* in which the court dismissed claims for both negligent and intentional infliction of emotional distress as well as claims for the loss of companionship and for the animal’s (“Floyd”) pain and suffering, despite the fact that American Airlines admitted its behavior was negligent and caused Floyd’s death.²¹ When a mechanical error forced the plane to taxi for more than an hour, the temperature in the unventilated cargo area (where Floyd was forced to travel) reached 140 degrees. Gluckman found Floyd lying on his side panting, face and paws bloody, with blood all over the crate. The condition of the crate showed clearly that Floyd desperately tried to escape.²² American Airlines, 45 minutes later, brought Floyd to a veterinarian, who diagnosed Floyd as suffering from heatstroke and brain damage.²³

The New York court dismissed the negligent infliction of emotional distress claim stating such action “arises only in unique circumstances, when a defendant owes a special duty only to plaintiff, or where there is proof of a traumatic event that caused the plaintiff to fear for her own safety.”²⁴ As to the intentional infliction of emotional distress claim, the court suggests that “[a]

¹⁹ See Ohio Rev. Code Ann. § 959.02 (West 2007).

²⁰ 510 Ill. Comp. Stat. Ann. 70/16.3 (West 2004).

²¹ 844 F. Supp. 151, 156 (1994).

²² See *id.* at 154.

²³ See *id.*

²⁴ *Id.* at 157 (citing *Cucchi v. N.Y. Off-Track Betting Corp.*, 818 F. Supp. 647, 656 (1993)).

deplorable as it may be for American to have caused the death of an innocent animal, the Court finds no allegation, and no evidence . . . that American's conduct was directed intentionally at Gluckman."²⁵

The court likewise denied the claim for loss of companionship, refusing to recognize such an independent cause of action.²⁶ Finally, with respect to the cause of action for Floyd's pain and suffering, the court again refused to recognize a viable claim.²⁷

Subsequent courts have continued to follow *Gluckman* and the court's line of reasoning. However, the good news is that one of our former students in the animal law class is a commercial airline pilot for a major carrier and informed the class that despite that lack of legal liability, his airline made major changes to their operating procedures when transporting animals following the *Gluckman* decision. He suggests that it is much safer today to transport a companion animal aboard his airline, and in fact he regularly transports his dog who loves the adventure.

While the courts may be slow to provide redress for negligent acts causing harm to animals, some defendants are not. Between 2000 and 2005, Massachusetts utility company NStar was responsible for the deaths of three dogs (and electrocutions of more than a dozen more) when they walked over "hot spots" of live underground wires on the sidewalks in Boston.²⁸ NStar accepted the blame and settled with the families for undisclosed amounts.²⁹ Whether these settlement offers were the result of a value the company places on companion animals or the desire to avoid negative publicity and a lawsuit, the outcome remains the same: the families were compensated for much more than "property loss" alone. NStar rightly realized that people have an affection for their pets that cannot be dismissed. In fact, Boston Mayor Thomas

²⁵ *Id.* at 158.

²⁶ *See id.*

²⁷ *See id.* at 159.

²⁸ *See* Jessica Bennett & David Abel, *Stray street voltage electrocutes dog*, BOSTON GLOBE, Feb. 5, 2004, B1; *See also* Peter J. Howe, *Dog's family demands \$740,000*, BOSTON GLOBE, Mar. 8, 2005, A1

²⁹ *See* Howe, *supra* note 28 at A1.

Menino stated he would push for legislation that would fine utility companies up to one million dollars in these instances.³⁰

IV. PROPERTY AND STANDING

Because animals lack legal rights and are classified as property, they also lack standing. This limitation also presents a significant barrier to bringing cases on behalf of animals. Since animal cases are often brought in federal court, Article III standing must be satisfied. As stated in *Humane Society of the United States v. Hodel*,

Art[icle] III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision."³¹

Because animals' property classification limits animals suing in their own right (except for animals on the endangered species list, who are granted standing automatically), lack of standing represents a significant bar to suits brought on behalf of or for the benefit of animals. The requirement of "injury-in-fact" is a tough hurdle to overcome. Plaintiffs suing on behalf of animals will be easily defeated if the injury is one of emotional harm. If an animal is property, how can a plaintiff satisfy injury-in-fact when emotional harm resulting from pain inflicted on property is non-cognizable?

On a limited basis, organizations, namely animal rights organizations, have satisfied the "organizational standing" requirements.

[An] association has standing to bring suit on behalf of its members when: (a) "its members

³⁰ Mac Daniel, *A reckoning after the shock*, *Boston Globe*, Mar. 4, 2004.

³¹ 840 F.2d 45,51 (1988) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."³²

Since aesthetic injury enables an organizational member to sue in its own right, the first prong of organizational standing can be easily satisfied. Germaneness, as set forth in element two, is often a formidable obstacle to standing. In essence, we see this requirement as meaning the organization's purpose must be closely allied with the lawsuit. We see germaneness as requiring the harm to the animal(s) underlying the basis of the lawsuit to be consistent with the goals or being germane to the organization's purpose. *Humane Society of the United States v. Hodel* held that "[the] lawsuit challenging the revivification of hunting on wildlife refuges is germane to the purposes of the Humane Society, and [we] therefore conclude that the organization has standing to challenge these practices as a representative of its members."³³

An interesting side note is that a plaintiff litigating on behalf of animals often seeks preliminary injunctive relief. One of the crucial elements a plaintiff must prove is "irreparable harm," which can prove to be rendered meaningless because technically one cannot protect until there is irreparable harm. So, what is left to "protect?"

V. UNITED STATES VS. THE WORLD

As law professors specializing in this field, among the most horrific examples of lack of legal recognition of rights of animals include the "animal sacrifice cases." If Mahatma Gandhi was correct when he said, "The greatness of a nation and its moral progress can be judged by the way its animals are treated," then the

³² Int'l Union United Auto. Workers v. Brock, 477 U.S. 274, 282 (1966) (citing *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

³³ *Hodel*, *supra* note 33 at 60.

United States has a very long way to go before it is a great nation, as compared to our allies.³⁴

In 1957, the European Economic Community signed the Treaty of Rome.³⁵ Absent from this treaty were provisions on animal welfare. Accordingly, a revision followed 40 years later, entitled The Treaty of Amsterdam, which included an animal welfare protocol.³⁶ The strength of this treaty between and among contracting parties is recognition that animals are sentient creatures capable of feeling and experiencing pain, and requires its members "to 'pay full regard to the welfare requirements of animals.'"³⁷ European law bans veal crates, regulates the treatment of egg-laying hens, calves, and much more.³⁸ Israel has voted to end force-feeding animals and birds fully recognizing foie gras is a barbaric and inhumane practice.³⁹ The United States, in fact, does not even ban animal sacrifice. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the court struck down city ordinances that prohibited the practice of animal sacrifice by the Santeria religion on First Amendment grounds.⁴⁰ Even though the Santeria rituals included killing chickens, pigeons, doves, ducks, goats, sheep, and turtles by cutting their carotid arteries, the Court ruled that the ordinances, which specifically prohibited "ritual sacrifices of animals," directly targeted the Santeria practices, thus interfering with the exercise of religion, of which it deemed there were 50,000 practitioners in South Florida at the time.

We, in collaboration with our colleagues, urge individuals here in the United States to unite with us to: (1) ensure the humane treatment of all animals; (2) save the lives of animals; and (3) push for the passage of a declaration on animal welfare by the United Nations. At a minimum, this declaration could be patterned after

³⁴ <http://thinkexist.com/quotes/>

³⁵ See Euro Group for Animals, *The Treaty and Animal Welfare*, http://www.eurogroupanimalwelfare.org/legislation/legislation_more1.htm (last visited Feb. 6, 2008).

³⁶ See *id.*

³⁷ Stephanie J. Engelsman, 'World Leader'—At What Price? A Look at Lagging American Animal Protection Laws, 22 PACE ENVTL. L. REV. 329, 347 (2005).

³⁸ See *id.* at 347, 352.

³⁹ See *id.* at 362.

⁴⁰ See 508 U.S. 520 (1993).

the European Union's Amsterdam Protocol that says all animals are sentient creatures, meaning that they are living, and living creatures have feelings and in particular feel pain.

For many years, we told our students that societal attitude toward animals has changed and will continue changing. A brighter day is coming, we told them. We assured them that the status of animals, at least companion animals, is evolving into one marked by compassion and humaneness, and that our laws will reflect that new status.

But Hurricane Katrina has shaken up our professorial prophesying. The stories and images were unbearable. Two years after Hurricane Katrina, images remain of people clinging to their companion animals on the top of their roofs and then being forcibly separated. We still see refugees escaping with their pets to designated bus pickup areas, only to be commanded to abandon their pets or remain behind with them in danger. To forbid people access to safety and shelter when they and their pets are giving deep emotional support to each other is unconscionable. We learned of animals, drowned, starved, and left for dead—between two to three thousand in all.⁴¹

The loss of these lives and the separation of thousands of others from their human companions have given urgency to the need to legally reclassify the status of domestic animals from property to beings. Defining companion animals as property is morally wrong and prevents their full protection.

Legislation has been passed that mandates pets be included in evacuations.⁴² For instance, U.S. Representative Barney Frank of Massachusetts is one of the sponsors of a federal bill that required provisions for pets and service animals in disaster plans in order for those plans to qualify the state or municipality for federal emergency funding.⁴³ This is, of course, to be praised, but it is obviously too late to save the animals who perished during the hurricane and its aftermath. We still need more progressive

⁴¹ See Mira Oberman, *Many Pets Still Homeless After Katrina*, DISCOVERY NEWS, Aug. 25, 2006, http://dsc.discovery.com/news/2006/08/25/katrinapets_an.html?category=animals&guid=20060825133000 (last visited Feb. 6, 2008).

⁴² Pets Evacuation and Transportation Standards Act of 2006, Pub.L. No. 109-308, 120 Stat. 1725 (2006).

⁴³ *Id.*

legislation to reflect the role of a companion animal's place in the family and within society. What about the recent tainted pet food crisis? Under existing law, owners of pets contaminated by melamine that died of renal failure would not be entitled to a judgment for non-economic damages of pain and suffering.

We have made strides. All too often, victims of domestic violence will not leave because most shelters do not allow pets to accompany the victims. This fact creates a no-win dilemma for the victim: either she leaves her pet behind, likely subjecting it to abuse and neglect, or she remains with the pet and suffers abuse herself. While they are still a minority, however, there are some programs that alleviate this situation. The Noah's Ark Foster Care Program in Boston, Massachusetts is a network of volunteers who will temporarily and secretly care for a victim's pet while she seeks the help she needs.⁴⁴ In New Mexico, the Companion Animal Rescue Effort (CARE) is a network of animal shelters, boarding kennels, and foster homes that provide temporary emergency care for abuse victims.⁴⁵ There are similar programs in Maryland,⁴⁶ California,⁴⁷ North Carolina,⁴⁸ and Arizona.⁴⁹

An animal may now even be protected by restraining orders. In California, Governor Arnold Schwarzenegger signed a

⁴⁴ See Claire Cummings, *Program for pets opens doors for abuse victims*, BOSTON GLOBE, June 7, 2007, at B1.

⁴⁵ See CARE Companion Animal Rescue Effort, *A program supporting emergency protective care for companion animals of domestic violence victims*, <http://www.apnm.org/programs/care/index.php> (last visited Feb. 6, 2008).

⁴⁶ See Anne Arundel County, Maryland, *Domestic Violence Pet Support Program*, <http://www.aacounty.org/AnimalControl/domesticViolence.cfm> (last visited Feb. 6, 2008).

⁴⁷ See Rancho Coastal Humane Society, *Animal Safehouse Program: Helping to Break the Cycle of Violence by Keeping Pets and People Safe*, <http://www.rchumanesociety.org/programs/safehouse.php> (last visited Feb. 6, 2008).

⁴⁸ See Forsyth County North Carolina, *Animal Control*, <http://www.co.forsyth.nc.us/AnimalControl/safehaven.aspx> (last visited Feb. 6, 2008).

⁴⁹ http://www.mag.maricopa.gov/archive/du/about_dv/keeping_safe/animal_cruelty/animal_cruelty.html.

bill that permits judges to name pets in restraining orders,⁵⁰ and a similar law went into effect on October 1, 2007 in Connecticut.⁵¹ These very positive developments have undoubtedly raised the status of animals in the eyes of the law, but there still needs to be more improvements, and programs such as these need to be the norm rather than the exception.

VI. CRUELTY TO ANIMALS

Dating back to 1887, Justice Niblack in his opinion in *State v. Bruner* stated,

There is a well defined difference between the offence of malicious or mischievous injury to property and that of cruelty to animals. The former constituted an indictable offence at common law, while the latter did not... The latter has in more recent years been made punishable as a scheme for the protection of animals without regard to their ownership.⁵²

The subject matter of this case was a tortured goose, not a companion animal.

The question then is, what happened? Where did our compassion for animals—including those not domesticated—go? Too often we see, read, and hear about people teasing or torturing animals for their own amusement. We need to vigorously prosecute those who abuse, neglect, or harm animals. The good news is that penalties for those actions are now becoming more severe. Massachusetts, for example, makes it a felony, punishable of up to five years in prison and a \$2,500 fine, to abuse an animal.⁵³ The not-so-good news is that many police chiefs and

⁵⁰ See generally Christie Keith, *Your Whole Pet*, SAN FRANCISCO CHRONICLE, Oct. 16, 2007.

⁵¹ See generally Christine Dempsey, *Law Gives Teeth to Pet Protection*, HARTFORD COURANT, Oct. 1, 2007, A1.

⁵² 12 N.E. 103, 104 (1887).

⁵³ See Mass. Gen. Laws Ann. ch. 272 § 77 (2007).

district attorneys do not pursue these stronger penalties because they still have the mindset that either an animal is property with no rights and little protection under the law, or there are too many other crimes to focus on and that resources should not be used for pursuing animal cruelty crimes.

The recent Michael Vick incident brought dog fighting, an underground practice occurring most frequently in urban areas, to the forefront. The outrage it generated—and the swift penalties that followed—gives hope to those of us who care deeply about animals. The argument (usually in his defense) that "it's cultural" is precisely the problem: we need to change the belief that this is an accepted form of entertainment by some members of our society. Whether he knew it was wrong or not is not relevant: it *is* wrong, and *everyone* needs to know that now.

VII. CUSTODY DISPUTES

Because animals are property, often divorce courts are left in the difficult position of who gets custody to be resolved typically on a basis of "title to the property" as opposed to the best interest of the pet. Accordingly, courts generally lack the authority to grant visitation of property. In *Bennett v. Bennett*, the court said, "Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals."⁵⁴ This holding was despite the fact that the court also noted that many consider a dog to be a member of the family.⁵⁵ In Maryland, however, one circuit court did uphold and enforce a divorce settlement agreement that granted one spouse visitation of the couple's dog for one month each summer.⁵⁶ Two other courts even considered the pet's best interest. In *Raymond v. Lachman*, the New York appeals court explained, "We think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years."⁵⁷ *Zovko v. Gregory*,

⁵⁴ 655 So. 2d 109,110-11 (1995).

⁵⁵ *Id.*

⁵⁶ *Ethan Assal v. Jennifer Barwick (Kidwell)*, Civil No. 164421 (Md. Cir. Ct., Montgomery Cty. 1999).

⁵⁷ 695 N.Y.S.2d 308, 309 (1999).

a Virginia case, involved roommates who shared the costs and responsibility of a cat.⁵⁸ When the roommates parted ways, one of them took the cat, and the other charged him with theft. After a trial to determine who was the better caretaker, the court decided that the cat "would be better off with Mr. Zovko."⁵⁹

The issues of custody and visitation are arising more and more frequently these days, and if the law begins to recognize animals as more than personal property, the "best interest" standard may eventually become the rule.

VIII. WILLS & TRUSTS LIMITATION

Courts have historically struggled in upholding wills and trusts that provide for a testator's or grantor's pets and have routinely invalidated bequests to companion animals.⁶⁰ Currently, 36 state legislatures and the District of Columbia⁶¹ have enacted laws to enable individuals to provide valid companion animal trusts, and the Uniform Trust Code provides for pet trusts too. What is interesting about wills and trusts law is that where the classification of animals as property is generally a limiting or negative aspect, when directions in a will regarding animals are against public policy, the courts will grant the animals more than just "personal property" status to reach what they deem the correct result. In *In re Estate of Howard H. Brand*, the testator directed that his horses and mules be destroyed upon his death, and the court noted that "the unique type of 'property' involved merits

⁵⁸ Case no. CH 97-544 (Va. Cir. Ct., Arlington Cty., Oct. 17, 1997).

⁵⁹ Brooke A. Masters, "In Courtroom Tug of War Over Custody, Roommate Wins the Kitty," Wash. Post, Sept. 13, 1997, at B1.

⁶⁰ See generally *In Re Howell's Estate*, 260 N.Y.S 598 (1932); See also *In re Searight's Estate*, 95 N.E.2d 779 (1950).

⁶¹ The states with statutes pertaining to pet trusts are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. See Estate Planning for Pets.org, *Pet Trust Statutes*, <http://www.estateplanningforpets.com/legal-statutes.htm> (last visited Feb. 6, 2008).

special attention. 'Property' in domestic pets is of a highly qualified nature, possession of which may be subject to limitation and control."⁶² A Pennsylvania court also denied the testator's wishes to have her two Irish setters destroyed humanely as being against public policy in *Capers Estate*.⁶³ Had the courts considered these animals as mere chattel, they would not have ignored the testators' wishes to dispose of their property as they desired.

IX. ANIMALS IN LABORATORIES

Like most jurisdictions, in Massachusetts it is a felony to willfully permit an animal to be subjected to unnecessary torture, suffering, or cruelty. Included in the definition of cruelty is "torment."⁶⁴ So, how does one justify permitting scientific research on animals? Most people would agree that to use a dog, cat, or even a chimpanzee for research experiments is, at a minimum, tormenting an animal. What many proponents of research would argue, however, is that research on animals is either "necessary," or "justified." To advance this position requires a rationale that a dog, cat, or chimp is the equivalent of an innate piece of property.

The Animal Welfare Act regulates animals used in research and in essence pre-empts state cruelty laws, as most state legislation specifically exempts research labs. State laws must exclude research activities because statutorily it is cruelty, punishable by fines or imprisonment or both.

Furthermore, the act of researching on animals is often supported on First Amendment grounds. The Animal Welfare Act is a weak federal law used to stifle public outrage over lab practices. Individuals like us or other concerned public citizens cannot sue under the act to prevent animal care violations. Oversight of lab animals rests with a committee at each research institution. The care required is minimal and would be a violation of state anti-cruelty laws.

⁶² *In re Estate of Howard H. Brand*, No. 28473 (Probate Court, Chittenden County, Vt., Mar. 17, 1999).

⁶³ 34 Pa. D. & C.2d 121 (1964).

⁶⁴ Mass. Gen. Laws Ann. ch. 272 § 77 (2007).

Arguments that animal research is necessary, justified, or does more good than harm detract from the overarching issue: the propriety of treating millions of animals like property for research at the hand and whim of the researcher. Arguments over the compatibility of different sciences and the necessity of the experimentation are merely collateral issues.

With the advancement of science and technology, it is now possible to conduct testing without having to use live animals. Human tissue, donated from human cells, can be grown in test tubes.⁶⁵ Computers can use simulation software to virtually conduct tests.⁶⁶ The software can even incorporate "hundreds of variables to simulate" various human conditions and the effects the drug or product would have on them.⁶⁷ Given the unreliability associated with testing on live animals (some side effects don't show up until years later),⁶⁸ the advancements in research testing should hopefully obviate the need for any animal testing in the near future.

X. CONCLUSION

To many individuals, legal rights for animals is worrisome because humans utilize animals for our own pleasures and economic pursuits. With a recognition that animals are sentient creatures capable of experiencing great pain should come a realization that animals are not property—not innate objects—and our legal system must recognize this. It did when slaves, women, and children were considered property, and now it is time to reclassify the status of animals, too.

"The great aim of education is not knowledge but action."
English philosopher – Herbert Spencer

⁶⁵ See Barnaby J. Feder, *Saving the Animals: New Ways to Test Products*, N.Y. TIMES, Sept. 12, 2007, Section H, page 5).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

COMPANION ANIMALS: AN EXAMINATION OF THEIR LEGAL CLASSIFICATION IN ITALY AND THE IMPACT ON THEIR WELFARE

ANNAMARIA PASSANTINO *

ABSTRACT

Animals are now defined as “sentient creatures” in European law and no longer just as agricultural products (Treaty of Amsterdam, 1997). That change reflects ethical public concern about animals’ quality of life.

* Annamaria Passantino, Ph.D., received her doctorate in “Blood parasite pathology in domestic animals in mediterranean and subtropical areas” from the University of Messina in Italy. Currently, she is a Professor with the Faculty of Veterinary Medicine at the University Messina, teaching Forensic Veterinary Medicine, Veterinary Legislation, Animal Protection and Medical Ethics. In the past, she has also taught Veterinary Ophthalmology and Veterinary Laboratory Medicine. She lectures at post-graduate triennial specialization schools about “Bovine clinics” and “Inspection of food animal of animal origin.” She is also Co-ordinator of a research Doctorate on “EU countries’ rulings concerning animal welfare and protection” and a course on Technologies, hygiene and health of extensive eco farms. She works in the Medical Clinic of the Veterinary Faculty, University of Messina. Ms. Passantino is member of the Committee of Animal Bioethic of Messina. Her research activity (160 works) covers topics such as serological investigations, clinical and medico-legal considerations on zoonotic infections and parasite diseases; evaluation of the physiological ocular parameters (tonometry, lacrimal secretion) and clinical aspects of ocular pathology in some domestic animals, haematological modifications in various species during and after pharmacological treatment; therapeutic efficacy of drugs; animal welfare and protection; medical ethics; veterinary laws and regulations, civil and penal code in Veterinary Medicine, purchase of animals and legal vice; ill-treatment of animals. She is also author of a book entitled “La tutela giuridica del sentimento dell’uomo per gli animali” [The legal protection of human feeling for animals].

In Italy, an important section of the regulation of man's relationship with companion animals is contained in the "State-Regions Agreement on Companion Animal Welfare and Pet Therapy", which was recognised by the Council of Ministers in DCPM 28th February 2003.

The Agreement defines some basic principles whose aims are to create a greater and increasingly correct interaction between man and companion animals. The agreement guarantees the latter's welfare in all circumstances. It is intended to avoid the inappropriate employment of companion animals and also to encourage a culture of respect for their dignity in the sphere of innovative therapeutic activities such as Pet-therapy.

Among the various aspects examined, this agreement especially underlines the responsibilities and duties of a companion animal handler and specifies that any person who lives with a companion animal or agrees to take care of one is responsible for its health and welfare and must house it and give it adequate care and attention.

The Agreement also introduced important new measures aimed at reducing the numbers of stray animals, such as the use of microchips as an official dog identification system and the creation of a computerised data bank.

The Author, after having analyzed the legal status of animals under the current system and discussed the idea of extending legal personhood to such animals, considers the law for the current valuation of companion animals. Finally, the Author promotes the idea that there is a legal and rational basis for changing the way that companion animals should be valued by legal system (such as the Agreement) and recommends the adoption of principles and guidelines for the care of pets. The Author evaluates these aspects of the Agreement.

I. INTRODUCTION

Animals are classified as either "wild" or "domestic". If an animal is classified as wild, a human would only be able to obtain a qualified property right in such animal through taming or confinement. Once a wild animal left the control of a human, the person no longer maintained a qualified property right in the

animal. In contrast, the ownership of a domestic animal is not lost if the animal escapes

Companion animals (CAs) can be considered a subcategory of domestic animals. To determine whether an animal fits within this subcategory it is necessary to focus on evidence of the relationship between the animal and its owner. If an animal is considered to be a companion animal, a person may have more rights in the animal, but also will likely be subject to more statutory responsibilities.

Companion animals (CAs) can play hugely important roles in the lives of people. They serve as companions (Fogel, 1981), a source of livelihood, entertainment, and inspiration. Pets are seen as medicine. They may be therapeutic¹ (e.g., Corson & Corson, 1989; Heiman, 1967; Walshaw, 1987) and they may serve as transitional objects and a locus of affection that helps children develop a humane caring sense of responsibility (Levinson, 1972; Robin & Bensele, 1985; Volkan & Cavanaugh, 1978).

Yet animals can and do exist independent of people and, as living beings, they arguably have interests separate and apart from their utility to humanity.

Serpell and Paul (1994) argued that companion animals could function as bridge-builders over the gap between humans and animals.

A. "Animal-Companion Defined"

Animal companion means a dog, a cat, or any warm-blooded, domesticated non human animal

The term *companion animal* will be used as the preferred term in this paper to reflect the changes in perception of the relationships people have with animals. Lagoni *et al.* (1994) point

¹Some studies suggested that the relationship with animals is also useful for human well-being and health. In particular companions animals could enhance quality of life by reducing blood pressure, heart rates, anxiety and depression. See: Garrity, T.F. and Stallones, L. (1998). Effects of pet contact on human well-being: Review of Recent Research. In: C.C. Wilson and D.C. Turner (Eds). *Companion Animals in Human Health*. Sage Publications. Thousand Oaks; Wilson, C.C. (1998). A conceptual framework for human-animal interaction research. In Wilson, CC, Turner, DC (eds.) *Companion animals in human health*. Thousand Oaks, CA: Sage.

out that the use of the phrase “companion animal” implies reciprocity indicating “a mutual relationship much more like friendship”. Instead the word *pet* infers passivity on the part of the animal and connotations of an animal existing to provide pleasure and entertainment for human beings. In fact, animal activists typically prefer the term “companion animals” over “pet”, as it better describes the relationship between a human and domestic animal, and fully encompasses the role that such animals play in people’s lives (Paek, 2003).

B. The Bond between Man and Companion Animals

In the course of the last few years the man-animal relationship has deeply changed (Lagoni *et al.*, 1994.) and has assumed distinctions which reflect the rapid evolution of the associated cultural changes² and there has been an enormous rise in the canine population.

The relationship between human beings and CAs is similar to a parent and child relationship. The companion animal guardians consider their animals as members of the family (Cain, 1983; Foote, 1956; Hickrod & Schmitt, 1982; Hirschman, 1994; Sussman, 1985; Voith, 1985) or as children or best friends³ (Squires-Lee 1995; Beyer 2000; Preece & Chamberlain, 1993), rather than as personal property, and describe the animal’s role in the family as “very important”.

In fact, a 1995 study, reported by the American Animal Hospital Association, revealed that 70% of surveyed individuals who formerly or then-currently shared their lives with CAs responded that they thought of their animals as children (Cropper,

² The changing nature of the relationship between people and companion animals has been attributed to the urbanization, industrialization, and isolation of modern society.

³ While the tendency to see a companion animal as a member of the family is pervasive, the role each pet plays in the unique family structure differs. Frequently, companion animal owners view their pets as children and engage in activities that parents often share with their human children such as playing. Similar to raising human children, caring for and training pets requires a tremendous investment of time, energy and money. In addition to being viewed as surrogate children, pets also take on a parental role, providing security and protection.

1998). Cain (1983) has confirmed that Cas “aren’t like family – they are family”.

Probably Cas are viewed as members of the family to the extent that they can be anthropomorphized or assigned human thoughts and feelings. Really dogs and cats are most commonly humanized and therefore are most frequently regarded as family members (Passantino, 2007).

It is more than socially acceptable to have a dog or cat in the household. According to EURISPES study made in 2002, in Italy there are 44,000,000 companion animals resident in eight and half million families, which generate business worth almost 5 million euros⁴. In the United States, there are approximately 68 million animal guardians with dogs in their household. Forty million, or four in ten households, have at least one dog⁵.

Popular media reflect the interest and connection that human beings have with animals. From the days of Lassie, Rin Tin Tin, and Benji, there is now an entire network devoted to animals. Unlike cartoon series of the past that anthropomorphized cute animal characters, much of the current media focus upon animal-human interaction.

C. Human-Animal Bond in Ancient Times.

Interaction between man and animals is documented throughout the history of the world and society’s attitude to animals has varied in line with differing views on the role of animals over the centuries and around the globe.

Man’s relationship with animals goes back as far as the Creation, when Man was freed from his solitude and given “precious travelling companions” to share his world with⁶.

⁴ At <http://www.gaiitalia.it>, last visited Oct. 5, 2005.

⁵ The Humane Society of the United States, U.S. Pet Ownership Statistic, at <http://www.hsus.org/ace/11831>, last visited Feb. 8, 2003

⁶ “... Then the Lord God said: it is not good for Man to be alone. I will make him some suitable helpers. And with a little earth the Lord God made all the animals of the field and the birds of the air and look them to man to see what he would call them. Man then gave a name to all domestic animals, to the wild animals and to the birds...” See, Genesis II, 18-20, la BIBBIA, Ed. Interconfessionale in lingua corrente, Torino, ELLE DI CI, 1985.

There has always been a close link between man and animals. Depending on the circumstances, animals can be friends, enemies or useful instruments to obtain certain ends.

In the Bible, animals are sometimes viewed in a very positive light, as friends to be defended against persecution or exploitation. However, sometimes Man's fear of wild animals is apparent.

It is recognised that animals are precious to Man because they work for him and provide food for him. (Rossano *et al.*, 1996).

The symbolic and allegorical significance of some animals derives from their behaviour and actions. Thus, the lion is the symbol of courage, the snake of temptation (Gen. 3), the fox of cunning and the vulture of rapacity. An invading army is likened to a storm of locusts (Na 15-17) and enemies to a herd of bulls (Sal 22, 13-14).

Domesticated dogs have been sharing their lives with humans for more than 12,000 years and domesticated cats have been companion animals for approximately 4,500 years (Pack, 2003). Cats were known to be household companions in Egypt 5000 years ago and were often mummified and entombed with their human companions. In addition, ancient Egyptians considered their dogs both assistants and protectors (Epstein, 2001). However, recent studies of dog's mitochondrial DNA at the University of California at Los Angeles, estimated that domestication occurred as early as around 135,000 years ago (Douglas, 2000). In 1978, archaeologists in northern Israel discovered a 12,000 year-old skeleton of a human (a woman) and a dog buried together (Squires-Lee, 1995).

II. LEGISLATION

Once, man used to place himself in a position of alterity, of separation with what was thought different from himself - animals first of all. This was not necessarily intended as an attitude of hatred or cruelty, but it meant that the individuality of the various

So, in Genesis II, we see that the world is not anthropocentric, but rather that all species are made to live together and inhabit the earth in harmony. It is also clear that animals hold a superior place, above all inanimate things, but they are inferior and subordinate to man. The latter conclusion is based on the fact that animals are created for him and that it is he who names them.

species was taken into consideration only in utilitarian terms, even when such usefulness was not really economic.

Subsequently the social structure changed: the disintegration of the family, the ever more frenetic rhythms of life and the progressive levelling of social roles led man to a reorganization of his own ego, to a different consideration of his own identity in favour of other living beings. The symbolic distance between the two worlds, human and animal, which seemed great earlier, is now beginning to take on new aspects (Passantino, 2007).

According to Barton-Ross and Baron-Sorenson, "Changes in human mobility and family structure have increased the likelihood of people forming significant attachments to pets" (Barton-Ross and Baron-Sorenson, 1998).

A. Sources of EU Laws Relating to Protection of Companion Animals

The stages of this evolution are marked by some important documents.

The Universal Declaration of Animals' Rights, proclaimed on October 15, 1978 at UNESCO (United Nations Educational, Scientific and Cultural Organization) House in Paris (Chapouthier & Nouët, 1998), that animals have rights and established that the violation of such rights led and continues to lead man to commit crimes against the natural world. But, above all, it asserts that there cannot be respect among men if first they do not respect animals.

The Declaration⁷ does not have any legal value and it does not envision any type of sanctions. However, it represents the fundamental point of departure for all the events that have taken place since, such as the European Convention for the Protection of Companion Animals, approved in Strasburg on 13th November 1987⁸.

⁷The declaration provides a code of biological ethics for the environment and all the living beings, based on every species' right to live. See League for Animal Rights, at <http://league-animal-rights.org/>

⁸ At <http://conventions.coe.int/Treaty/EN/Treaties/Html/125.htm>, visited April 27, 2005.

This recognises that “in consideration of the particular ties existing between man and companion animals,” man has the moral obligation to respect all living creatures.

In Contrast to the US, the European Convention for the protection of Pet Animals expands the guardian role of humans with regard to their companion animals.

The basic principles for animal welfare presented in this treaty are that nobody shall cause a pet unnecessary pain, suffering, or distress. Additionally, it provides that no one shall abandon a companion animal. The provision on maintaining a pet requires accommodation, care, attention, water, food, and exercise for the pet and that the guardians must take reasonable measures to prevent the animal from escaping.

The European Convention has been signed but not ratified by Italy (table 1). Nevertheless, many of its precepts have been acknowledged by number law no. 281 of 14th August 1991 (Anon, 1991). This, at last, shows a radical change of perspective in juridical guardianship, with the awareness of the fact that an animal is a psycho-physical entity, capable, like man, of feelings and emotions, of pain and anguish (Passantino & De Vico, 2006). A subject with rights, and so fully to be safeguarded, no longer an object, regarded only as a “*res*” useful to man.

Article 1 of the aforesaid law indicates the state as the fundamental promoter of such guardianship.

Therefore, the "Safeguarding of Animal Welfare" aims to recognize animals' role and habitat considering them as our fellow earthly tenants, reducing their exploitation and subjection by man.

It must be specified that this concept is part of a wider movement at a communitary level. In fact, the provisional text of article III-5*bis* of the European Constitution sanctions the obligation for the Union and the Member States to take into account, in the matter of animal welfare, that they are sentient beings.

The recognition of animal dignity as sentient beings, besides constituting a value strongly shared by most Italian citizens, is contained in the Protocol on Animal Protection and Welfare, attached to the final act of the institutive Treaty of the European Union, approved in Amsterdam in 1997 (Anon, 1997). This demonstrates how strongly the need for animal safeguard and welfare is perceived by the UE Members.

B. Are Companion Animal Property or Sentient Being?

Common law and civil law traditions are dualistic in that there are two primary normative entities in this system: persons and things. Animals are treated as things, and, more specifically, as property of persons⁹.

The Sources of the Italian Law did not recognise any rights for animals. In Roman law, animals were “*res*” (things) and sometimes were put at the same level as the other “thing”, that is to say slaves.

The same, for example, is in the United Kingdom (UK) and the United States (US)¹⁰.

The legal status of animals in the UK remains as it always has been, that of property so far as domestic and captive animals are concerned.

But there is a cultural difference between two states. In the UK, property rights are important, particularly so far as common law is concerned. But by and large there is less opposition in principle to qualifying property rights. In the US, constitutional rights are somewhat tied to or based upon property rights.

In the spirit of the Italian modern law, the animal “thing” has become a “movable thing”¹¹, as opposed to “immovable things”.

⁹ For a general discussion of the status of animals as property, see Francione GL, *Animals, Property and the Law*, Ed. By Tom Regan, Temple University Press, 1995.

¹⁰ Under the current U.S. legal framework, animals are clearly treated as a form of personal property.

¹¹ Article 812 Civil Code in the third book, second section, distinguishes between movable and immovable properties, decreeing that: “soil, spring and watercourse, trees, building and other are immovable properties (...), even if these are only temporary tied to the soil, and generally immovable is everything that is incorporated into the soil naturally or artificially (...) moveable properties is everything else”. Animals are included in this definition of moveable properties.

The animal-being essence is pointed out in the article 820 c.c., which distinguishes between natural fruits and civil fruits: natural fruits are those which come from thing.....as agricultural products, woods and parts of animal.....”.

It is true that animals' suffering is also recognised by the law, which aims to prevent it by making certain behaviour obligatory, but animals are still juridically considered as "things" (Passantino *et al.*, 2004), as a good owned by men (articles 810 and 812 of the Italian Civil Code).

The denial of rights to animals depends on a series of juridical, scientific, philosophic and moral reasons.

The Juridical tradition also does not recognise for non-human beings qualities which are proper to human beings, and it considers the expression "animals' right" as a "metajuridical" concept.

Finally, also the article 1496 c.c., which regulates animal trading, regarding animals as res, decrees that: "... special laws guarantee for the flaws or , if there are no laws, local customs shall guarantee. When local customs do not provide, previous laws should be observed", i.e. civil code regulations regarding property sale should be applied. The parties to the case, if they are at variance or if laws do not provide anything, should use the regulations of the trading area. Also flaws of "sold things are regulated by local customs, while civil code is considered as subsidiary", considering that special laws addressed to the flows of "sold thing" are lacking.

Thus it is clear that owner as *dominus* may treat his animal as he wishes, observing the existing protective laws.

However animals should be treated not as objects but as subjects "worthy of consideration" and accepted in a new legal framework. This is considering that the ethological studies have highlighted new important aspects on animal behavior and animal social life as well, casting new light on their capacity of feeling pleasure, pain, as well as having interests and being capable of satisfying these interests. For an explanation, see Francione GL. Introduction to Animal Rights: Your Child or the Dog? Temple University Press, 2000; Galvin RW. What Rights for Animals? A Modest Proposal, *Pace Environmental Law Review* 1985; 2: 245; Goodkin SL. The Evolution of Animal Rights. *Columbia Human Rights Law Review* 1987; 18: 259; Kelch TG. Toward a Non-Property Status for Animals. *New York University Environmental Law Journal* 1998; 6(3): 531-539; Regan T. Do sentient beings have an inherent value? International Conference CIWF, London 17-18 March 2005; Regan T. The Case for Animal Rights. University of California Press: Berkeley, USA, 1983; Rollin BE. The Unheeded Cry: Animal Consciousness, Animal Pain, and Science. United Kingdom: Oxford University Press, 1989; Singer P. Animal Liberation: A New Ethics for Our Treatment of Animals. (2d ed., Avon 1990).

David Favre (2000) writes that “Animals are not humans and are not inanimate objects. Presently, the law has only two clearly separated categories: property and juristic persons”.

In fact, animals are personal property, and, as personal property, have value. Duckler (2002) has stated that:

“... animals are fundamentally distinct from manufactured commercial objects in that value in at least three ways.

First, animals, by their nature, are inherently unique and irreplaceable objects. Concepts of modern genetics command the recognition that every individual sexually-reproducing animal is a distinct fingerprint of nature, each unlike that of any other. ... The awesome power of the genetic variation to construct a singular and unique object in the universe cannot be applied to nonliving commercial properties, even handcrafted ones. ... Second, animals, as a legally recognized group, are relatively unusual. Most animals are much more novel and noticeable commercial items than are the majority of objects placed into the stream of commerce or woven into our social fabric. As with works of art, market transactions involving larger animals, captives, and companion animals are more pointedly vulnerable to public scrutiny, and under such scrutiny often become cloaked with a notoriety not accompanying non-living goods. That those transactions engage the emotions and strident opinions of the communities of buyers and sellers in which they occur, suggests that the items involved in the exchanges are special goods worthy of more sensitive treatment than that given standard trade items.

Finally, animals have a relatively serious impact on human communities. Most animals, as distinct from inanimate objects, are an integral part of the ecological and psychological health of every community in which they reside. Because overall biological and cultural diversity is increased by the presence, and damaged by the absence, of captive

and companion animals, oscillations in our public health transcend the self-interest of just the owners, buyers, and sellers in the marketplace. In other words, more than purely economic interests are at stake in the ownership of animals as personal property because of what animals are. Laws regulating animals as property encroach slowly and surely on the protection and enforcement of our nation's environmental health. ..."

C. Animals as Sentient and Emotive Being.

A sentient being is a being that, by virtue of its characteristics, has the capability of experiencing suffering, both at physical and psychological levels, regardless of the species to which it belongs.

Only the members of the animal kingdom can be sentient, although not every animal species possesses the characteristics that would make their members be considered sentient beings.

Sentient animals are beings that have a physical and psychological sensibility, which allows them – in the same way as humans – to experience pain and pleasure¹². And it is certain that they naturally seek, by all means available to them, to avoid painful experiences.

¹²Contemporary philosophers such as Jeremy Bentham have argued that the question is not can animals reason, but can they suffer? Peter Singer argues that the utilitarian principle of the greatest good for the greatest number should include animals because they too can feel pleasure and pain. In fact, he has said: "... *They have conscious experiences, ... they can feel pain or suffer in some way, and in that very direct sense, they can be harmed. ... I think there are other living things, certainly, definitely plants, and arguably some things that belong to the animal kingdom of which that might not be true;.....*". 5th Animal Conference on Animals and Law - September 25, 1999, New York City.

Animals also have a life¹³ and a liberty of their own, which they naturally seek to preserve, once again in the same way as humans do. And, exactly in the way humans look at the experience of suffering and to the deprivation of life and liberty as harms that should be avoided by them, they should also look at the experience of suffering and the deprivation of life and liberty as evils that should be avoided for animals, since animals, just like humans, even considering the differences, do not have any interest in being subjected to these harms.

In fact, humans look at suffering as having a moral relevance in the sense that every act that consists in deliberately inflicting suffering on another person is considered a morally condemnable act. In the same way, every deliberate act leading to life and liberty deprivation for another person is considered a morally unacceptable act. Laws in all human societies that value life, liberty and happiness as fundamental values reinforce these fundamental principles. Still, these legal principles are rarely extended to animals, although they too have no interest in being subjected to any kind of suffering, deprivation of life or of liberty.

Presently, respect for animals is a moral and social value that assembles a very solid consensus in human societies, imposing itself with more or less strength depending on the historical, social and cultural circumstances of each society.

Scientific evidence (data) supports the contention that animals are sentient and emotive beings. Research has shown that mammals share similar emotive and cognitive characteristics with humans and that mammals are remarkably similar to humans both neurologically and genetically¹⁴. Moreover, many scientists have

¹³In Singer's opinion, animals are sentient beings, not sub-human beings with proto-human behaviour. All sentient beings are of intrinsic value because of their conscious state and each conscious life has equal value. For further discussion on this issue, see PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (Random House 1975).

¹⁴Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L.J. 531, 539 (1998).

concluded that the DNA of animals and humans has “a ninety percent match or agreement with each other”¹⁵.

The law should reflect society’s recognition that animals are sentient and emotive beings capable of providing companionship to the humans with whom they live (Passantino, 2006).

D. Sentiente of Animals as a Constitutional Principle.

The acknowledgment of animal dignity as sentient beings¹⁶, besides constituting a strongly shared value by most Italian citizens, is contained in Protocol on Animal Protection and Welfare, which demonstrates how important animal safety and welfare is perceived by the UE State Members¹⁷. It states that “... to ensure improved protection and respect for the welfare of animals as sentient beings.”

There is a fast growing group of states where the moral and social value that the respect for animals represents is also recognized as a legal value, which makes animals benefit from specific legal protection.

An important example is Germany, which has recently introduced the protection of animals in its Constitution, becoming the first European Union member-state to do it.

¹⁵Lyann A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. Ill. U. L. J. 31, 32 (2002).

¹⁶In the philosophy of animal rights, sentience is commonly seen as the ability to experience suffering. A being is declared to be sentient if he can physically or psychically suffer. It is characterized by the possession of a developed nervous system and brain. The group of sentient beings particularly includes vertebrate species: mammals (human or not), birds, reptiles, amphibians and fishes. Each sentient being has the right to life and to welfare.

¹⁷Animal laws vary from one country to the next. What one country may value as life, another values only as property. This leads to fundamental differences in the existing laws designed to protect animals. For a brief explanation in Italy, see e.g. Passantino A., *La tutela giuridica del sentimento dell’uomo per gli animali*. Aracne Editrice (2007). An animal’s moral status, be it sentient being or machine, inevitably determines how an animal will be viewed in the eyes of the law.

In fact, in July 2002, the German federal Constitution was reformed and the principle was introduced, in the new formulation of the art. 20, according to which the “protection purpose of the natural foundations of life and the animals” is assigned to the State¹⁸. In German legislation animals are defined as “legal creatures”, assuming a status that is placed in the centre between that one of subject and that one of object¹⁹.

Hoping to set an example for many other countries, in Italy, the Constitutional Transaction Commission of the Chamber Deputies approved a modification of article 9 of the Constitution that inserts after the words: “The Republic promotes the development of culture and scientific and technical research. The protection of the landscape and the historical and artistic patrimony of the Nation. ... the Republic protects the requirements, in matter of welfare, of animals as sentient beings”.

Such a constitutional bill in parliament, if approved, would make Italy the second among European countries that recognize animals’ status as sentient beings in a constitutional text. Moreover, several proposals of modification have been made recently, according to the code of art. 9 of our Constitution. It is a good idea to list them in order to show better how they are effectively laying the foundations of a new and correct relationship between man, animals and environment. Proposal no 4429, of 28/10/2003 was directed, “with particular care, to the defence of biodiversity, the equilibrium of the ecosystems and of the hydro geological cycles, which are considered common assets of humanity”; Proposal no 4423, of 24/10/2003 it would add to the end of art. 9 the following commas: “the Republic recognizes the environment, the biosphere and the ecosystems to be of irreplaceable value in the interests of the State and the planet, it guarantees the inviolability and protection, not the shortness of life, the protection of the natural resources, all the living species and biodiversity”. Proposal no 705, of 12/06/2001, suggested the insertion, after the first code of art. 9, of the following: “The no

¹⁸P. Unruh, *Animal Protection as a Constitutional Principle – Effects on the Legislation, the Administration and the Judiciary*. Dtsch Tierarztl Wochenschr 110(5),183-186.

¹⁹ Johannes Caspar, *Animal protection in constitutional law?* Dtsch Tierarztl Wochenschr 105(3):85-89 (1998).

human animal species is directly on par with the life and in compatible existence with their own biological characteristics. The Republic recognizes all the animals as subjects with rights. It promotes and develops services and initiatives regarding respect of animals and the protection of their dignity". It is hoped that the proposal of reform of the Italian parliamentary commission becomes part of a greater movement at a community level. In fact, the temporary text of article III-5*bis* of the European Constitution sanctions the obligation for the Union and the Member States to take into account in the matter of animal welfare that they are sentient beings. This brief review, testifying the great evolution in collective sensibility with regard to the safeguarding of natural equilibriums and the correct relationship between living creatures demonstrates how much can still be done to attain the recognition of a more modern legal status of animals and at the same time how much we are approaching the objective.

Other examples concern the laws of Norway, Portugal, Switzerland, Sweden, the Netherlands, the United Kingdom and the US will also be referenced.

In Norway animals have not yet obtained legal status as "sentient beings"; in contemporary Norwegian Law, they have legal status as property or nature²⁰.

The changing of the legal status of animals in the Portuguese Civil Code from "things" to the category of "animals" or "non-human persons" will be implemented. Portugal will in the near future have the protection of animals included in its Constitution²¹.

²⁰In 2003, the Parliament decided that the revised Animal Welfare Act must be based on the assumption that every animal has an intrinsic value. See Norwegian Animal Protection Alliance, <http://www.dyreverm.no/english> (last visited March 2006). Because the interests of animals are not covered by the Norwegian Constitution, acts passed by the Parliament are the highest sources of law in the field of animal welfare.

²¹ http://www.animallaw.info/nonus/articles/arptconstitutionalproposal_en.htm

The reference to the importance of the protection of animals and their welfare that the Protocol on Animal Welfare annexed to the Amsterdam Treaty recognizes and determines is also one of the most consistent legal foundations for the necessity of including in the Constitution of the

Switzerland has gained international attention as an animal-loving nation. Animal-rights activists in this country aggressively campaigned to raise the legal status of animals and obtained over 100,000 signatures to put a referendum to a national vote.²² The referendum proposes that animals be given similar legal rights to children in tort offences and divorce proceedings.²³ Another Swiss animal-rights organization is gathering signatures to call for a referendum that proposes even stronger rights for animals²⁴ and calls for: “the respect of animal’s dignity, emotions and ability to feel pain” by amending the Swiss Constitution to enshrine animal’s rights.²⁵

Portuguese Republic a specific ordinance about the protection of animals. Considering the present Constitution of the Portuguese Republic, in accordance with the last Constitutional Revision of 2001, it is hereby proposed the introduction of the following article in the Constitution, in the Title III - Economic, social and cultural rights and duties, in Chapter II - Social Rights and Duties, figuring from now on as the Article 73rd of the Constitutional text, with the following formulation:

1. The animals that have a physical and psychological sensibility that allows them to experience suffering are beings intrinsically worthy of respect and protection by all the people and the by the State itself.

2. It is duty of the Portuguese State to promote and insure the respect from the animals that have characteristics pointed in the previous number, taking the necessary measures to protect and preserve them from all suffering, imprisonment and death that are not justifiable.

3. The animals that have the characteristics pointed in the number 1 of this article will only be subjected to the infliction, to imprisonment or to the induction of death in the cases in which that really is necessary and happens according to specific legislation that will command such situations.

²²See Anne Marie, *Switzerland to Give Human Rights to Animals*, Jan. 4, 2001, <http://www.kuro5hin.org/story/2001/1/4/173316/3956>; Brian Camell, *Swiss to Vote on Animal Rights Measure*, Animal Rights.net, Sept. 5, 2000, <http://www.animal.rights.net/articles/2000/000063.html>; Claire Doole, *Swiss Ponder Animal Rights*, BBC News, Sept. 3, 2000, <http://news.bbc.co.uk/1/hi/English/world/Europe/newsid.908000/08764.stm>.

²³Marie, *supra* note 22.

²⁴Doole, *supra* note 22.

²⁵Doole, *supra* note 22; Marie, *supra* note 22..

In the United States, even if animals are regarded as individuals with intrinsic value, they will still be classified as property.²⁶ The central legal issue at the present time is therefore simply put: “Animals are not humans and are not inanimate objects. Presently, the law has only two clearly separated categories: property or juristic persons.”²⁷

III. COMPANION ANIMAL WELFARE

A. *How Should Well-Being or Welfare Be Defined?*

²⁶ “Animals are property. These three words – and their legal implications and practical ramifications – define the most significant doctrines and cases ... and the realities for current practitioners of animal law.” Frasch Pamela D., Waisman S.S., Wagman B.A., Beckstead S., *Animal Law*, 67 (Carolina Academic Press, Durham, North Carolina 2000) Several authors have critically examined the centuries-long practice of classifying animals as property. See generally Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471 (1996); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books 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 for 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, 270 (1998); Petra Renee Wicklund, *Abrogating Property Status in the Fight for Animal Rights*, 107 Yale L.J. 569 (1997). For relevant case law, see Frasch et al., at 67-107, 175-276.

The definition of animal is limited under the U.S. Animal Welfare Act and applies mainly to warm blooded animals, such as dogs, cats, non-human primates, guinea pigs and rabbits. 7 U.S.C. § 2132(g). For more information on the Animal Welfare Act, see the Animal Legal & Historical Center’s AWA Topic Page at <http://www.animallaw.info/topics/spusawa.htm>. Although companion animals are considered family members by their guardians, established legal doctrine classifies these animals as property. See 4 Am. Jur. 2d Animals § 6 (1995).

²⁷ David Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473, 502 (2000). See Robert R. M. Verchick, *A New Species of Rights-Rattling the Cage: Toward Legal Rights for Animals*, 89 Cal. L. Rev. 207 (2001).

The word “welfare” means, according to the 1993 edition of the Oxford English Dictionary, “happiness, well-being, good health or fortune, successful progress or prosperity.”²⁸

A clearly defined concept of welfare is needed for use in precise scientific measurements, in legal documents and in public statements or discussion.

Welfare is defined in the following way: a state of animal well-being which flourishes when physiological and psychological requirements²⁹ are met continuously and adverse factors are controlled or absent. It can be readily related to other concepts such as: needs, freedoms, happiness, coping, control, predictability, feelings, suffering, pain, anxiety, fear, boredom, stress and health.³⁰

²⁸ <http://www.oed.com>, visited October 5, 2005.

²⁹ The reference to both physiological and psychological requirements extends also to behavioural needs. Seamer J.H., *Human stewardship and animal welfare*. Applied Animal Behaviour Science, 59, pagg. 201-205 (1998).

³⁰ Duncan I.J.H., *The changing concept of animal sentience*. Applied Animal Behaviour Science, 100, pp. 11-19 (2006); Ewing S.A., Lay Jr D.C., von Borell E., *Farm animal well-being. Stress physiology, animal behavior, and environmental design*. Upper Saddle River, NJ, USA: Prentice Hall; 1999. p. 357; Fraser A.F., Broom D.M., *Farm Animal Behaviour and Welfare*, third ed. (1990), Ballière Tindall, London, UK; Fraser D., Weary D.M., Pajor E.A., Milligan B.N., *A scientific conception of animal welfare that reflects ethical concerns*, *Anim. Welfare*, Volume: 6, (1997), pp. 187-205; Garner, J.P., Falcone C., Wakenell P., Martin M., Mench J.A., *Reliability and validity of a modified gait scoring system and its use in assessing tibial dyschondroplasia in broilers*, *Br. Poult. Sci.*, Volume: 43, (2002), pp. 355-363; Kirkden R.D., Pajor E.A., *Using preference, motivation and aversion tests to ask scientific questions about animals' feelings*. Applied Animal Behaviour Science, 100, pp. 29-47 (2006); Millman S.T., Duncan I.J.H., Stauffacher M., Stookey J.M., *The impact of applied ethologists and the International Society for Applied Ethology in improving animal welfare*. Applied Animal Behaviour Science, 86, pp. 299-311 (2004); Moberg G.P., *A model for assessing the impact of behavioral stress on domestic animals*. *J Anim Sci*, 65, 1228-1235 (1987); Moberg G.P., Mench J.A., editors. *The biology of animal stress. Basic principles and implications for animal welfare*. Wallingford, Oxon, UK: CABI International, 2000. p. 377; Rushen J., Taylor A.A., de Passillé A.M., *Domestic animals' fear of humans and its effect on their welfare*. Applied Animal Behaviour Science, 65, pp. 285-303 (1999);

Effects on welfare which can be described include those of disease, injury, starvation, beneficial stimulation, social interactions, housing conditions, deliberate ill treatment, human handling, transport, laboratory procedures, various mutilations, veterinary treatment or genetic change by conventional breeding or genetic engineering.³¹

Welfare can be measured in a scientific way that is independent of moral considerations. Welfare measurements should be based on a knowledge of the biology of the species and, in particular, on what is known of the methods used by animals to try to cope with difficulties and signs that coping attempts are failing.³² The measurement and its interpretation should be objective.

Welfare is a broad term, of which health³³ and feelings³⁴ are important parts. Fraser suggests that three main ideas are

Unti, B.O., Rowan, A.N., 2001. *A social history of postwar animal protection*. In: Salem, D.J., Rowan, A. (Eds.), *State of the Animals 2001*. Humane Society Press, Washington, DC, USA, pp. 21–37; Tannenbaum, J., *Ethics and animal welfare: the inextricable connection*, *Journal of the American Veterinary Medical Association* 198, 1360-1376 (1991).

³¹ <http://www.veterinaria.org/revistas/redvet/n121207B/BA018ing.pdf>

³² *supra* note 31

³³ The term "health" is encompassed within the term welfare. Like welfare, health can refer to a range of states and can be qualified as either "good" or "poor." However, health refers to the state of body systems, including those in the brain, which combat pathogens, tissue damage or physiological disorder. See D.M. Broom, *Indicators of Poor Welfare*, *British Veterinary Journal* v. 142, 524-525 (1986); D. Fraser, *Assessing Animal Well-Being: Common Sense, Uncommon Science*, Food Animal Well-Being, 37-54, West Lafayette, Indiana: USDA and Purdue University (1993).

³⁴ Feelings are aspects of an individual's biology which must have evolved to help in survival, just as aspects of anatomy, physiology and behaviour have evolved. They are used in order to maximise its fitness, often by helping it to cope with its environment. It is also possible, as with any other aspect of the biology of an individual, that some feelings do not confer any advantage on the animal but are epiphenomena of neural activity. See D.M. Broom, *Welfare, Stress and the Evolution of Feelings*, *Advances in the Study of Behaviour*, v. 27, 371-403 (1998).

expressed in public discussion concerning animal welfare: i) feelings, ii) functioning and iii) natural living.³⁵

i) The concept of “feelings” in animals relates to both the subjective categories of hedonism and the desire for fulfilment in human well-being.³⁶ As a definition of animal welfare, the concept is closer to hedonism; for example, Fraser represents this idea as follows: “Animals should *feel* well by being free from prolonged and intense fear, pain and other negative states, and by experiencing normal pleasures.”³⁷

However, expression of preferences by animals is often included under the heading of feelings without recognition that this is a separate issue. This is partly because it is often assumed, and sometimes stated explicitly, that pleasure will be achieved and suffering avoided by animals expressing preferences: this is the basis of preference testing. Thus Duncan and Fraser say that:

“One research approach [to the subjective experience of animals] involves studying the preferences of an animal for different environments, and the strength of the animal’s motivation to obtain or avoid certain features of the environment. Underlying such research is the assumption that animals will choose (and work to obtain) environments in which they experience more contentment and/or less pain, fear and other negative states.”³⁸

There are, then, three possible views on the subjective nature of animal welfare. First, that animal welfare is all about feelings such as pleasure and suffering (hedonism), and that expression of preferences is only relevant because it tends to increase pleasure; thus preference tests may help to reveal such feelings. Second, that animal welfare is about both feelings and preference satisfaction. Third, that animal welfare is all about preference satisfaction; this

³⁵ D. Fraser et al, *A Scientific Conception of Animal Welfare that Reflects Ethical Concerns*, *Animal Welfare*, Vol. 6, No. 3, 190 (1997).

³⁶ See Jensen K.K. and Sandoe P, *Animal Welfare: Relative or Absolute?* in *Applied Animal Behaviour Science* v. 54: 33-37 (1997), discussing hedonism, preference testing and animal welfare.

³⁷ Fraser, *supra* note 35, at 187.

³⁸ L.J.H. Duncan & D. Fraser, *Understanding Animal Welfare*, in *Animal Welfare* 19-31 (M.C. Appleby and B.O. Hughes, eds., 1997).

third view is probably rare. Interactions between hedonism and desire or preference fulfilment will be considered below.

ii) Broom points out that feelings may be an important aspect of functioning.³⁹ However, it may still be that when it comes to a definition of well-being or welfare it is appropriate to adopt one category as pre-eminent and to think of the others as contributing to well-being or as providing means of assessing it, rather than as defining it. In this case, welfare may be defined in terms of functioning, with any associated variation in feelings or preference satisfaction being seen as secondary.

iii) The idea of 'natural living' for animals encompasses several concepts, perhaps most commonly that of the importance of living in 'natural environments.' One other major approach to 'natural living' for animals is that proposed clearly by B.E. Rollin:

"It is likely that the emerging social ethic for animals ... will demand from scientists data relevant to a much increased concept of welfare. Not only will welfare mean control of pain and suffering, it will also entail nurturing and fulfillment of the animals' natures, which I call *telos*."⁴⁰

There are conditions of an animal's life for which society, science and the legislator can establish requisites of welfare, after having identified physiological and ethological requirements.

The concept of welfare is particularly relevant in the relationship between man and domestic animal or pets, where it is necessary to define the best conditions for the environment, feeding and utilization of animals. An example, in Italy, is the "State-Regions Agreement on Companion Animal Welfare and Pet Therapy," which was signed on 6th February 2003 at the State-Regions Conference by the Ministry of Health, the Regions and the Autonomous Provinces of Trent and Bolzano⁴¹ and recognised by

³⁹ D.M. Broom, *Welfare, Stress and the Evolution of Feelings*, *Advances in the Study of Behaviour*, v. 27, 371-403 (1998).

⁴⁰ Fraser, *supra* note 35, at 190, citing B.E. Rollin, *Animal welfare, science and value* in *Journal of Agricultural and Environmental Ethics* v. 6 (suppl. 2): 44-50 (1993). The term *telos* derives from Aristotle's writings. See Aristotle, *The Nicomachean Ethics*. Harvard University Press: Cambridge, Massachusetts, USA (1934).

⁴¹ Published in *Gazzetta Ufficiale* n.51 of 3rd March 2003.

the Council of Ministers (or “Government”) in DCPM 28th February 2003.⁴²

The Agreement defines some basic principles that aims to create a greater and increasingly correct interaction between man and companion animals, to guarantee the latter’s welfare in all circumstances, to avoid the inappropriate employment of animals and also to encourage a culture of respect for their dignity in the sphere of innovative therapeutic activities such as Pet-therapy.⁴³

Among the various aspects examined, this agreement especially underlines the responsibilities and duties of a companion animal handler and specifies that any person who lives with a companion animal or agrees to take care of one is responsible for its health and welfare and must house it and give it adequate care and attention. The Agreement also introduced important new measures aimed at reducing the numbers of stray animals, such as the use of microchips for an official dog identification system and the creation of a computerised data bank.

The legislative basis on which the Agreement is founded comes from:

- the norms for the prevention of straying animals;
- the European Convention for the protection of pets.

Therefore, it is hoped that this Agreement can:

1. reduce the phenomenon of stray animals through the improvement of the man/pet relationship. Especially when a pet shows behavioural problems, abandonment is very likely;
2. improve the quality of a pet’s life by safeguarding its well-being, i.e. its psycho-physical equilibrium.

These objectives can be achieved through a correct formulation of the man-animal relationship.

⁴² Published in Gazzetta Ufficiale n.52, 4th March 2003.

⁴³ A. Passantino, *Responsible pet ownership: legal issues in Italy*, Abstract Book of 11th International Conference on Human-Animal Interactions, Tokyo 5th-8th October 2007, P-10, p. 139 (2007b)

*B. General Principles for the Care of Companion Animals:
Proposals*

In order to develop guidelines on how pets should be housed, it is appropriate to determine what conditions, or standards, should be met.

In 1965, Brambell reviewed the welfare of farm animals in intensive husbandry systems and proposed that all farm animals should benefit from minimal standards of welfare known as “The Five Freedoms”: 1) freedom from thirst, hunger and malnutrition, 2) freedom from discomfort, 3) freedom from pain, injury and disease, 4) freedom to express normal behaviour and 5) freedom from fear and distress.⁴⁴

These principles, used to assess the welfare of farm animals, as well as laboratory and zoo animals, can be modified for use in companion animals (Table 2).⁴⁵

The Author puts forward the following specific proposals:

- 1) for correct keeping of CAs:
 - a) Any person who keeps a CA animal shall be responsible for its health and welfare.⁴⁶
 - b) All CA owners or keepers shall have their animals examined by a veterinarian every time their state of health renders it necessary⁴⁷ and the owners shall follow the veterinarian’s prescriptions.

⁴⁴ Rochlitz, I, *A review of the housing requirements of domestic cats (Felis silvestris catus) kept in the home*, Applied Animal Behaviour Science, v. 93, Iss. 1-2, 97-109, 99 (2005), citing Brambell F.W.R., Report on the Technical Committee to Enquire into the Welfare of Livestock Kept Under Intensive Husbandry Systems, (1965), HMSO, London.

⁴⁵ Rochlitz, *supra* note 45, at 99.

⁴⁶ Dogs shall be fed to maintain their body weight within the normal physiological range, no matter how much physical activity they have. Ideal body weight depends on breed and age. The food offered should be sufficient in amount and appropriately balanced in nutrients to meet their physiological needs. Passantino A., Di Pietro C., Russo M., The future for companion animal welfare: approaches of the European and Italian law. 30th Annual WSAVA Congress, Mexico City, May 11-14, 2005.

⁴⁷ Health and welfare are strongly correlated. Diseases and disorders often cause dullness, discomfort and sometimes pain. Dog owners have a

- c) Any person who keeps a CA or who is looking after it shall provide accommodation, care and attention which take into account the ethological needs of the animal in accordance with its species and breed. For example, Rochlitz makes recommendations for the housing of cats in the home, in catteries and animal shelters.⁴⁸ The main points to be considered when designing or evaluating housing for cats are size of enclosure (pen and cage)⁴⁹,

responsibility to prevent, control and treat disorders when appropriate and to maintain their dogs in healthy condition. Health and welfare should be checked daily. This should include observing whether the dog is eating, drinking, urinating, defecating and behaving normally. Veterinary advice must be obtained if a dog shows significant signs of ill health which persist for more than a few days, or of severe distress which persist for more than a few hours. Passantino, *supra* note 47.

The following signs may indicate ill-health:

- abnormal dullness, lethargy or abnormal excitement, agitation
- loss of or increase in thirst or appetite
- a discharge from the eyes, nose, mouth, anus, vagina or prepuce
- vomiting, diarrhoea
- any bleeding which is unlikely to stop or which has not stopped within a few minutes
- straining as if to defecate or urinate
- sneezing or coughing or abnormal or increased rate of breathing
- lameness or gait abnormality, inability to stand
- loss of balance, uncoordinated gait, fits
- significant weight loss
- patchy or excessive hair loss
- swelling of part of the body
- pale gums and inner eyelids
- persistent scratching or biting resulting in self mutilation
- persistent shaking of the head.

⁴⁸ Rochlitz I. Recommendations for the housing of cats in the home, in catteries and animal shelters, in laboratories and in veterinary surgeries. Journal of Feline Medicine & Surgery, vol. 1, issue 3: 181-191 (1999).

⁴⁹ Rochlitz, *supra* note 49, at 182: "Within an enclosure (the internal environment), there should be adequate separation between feeding, resting and elimination (litter tray) areas. The enclosure should be large enough to allow cats to express a range of normal behaviours, and to permit the caretaker or owner to carry out cleaning procedures easily."

- complexity of enclosure⁵⁰, quality of the external environment⁵¹ and contact with conspecifics⁵².
- d) All owners or keepers of animals shall guarantee the animals constant appropriate living conditions, including regular cleaning of the shelter.⁵³

⁵⁰ Rochlitz, *supra* note 49, at 182: "Beyond a certain minimum size, it is the quality rather than the quantity of space that is important. Most cats are active, have the ability to climb well and are well-adapted for concealment." *Id.* at 183: "Resting areas where cats are retreat to and be concealed, in addition to "open" resting areas (e.g. shelves), are essential for their well-being." *Id.* at 184: "There should be a sufficient number of litter trays, at least one per two cats, sited away from feeding and resting areas. Cats can have individual preferences for litter characteristics, so it may be necessary to provide a range of litter types and designs of litter trays." *Id.* at 184: "Most cats play alone rather than in groups, so the cage should be large enough to permit them to play without disturbing other cats."

⁵¹ Rochlitz, *supra* note 49, at 185: "The environment around the enclosure (the external environment) will have an impact on the cat's welfare. Efforts should be made to increase olfactory, visual and auditory stimulation, for example by creating enclosures that look out on to areas of human and animal activity, or by providing access to an outdoor run."

⁵² Most cats can be housed in groups providing that they are well socialised to other cats, and that there is sufficient space, easy access to feeding and elimination areas and a sufficient number of concealed retreats and resting places. When cats are kept in large groups, it may be necessary to distribute feed, rest and elimination areas in a number of different sites, to prevent certain cats from monopolising one area and denying others access (van den Bos, R.; de Cock Buning, T., "Social behaviour of domestic cats (*Felis lybica f. catus* L.): a study of dominance in a group of female laboratory cats". *Ethology* 1994 pp. 14-37). Owners and caretakers need to be knowledgeable about the behaviour of the animals they are responsible for, since behavioural changes are often the first indicators of illness or other causes of poor welfare.

⁵³ Dogs must be provided with sheltered, dry and draught-free sleeping areas, with room to move around freely and to urinate and defecate away from the sleeping area.

For dogs that do not share their owner's home, accommodation may be a kennel to which the dog has free access, a kennel with an enclosed run attached, or a kennel to which the dog is tied. The last is the least-preferred option.

- e) Prohibition to keep animals outside without suitable shelter.
 - f) Any person who keeps a CA or who has agreed to look after it shall take all reasonable measures to prevent its escape and shall guarantee the protection of third parties from aggression.
- 2) to encourage the development of education programs for CAs and owners where the participants receive information about the animal's normal behaviour and the principal diseases and obtain basic knowledge about keeping and caring for animals:
- a) Information and education programmes for owners/keepers of CAs. Correct information can be given, for example, in informative, practical and concise brochures, containing mainly the following information:
 - normal behaviour of the dog/cat;
 - correct behaviour towards dogs/cats;
 - behaviour in the presence of children;
 - how to recognize and behave in the case of aggressive behaviour of the dog;
 - how aggression can be prevented;
 - responsibility of the owner/keeper
 - b) Information and education programs among individuals concerned with the keeping, breeding, training and/or trading of CAs, for any commercial purpose. In these programs, attention shall be drawn in particular to the following subjects:
 - the need for training of CAs for any commercial or competitive purpose to be carried out by persons with adequate knowledge and ability;
 - the need to discourage:
 - gifts of CAs to persons under the age of sixteen without the express consent of their parents or other persons exercising parental responsibilities;
 - gifts of CAs as prizes, awards or bonuses;
 - unplanned breeding of CAs;

The kennel or sleeping area must be large enough to allow the dog to stand up and turn around and lie down comfortably. At frequent intervals it should be cleaned so that it is dry and clear of faeces, mud and bones.

- the possible negative consequences for the health and well-being of wild animals if they were to be acquired or introduced as CAs;
- the risks of irresponsible acquisition of CAs leading to an increase in the number of unwanted and abandoned animals.

IV. CONCLUSIONS

Although CAs are considered family members by their guardians, established legal doctrine classifies these animals as property. Currently in the eyes of Italian and European law, similar to the United States and the UK, animal guardians share a legal relationship with their companion animal as owners of property.

The concept of property ownership refers to the possession, use and disposal of a thing. There is, however, a judicial and legislative trend to acknowledge CAs as more than property, and the enactment of both Member States and EU are currently the strongest force in dismantling the property status of companion animals. CAs, like all animals, deserve to be treated with dignity and respect as emotional and sentient beings.

Table 1 – Field of application of the European Convention for the protection of companion animals. Status as of 3/5/2005 (Source: Treaty Office on <http://conventions.coe.int>)

Participating States	Ratification	Enforced
Austria	10 th August 1999	1 st March 2000
Belgium	20 th December 1991	1 st July 1992
Bulgaria	20 th July 2004	1 st February 2005
Czech Republic	23 th September 1998	24 th March 1999
Cyprus	9 th December 1993	1 st July 1994
Denmark	20 th October 1992	1 st May 1993
Finland	2 nd December 1991	1 st July 1992
France	3 rd October 2003	1 st May 2004
Germany	27 th May 1991	1 st May 1992
Greece	29 th April 1992	1 st November 1992
Lithuania	19 th May 2004	1 st December 2004
Luxemburg	25 th October 1991	1 st May 1992
Norway	3 rd February 1987	1 st May 1992
Portugal	28 th June 1993	1 st January 1994
Romania	6 th August 2004	1 st March 2005
Sweden	14 th March 1989	1 st May 1992
Switzerland	3 rd November 1993	1 st June 1994
Turkey	28 th November 2003	1 st June 2004

Table 2 – Standards for the assessment of welfare in domestic cats (Rochlitz, 2005)

1. Provision of food and water: a balanced diet that meets the animal's nutritional needs at every life stage, supplied appropriately, fresh water.
2. Provision of a suitable environment: adequate space and shelter, no extremes of temperature, adequate light, low noise levels, cleanliness, indoor-only or access to the outdoors.
3. Provision of healthcare: vaccination, neutering (sterilisation), internal and external parasite control, identification of the individual (microchip, collar), prompt access to veterinary care.
4. Provision of opportunities to express most normal behaviours, including behaviours directed towards conspecifics and towards humans.
5. Provision of protection from conditions likely to lead to fear and distress.

REFERENCE

- 1) Anon 1997. Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty on the European Community - Protocol on protection and welfare of animals. In *Official Journal of the European Union* C 340, 10/11/1997, p. 110.
- 2) Anon 1991. Law 4 August 1991, No. 281 - Legge quadro in materia di animali d'affezione e prevenzione del randagismo. In *Official Journal* No. 203, 30 August 1991.
- 3) Barton-Ross C. and Baron-Sorenson J. *Pet Loss and Human Emotion- Guiding Clients Through Grief* (Accelerated Development, Philadelphia: Taylor and Francis (1998).
- 4) Beyer Gerry W. *Pet animals: what happens when their humans die?* 40 *Santa Clara L. Rev.*, 617 (2000).
- 5) Broom D.M. *The evolution of feelings and their relation to welfare*. In: Veissier I and Boissy A (eds) *Proceedings, 32nd Congress of the International Society for Applied Ethology* pp 42-43. Institut National de la Recherche Agronomique, France (1998).
- 6) Cain A.O. *A study of pets in the family system*. In A. H. Katcher & A. M. Beck (Eds.), *New perspectives on our lives with companion animals* (pp. 72-81). Philadelphia: University of Pennsylvania (1983).
- 7) Chapouthier G. and Nouët J.C. *The Universal Declaration of Animal Rights, Comments and Intentions*. Édition LFDA, (1998).
- 8) Corson S.A. & Corson E.O. *Pet animals as nonverbal communication mediators in psychotherapy in institutional settings*. In S. A. Corson, E. O. Corson, & J. A. Alexander (Eds.), *Ethology and nonverbal communication in mental health: An interdisciplinary biosocial exploration* (pp. 83-110). Oxford: Pergamon (1980).
- 9) Cropper C.M. *Strides in pet care come at price owner will pay*. *N.Y. Times* A16, Apr. 5 (1998).
- 10) Douglas K. *Mind of a dog*. 165 *New Scientist* 22, 24 (Mar. 4, 2000).
- 11) Duckler G. *The economic value of companion animals: a legal and anthropological argument for special valuation*. *Animal Law*, Vol. 8: 199-221 (2002).

- 12) Duncan I.J.H. & Fraser D. Understanding animal welfare. In: Appleby M C and Hughes B O (eds) *Animal Welfare* pp 19-31. CAB International: Oxfordshire, UK (1997).
- 13) Epstein L.A. *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. Ill. ULJ 31, 32 (2001).
- 14) Favre D. *Equitable self-ownership for animals*, 50 Duke L. J. 473, 502 (2000).
- 15) Fogle B. *Interrelations between people and pets*. Springfield, IL: Charles C. Thomas (1981).
- 16) Foote N.N. *A neglected member of the family, Marriage and family living*. 28, 213-218 (1956).
- 17) Fraser D., Weary D.M., Pajor E.A. and Milligan B.N. *A scientific conception of animal welfare that reflects public values*. *Animal Welfare* 6: 187-205 (1997).
- 18) Heiman M. *Man and his pet*. In Slovenko R. & Knight J.A. (Eds.), *Motivations in play, games, and sports* (pp. 329-348). Springfield, IL: Charles C. Thomas (1967).
- 19) Hickrod L.J. & Schmitt R.L. *A naturalistic study of interaction and frame: The pet*. *Urban Life*, 11, 55-77 (1982).
- 20) Hirschman E.C. *Consumers and their companion animals*. *Journal of Consumer Research*, 20, 616-632 (1994).
- 21) Jensen K.K and Sandøe P. *Animal welfare: relative or absolute?* *Applied Animal Behaviour Science* 54: 33-37 (1997).
- 22) Lagoni L., Butler C. & Hetts S. *The Human-Animal Bond and Grief*. Philadelphia: WB Saunders Company (1994).
- 23) Levinson B.M. *Pets and human development*. Springfield, IL: Charles C. Thomas (1972).
- 24) Paek E. *Fido Seeks Full membership in the family: dismantling the property classification of companion animals by statute*. *University of Hawai'i Law Review*, 481-524 (2003).
- 25) Passantino A., Di Pietro C., Russo M., Passantino M. *Origin of the contract of sale of animals*. 35th WAHVM Congress & 4th Italian National Congress on the History of Veterinary Medicine, Turin, Italy, September 8-11, 2004.
- 26) Passantino A., De Vico G. *Our Mate Animals*. *Rivista di Biologia/Biology Forum*, 99(2): 200-204 (2006).

- 27) Passantino A. *Sentience of Animals as a Constitutional Principle-Moral and Ethic Perspectives*. Proceedings of 14th Congress of Federation of Asian Veterinary Associations, Auckland, New Zealand, May 25-27 2006, 319-326.
- 28) Passantino A. *Conflicting view of companion animals: Society vs. Law*. Abstract Book of 11th International Conference on Human-Animal Interactions, Tokyo 5th-8th October 2007. P9, p.138 (2007a).
- 29) Passantino A. *Responsible pet ownership: legal issues in Italy*. Abstract Book of 11th International Conference on Human-Animal Interactions, Tokyo 5th-8th October 2007, P-10, p. 139 (2007b)
- 30) Preece R. & Chamberlain L. *Animal welfare & human values*. Wilfrid Laurier University Press, 242 (1993).
- 31) Robin M. & ten Bensele R. *Pets and the socialization of children*. In M. B. Sussman (Ed.), *Pets and the Family* (pp. 63-78). New York: Haworth (1985).
- 32) Rochlitz I. *Recommendations for the housing of cats in the home, in catteries and animal shelters, in laboratories and in veterinary surgeries*. Journal of Feline Medicine & Surgery, vol. 1, issue 3: 181-191 (1999).
- 33) Rochlitz I. *A review of the housing requirements of domestic cats (*Felis silvestris catus*) kept in the home*. Applied Animal Behaviour Science, Vol: 93, Issue 1-2, 97-109 (2005).
- 34) Rollin B.E. *Animal welfare, science and value*. Journal of Agricultural and Environmental Ethics 6 (suppl. 2): 44-50 (1993).
- 35) Rossano P., Ravasi G., Ghirlanda A. *Nuovo dizionario di teologia biblica*, 1996, 75 ss.
- 36) Serpell J.A. & Paul E.S. *Pets and the development of positive attitudes to animals*. In A. Manning and J. A. Serpell (Eds.), *Animals & human society: Changing perspectives*. London: Routledge (1994).
- 37) Squires-Lee Debra, In *Defense of Floyd: Appropriately valuing companion animals in tort*, 70 N.Y.U.L. Rev., 1065-66, 1995
- 38) Sussman M.B. *Pets and the family*, New York: Haworth (1985).
- 39) Voith V.L. *Attachment of people to companions animals*, 15 Veterinary Clinics of North America 289, 290 (1985).

- 40) Volkan V.D. & Kavanaugh J.C. (1978). *The cat people*. In S. Grolnik A.& Barkin L. (Eds.), *Between reality and fantasy: Transitional objects and phenomena* (pp. 201-303). New York: Jason Aronson.
- 41) Walshaw S.O. *Contemporary perspectives on pets and people*. In P. Arkow (Ed.), *The loving bond: Companion animals in the helping professions* (pp. 37-53). Saratoga, CA: R & E Publishers (1987).

**COMPLEMENTING LEGISLATION:
THE ROLE OF CULTURAL PRACTICES IN THE
CONSERVATION OF WILDLIFE – EXAMPLES
FROM GHANA**

SHADRACK ARHIN

Introduction

Ghana's wildlife conservation laws, as they pertain to several other African countries, are considered inadequate in the conservation of wildlife. This is either because legislation has been slow in dealing with evolving wildlife challenges, or because the laws are old, obsolete, and incapable of effectively dealing with wildlife issues. In Ghana, an attempt was made in 1995 by the undersigned, and Professor David Favre, to consolidate and modernize all of Ghana's wildlife laws into one homogenous piece of legislation to bring it in line with current practices under CITES and other international legislation. However, this attempt has still not seen the light of day, and Ghana still operates wildlife laws under its main legislation passed as, "*The Wildlife Preservation Act*" in 1960.

Various regulations to the principal Act have been passed, but without an amendment, these regulations have been ineffectual in tackling emerging wildlife issues.

Of prime importance to many wildlife enthusiasts has been the issue of progressing from a state of '*preservation*' to one of '*sustainable use or conservation*', consonant with the aspirations of the many communities that share a home and life with wildlife.

In the light of the obvious inadequacies of legislation as it exists now, there must be some backup plan that either deliberately or inadvertently addresses wildlife issues. In many African countries, there can be found a plethora of cultural values and practices whose consequences, though not always intended, have resulted in tremendous conservation roles for wildlife.

Cultural Values and Practices

Culture has been defined as '*the way of life of a people*', or '*the systems and beliefs of a people that shape their thoughts, lifestyle and conduct*'

It is impossible to define '*the culture*' of any one country in Africa. The diversity and multiplicity of ethnic groupings makes this impossible. Notwithstanding this, a common trend of '*respect and sanctity of life*' creates near universal practices among the many ethnic groups. It is part of the universal belief of many ethnic groups that many species of animals are sacred, and therefore should not be harmed unnecessarily. Indeed among many groups, fetish groves are created where animals found within them are considered 'sacred', and protected from hunters. For many of the people who practice these cultural practices, a strong thread of the sacredness of the groves is attached to them. Indeed in some instances, fetish priests guard any entrance to the groves, and elaborate rituals must be performed before entry will be allowed. The country Ghana is divided into ten regions consisting of several ethnic groupings with diverse but often related belief systems. It is estimated that there are over one thousand sacred groves in Ghana and each contain wildlife, water sources and the like.

Despite the advent of modern lifestyles, many indigenes still revere their culture, and by so doing, have come to appreciate a lot of the values that deal with the relationships and sacredness of animals to human beings.

The Aboakyer or Deer Hunt Festival of the Winneba People

Winneba is a coastal town in Ghana that lies within the Central Region of the country. It is approximately an hour drive from the capital city, Accra. It is a fishing town with a rich cultural heritage. The main festival of the people, the deer hunt festival, takes place in May of each year. During the festival, two tribal war groups are sent out by the chief of the town to enter the otherwise sacred fetish grove and catch live a deer and bring it to the chief. After performing certain rituals, the chief will offer the deer as a sacrifice to the gods. The animal is not to be killed but caught with the bare hands, and the group that first succeeds in catching the deer is deemed the victor for the year. However, in between

festivals, no hunting or very limited hunting of the deer is permitted, as the animal is deemed 'sacred' and fit only as a sacrifice to the gods on the festival day. By considering the deer as the god's yearly sacrifice, the people of Winneba are inadvertently conserving this animal which could otherwise have become extinct due to unbridled hunting for its hide and meat.

Nananom Mpow or Ancestors Fetish Grove

About eighty years ago, a sacred grove was created in the Central region among one of the large ethnic groups in Ghana. The grove, the fantis, was declared outlawed to all people at all times. The purpose for this was that the grove was the abode of the gods, and because of the sacredness attached to the gods, human beings were not to go into the grove because they might disturb them. For the forty or so years that the sacredness of the grove was accepted by the populace, no hunting of wildlife or picking of plant life was allowed. Various species of animals and plants were thus preserved again unwittingly. But sadly, since the advent of so called, "civilized behaviour," the sacred grove has been heavily compromised and hunting and collecting of wildlife goes on all year, resulting in the possibility that some wildlife may become extinct in the future.

The Buabeng – Fiema Monkey Sanctuary

Somewhere close to the geographical center of the Republic of Ghana lies the Brong Ahafo Region. In this region are the villages of Buabeng, Fiema and Dotobaa. The people of these villages are mostly farmers. Surrounding the villages are vast forests, and there is a 4.5 kilometre sacred grove. Several decades ago, the sanctity of this grove was well respected, but over the years, due to population growth and its consequent pressure on existing land, farmers and hunters have gradually been conducting their farming and hunting activities close to the sacred groves, and some probably inside the groves.

Unlike the other examples above, where the effect of conservation was not necessarily caused by deliberate governmental intervention, for the above sanctuary, a deliberate plan was put in place to create a conservation which will not only protect the

monkeys in their natural habitat but also allow the villagers to pick up plant life (mostly for medicinal purposes and food) and in the process create a hub for tourism.

A teacher by the name of Daniel Kwaku Akowuah was able to get the local assembly to pass a law creating an eighty hectare sanctuary to protect the Mona and black and white Colobus monkeys which abound in the grove and number about three hundred and fifty. The law prohibited the hunting and killing of the monkeys upon pain of arrest, prosecution, and a fine. Though initially resisted, the law has stood the test of time, and this sanctuary is now one of the most popular tourist destinations in Ghana.

It must be added that the success of this conservation effort was achieved because of the involvement of the local population in the exercise, who view the monkeys as part of their spiritual heritage. It is a good omen for the monkeys who deserve protection.

The Tavi Adidome Monkey Sanctuary

This sanctuary lies in the Volta Region of the Republic of Ghana, and is one of the eco-tourism projects supported by the United States government, which in the year 2004, commissioned a visitor's reception center at the sanctuary. As with the other sanctuaries in Ghana, this one has also evolved out of a grove held sacred by the local people in the area. In this grove are the Mona and Patas monkeys, which are regarded as gods, and as such, cannot be hunted and or killed by anyone. The greater protection of the monkeys, therefore, lies not so much in the deliberate conservation efforts made by government, but in the spirituality accorded the monkeys by the local people. The monkeys freely roam the villages, pick food from peoples' homes, and are generally treated as kith and kin. When a monkey dies, elaborate funerals are conducted as for human beings, and the monkeys are buried in their own cemeteries. This is indeed one of the examples where strong traditional practices coupled with governmental intervention has created a strong conservation culture amongst native inhabitants.

The Paga Crocodile Pond

Paga is a village that lies in the northernmost part of Ghana and on the border of the Ghana/Burkina Faso. In this rural setting lies the famous crocodile pond, which is a major tourist attraction. Oral history suggests that a hunter, while being pursued by a lion, became trapped between the lion and the pond. In his anxiety, he made a pact with a crocodile in the pond that if it carried him across the pond, so as to escape from the pursuing lion, he and his descendants will forever abstain from eating crocodile meat. Upon his successful escape, he established a village near the pond which to this day has maintained his sacred promise to the crocodile. Due entirely to this tale, crocodiles abound in the pond, and are neither killed nor eaten. There is a strong belief that every descendant of the hunter has a personal crocodile that crawls to the person's house and dies if the human being dies.

The crocodiles have also become a major tourist attraction. Upon arrival at the pond, a visitor has to buy a chicken which he hands over to a crocodile caller, who in turn calls the crocodiles to come for their meal. The crocodile will usually come up and take the chicken from the caller without harming him. In some instances, the chicken is thrown into the pond whereupon the crocodile will surface to eat it. Anytime a crocodile has come up to the surface onto dry land, it has been possible for total strangers to sit by it, or hold its tail without any harm. Sometimes, children in the village take turns riding on the backs of the crocodiles. Again it can be seen that because of a spiritual connection to the crocodile, it has become, without any legislation, a protected species.

Conclusion

It is obvious that cultural practices, to the degree and extent as elaborated upon above, can be beneficial to both human beings and animals, and can help promote conservation of endangered animal species in an atmosphere of co-existence with human beings. Sadly, however, 'civilization' and a modern way of life seems to be gradually eroding this noble attitude towards conservation. It is hoped that the various animal rights groups scattered all over Ghana and Africa will push towards a preservation of those cultural attitudes that help in this regard.

SHADRACK ARHIN, Attorney

Shadrack Arhin is 46-year-old, married and has three children. Mr. Arhin was educated in Ghana and called to the Ghana Bar 21 years ago. His firm, "Corporate Legal Concepts", is established in Accra, Ghana's capital. Mr. Arhin specializes in Property, Corporate and Environmental law with special interests in wildlife law.

Mr. Arhin, with the assistance of Professor David Favre, conducted extensive research on Ghana's wildlife laws which culminated in the redrafting of Ghana's wildlife laws in 1995. Recently, Mr. Arhin served as vice chair of the American Bar Association's Animal Law Committee, and was a guest-speaker at the Animal Law Conference held in San Diego, California, in April 2004.

TO SAVE LAB ANIMALS THE LEGAL WAY: THE RIGHT TO APPEAL ON PERMITS TO PERFORM ANIMAL EXPERIMENTS

LIVE KLEVELAND, THE NORWEGIAN ANIMAL PROTECTION ALLIANCE¹

I. INTRODUCTION

In European law, the use of animals in experimentation is regulated by a directive that, among many other things, sets out minimum standards for the national control of the animal welfare aspects. Each member state is obliged to designate an authority responsible for verifying that certain animal welfare standards are met.²

In Norway a special committee, the Animal Research Authority, has the role of controlling authority.³ The Animal Research Authority is an independent body with eight members representing various scientific fields, law and animal protection organisations. The members are appointed for a two to four year mandate by the Food Safety Authority, which itself is a subordinate body to the Ministry of Food and Agriculture and the Ministry of Coast and Fisheries.

Any researcher, who wishes to perform an animal experiment, must obtain a permit either from the Animal Research

¹ The Norwegian Animal Protection Alliance (NAPA) is a leading national animal charity. Corresponding author: live@dyrevern.no

² See Council Directive 86/609, art. 6, § 1, 1986 (EC) on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes, *available at* http://ec.europa.eu/food/fs/aw/aw_legislation/scientific/86-609-eec_en.pdf; European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes art. 1, § 2(e), 2005, ETS no. 170 *available at* <http://conventions.coe.int/treaty/en/treaties/html/123.htm>.

³ Norway is not a member of the European Community (EU) but because of a bilateral treaty between the EU and Norway, this legislation applies unequivocally.

Authority or a person authorized to give permission on its behalf. For reasons of simplicity, I will solely make reference to the Animal Research Authority in this article.

When the permit is granted or denied, the question of appeal arises. All appeals on decisions from the Animal Research Authority are directed to the Food Safety Authority, who makes a final decision. Further complaints may be taken to court, but not directed to other governmental bodies.

Decisions relating to permits are administrative in nature. In general, the right to appeal an administrative decision is regulated by national legislation which differs within the various EU member states and in Norway.

In Norway, the right to appeal is covered by the Public Administration Act.⁴ As a person to whom the permit is directed, the researcher is considered a “party” and clearly has the right to appeal.⁵ But what about the animals?

II. THE RIGHT TO APPEAL IN THE PLACE OF THE ANIMALS

Animals are not recognized as individuals having the capacity to hold rights. They are perceived by law merely as things, unable to assume the role of plaintiff, party or any other individual with legal standing.

As a consequence the animals themselves cannot, by legal means, appeal a decision granting someone the right to infect them with a lethal disease, operate electrodes into their heads or poison them. The question then becomes can someone else appeal on their behalf?

According to the Public Administration Act, not only a party, but also “another person having a legal interest in appealing the case” has the right to appeal.⁶ The criteria correspond with similar rules regarding the capacity to act as a plaintiff.

⁴ See Lov om behandlingsmåten i forvaltningssaker [The Public Administration Act] (Forvaltnings 10. februar 1967), translated in Universitetet i Oslo, <http://www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>.

⁵ See *id.* at § 2e).

⁶ See *id.* at § 28 §; Lov om mekling og rettergang i sivile saker [The Civil Procedures Law] (Tvisteloven) 17. juni 2005 nr. 90) §§ 1-4 (Nor.).

In the Civil Procedures Law, which entered into force on January 1st, 2008, it is stated that organisations have the capacity to go to court, provided that the case in question is within the organisation's goals and practices.⁷

This rule is new, but codifies a principle already developed by the Supreme Court. The Supreme Court has concluded several times that organisations have legal interest in various matters where the result represents important interest for them. For animal welfare organisations the two so-called battery hen verdicts are of particular interest.⁸ The Supreme Court assumed that an animal welfare organisation had a legal interest in whether or not a regulation concerning battery hens was in compliance with the animal welfare law or not.

An appeal to a superior authority is cheaper, less time-consuming and easier to administer than a case in court. This is why it is more favorable to allow, for example, organisations the right to appeal if they already have the capacity to go to court.⁹

Due to the decisions from the Supreme Court and further arguments from literature in law, the Food Safety Authority has long assumed that certain animal protection organisations have the right to appeal on permissions to perform animal experiments.¹⁰

III. THE DEVELOPMENT OF THE CASE OF APPEAL

When the Animal Research Authority has made a decision, an appeal must be submitted within three weeks of the complainant learning about this decision.¹¹ However, the right to appeal is exhausted within three months of the decision no matter when the complainant became cognizant of the Animal Research Authority's decision.

Animal welfare organisations are not notified about permissions to perform animal experiments, and therefore have to keep themselves informed. Without the possibility to access these decisions, the right to appeal would have been rather illusionary.

⁷ See The Civil Procedures Law, *supra* note 6.

⁸ See Rt. 1984 s. 1488 and Rt. 1987 s. 538 (Nor.).

⁹ See Eckhoff, T., *Forvaltningsrett*, 5. utgave, Tano, 1994 (Nor.).

¹⁰ The question was discussed in detail in Appeal no. 2005/5396 (Nor.).

¹¹ See The Public Administration Act, *supra* note 4 at § 29.

However, under the Freedom of Information Act the vast majority of all applications for animal experiments are made public, along with the minutes from the Animal Research Authority's monthly meetings and other relevant documents that were referred to in making the decisions.¹² All these documents are listed online in the Food Safety Authority's archive system. Any person can examine the list and order documents of interest.

When an appeal is brought, it is directed to the Animal Research Authority, which considers if the applicant has met the formal criteria for appeal.¹³ For example, it must consider if the time limit is expired and if the complainant has "legal interest of appeal." When the appeal does not comply with imperative conditions, it is rejected.

If the appeal makes it necessary, the Animal Research Authority will have to investigate the case further. The other party, in this case the researcher, will be informed about the appeal.

The Animal Research Authority considers the appeal, and may chose to change its previous decision. If the decision is upheld, the appeal is sent to the Food Safety Authority, which makes the final decision.¹⁴ All aspects of the case may be considered, and the Food Safety Authority can even consider new information.¹⁵ The result can be a new decision, a change, or that the former decision is upheld.

The Food Safety Authority must handle the case within three months after the Animal Research Authority has received the case. In practice, it can take longer, but an appeal is generally a swifter process than a court case.

IV. CONSEQUENCES

The Norwegian Animal Protection Alliance (NAPA) has actively used the mechanism to appeal decisions to permit animal experiments. On several occasions we have succeeded in stopping

¹² See Lov om offentlighet i forvaltningen [The Freedom of Information Act] 19. juni 1970 nr. 69 § 2, translated in The World Law Guide, <http://www.ub.uio.no/ujur/ulovdata/lov-19700619-069-eng.pdf>.

¹³ See The Public Administration Act, *supra* note 4 at ch. VI.

¹⁴ See *id.* at § 28.1.

¹⁵ See *id.* at § 34.2.

animal experiments or changing procedures to the benefit of the animals.

The Marine Toxin-case is one example. Norway produces shellfish for human consumption, and the shellfish sometimes contain toxins that can be dangerous. Two out of three standard types of toxins have traditionally been tested out on animals. According to scientists not only the actual poisoning, but also the test itself causes severe suffering. In Norway approximately 3,000–4,000 mice have been killed every year in relation to the testing. Alternative methods are developed, but even if scientists agree that they provide safer results than the animals, they have not been applied. The reason for that is specific EU legislation that applies also in Norway. In 2006 The Norwegian Animal Protection Alliance challenged the interpretation of the EU legislation and appealed on a permission to conduct animal experiments in shellfish testing. As a result permission was withdrawn for one of the two standard tests. Later the same year the test was banned. As a consequence approximately 2,000–3,000 animal lives are spared every year from now on.

Appeals lead to better scrutiny of animal experiments, and may be seen as an extra guarantee for fair trial in particularly controversial cases. Because the researchers have the right to appeal as well, the possibility for animal welfare organisations to appeal for the animals introduces an element of contradiction and balance into a highly debated and ethically difficult matter.

Live Kleveland is a lawyer and animal rights activist. She works as a legal advisor for the Norwegian Animal Protection Alliance, focusing her work on questions concerning animal experimentation and farm animals. She has previously worked for other national animal welfare organizations such as the Norwegian Animal Health Authority (now the Food Safety Authority) and the Norwegian School of Veterinary Medicine. She has been a deputy member of the national Animal Research Authority for four years and a member of the Institutional Animal Care and Use Committee (IACUC) at the Norwegian School of Veterinary Medicine.

CHARTING THE GROWTH OF ANIMAL LAW IN EDUCATION

PETER SANKOFF*

"The great aim of education is not knowledge but action."

- Herbert Spencer (1820-1903)

Although the extent to which the animal law movement has succeeded in generating meaningful change for animals remains a subject of debate,¹ one thing about the movement cannot

* Peter Sankoff is a Senior Lecturer at the University of Auckland, Faculty of Law, where he has taught animal law, criminal law and evidence since 2001. Peter graduated with a B.A. (Broadcast Journalism) from Concordia University in 1992, a J.D. from the University of Toronto in 1996, and an LL.M. from Osgoode Hall Law School in 2005. Peter has also worked as a law clerk for Madame Justice Claire L'Heureux-Dubé at the Supreme Court of Canada and for the Canadian federal government as an advisor on human rights matters involving criminal justice.

From 2002-2006, Peter was the Co-Chair of the Executive Committee of the Animal Rights Legal Advocacy Network (ARLAN), a New Zealand group of lawyers and law students working on animal welfare issues, and also the editor of the ARLAN Report, a short journal discussing topics relating to animals and the law. In 2007, Peter won a \$15,000 grant from Voiceless, the fund for animals (with Steven White of Griffith Law School) to produce a workshop entitled Animal Law in Australasia: A New Dialogue. From this workshop will emerge the first book on animal law ever written in the Southern Hemisphere, expected in late 2008. To learn more about this and other aspects of Peter's work, visit: www.lawstaff.auckland.ac.nz/~psan009.

The author wishes to thank Georgia-Kate Bates, Sophie Klinger and Deidre Bourke for their invaluable assistance with this project. Ms. Bates' assistance came courtesy of the University of Auckland's Summer Scholar Program, while Ms. Klinger and Ms. Bourke were funded by a University of Auckland research grant. The author also wishes to thank all of the survey participants, and especially Steven Wise, Paul Waldau and Laura Ireland Moore for their assistance in tracking down some of the more difficult data sources.

¹ See David Wolfson, *Symposium Conclusion*, 13 ANIMAL L. 123, 125 (2007).

be disputed: it is growing at a remarkable pace, both in the United States and abroad. For one thing, there are more people working as animal lawyers and studying to earn this informal classification than ever before.² Where twenty years ago individuals practicing or trying to acquire knowledge in this area operated in isolation, today's enthusiast can attend animal law conferences,³ participate in moot court simulations⁴ and chat with like-minded individuals on animal law related websites.⁵ Most importantly, for the student undertaking the study of law in 2008, there now exists a very strong possibility that the institution they attend offers a course in animal law or will do so in the near future.

The pace in which these developments have unfolded should not be underestimated. The first animal law course was taught just over twenty years ago,⁶ but since that time, courses of this sort have become regular features at reputable universities worldwide, with new ones surfacing every year. It is no wonder that in the United States animal law is being referred to as "one of the nation's fastest growing fields of legal study and practice."⁷

The impact of this change cannot fully be quantified, but it is undoubtedly important. To begin with, increased acceptance of these courses in academic institutions helps to justify the devotion

² See Joyce Tischler, *Symposium Introduction* 13 ANIMAL L. 13, 20-25 (2007).

³ See, e.g., Lewis and Clark Annual *Animal Law Conference*, <http://www.lclark.edu/org/saldf/conference.html> (last visited Oct. 25, 2007); *The Future of Animal Law* at Harvard University, http://www.cmcna.com/animal_law_conference_2007/index.htm (last visited Oct. 25, 2007).

⁴ See, e.g., National Animal Advocacy Competitions, <http://www.lclark.edu/org/nca/mootcourt.html> (last visited Oct. 25, 2007).

⁵ See, e.g., Voiceless Law Talk, http://www.voiceless.org.au/Law/Law_Talk/Introducing_Voiceless_Law_Talk.html (last visited Oct. 25, 2007).

⁶ The first course devoted exclusively to animal law appears to have been taught by Jolene Marion at Pace Law School from 1986 to 1989. E-mail from Steven M. Wise, President, Center for The Expansion of Fundamental Rights, Boston, to Peter Sankoff, Senior Lecturer, Auckland (June 11, 2007), (05:54:15) (on file with author).

⁷ Laura Ireland Moore, *A Review of Animal Rights: Current Debates and New Directions*, 11 ANIMAL L. 311, 311 (2005).

of time and resources for further study and research into animal law issues. The combined effort also lends added credibility to attempts by activist groups and non-governmental organizations to raise legal questions relating to animals on the national and international stage. When animal law was first taught at Harvard University the event made headlines across the United States, and it was regarded as a moment that “gave legitimacy to [animal law issues] that had not previously existed.”⁸ Legitimacy of this type is important if meaningful change for animals is to occur, as there remains much work to be done in developing new sectors of legal research and spreading the message about animal suffering and the role the law plays in entrenching improper treatment. Increased acceptance on law faculties remains a useful way of spurring these advances.

The development of animal law courses also has a practical, albeit more subtle, effect. As Professor Favre has remarked, “eventually, the wave of individuals passing through law schools will have their full effect on legal institutions. As they become legislators, judges and community leaders, the issues of animal welfare will rise on the national agenda.”⁹ Animal law courses are useful ways of spreading the dialogue about animal issues to a wider audience, and the more courses there are, the more extensive the impact.¹⁰

Each of these objectives are important, and with so much to be gained it is hardly surprising that many animal advocacy groups have made increased access to animal law courses a core focus of their strategy for change.¹¹ These efforts have been

Comment [PS2]: It is not possible to list the email address of the posters in this or footnote 13. The forum in question does not require those posting to list an email address.

⁸ David Favre, *Gathering Momentum* 1 JOURNAL OF ANIMAL L. 1, 2 (2005).

⁹ *Id.* at 6.

¹⁰ There is, of course, also the incidental benefit of getting students in these classes to re-think their own choices in relation to animals and consider veganism. Posting of Gary Francione, to <http://lawtalk.voiceless.org.au/forum/index.php/topic.74.0.html> (May 2, 2005, 11:19:57).

¹¹ See, e.g., ALDF, *Programs: Animal Law Program*, <http://aldf.org/content/index.php?pid=26> (last visited Oct. 23, 2007) (“Moving toward the day when animal law is part of the curriculum at each and every law school, the Animal Law Program collaborates with students, faculty, and school administrations to facilitate the development

successful, but there is still work to be done. Although animal law “has established roots that run both broad and deep”,¹² many skeptics remain unconvinced about the subject’s viability as anything more than a niche topic. Some of the discipline’s longest tenured academics have signaled that the movement must remain vigilant before assuming that the “battle” to attain legitimacy in law faculties is over. For example, Professor Taimie Bryant of U.C.L.A. recently noted that:

Attitudes in the field have changed remarkably, but I would caution that [animal law] is still not seen as a totally legitimate field in academia because the field is not recognized by law school administrators and faculty as containing sophisticated, complex or particularly troubling issues. While writing and teaching in other fields such as tax and constitutional law brings with it legitimacy and status as engaging with “hard” subjects, writing and teaching in animal law is too often seen as dealing with inconsequential or “emotional” issues.¹³

David Favre has similarly written that “for a number of people [animal law] is a novelty course, not a mainstream area where significant academic effort should be expended.”¹⁴ These attitudes are hardly unfamiliar to the small number of animal law scholars working as full-time academics, many of whom have had to get used to snide comments, jokes, or – in the worst case – overt pressure from other professors or law Deans to abandon this area of teaching and research altogether.

of animal law courses”); *Voiceless Animal Law Advocates (Australia)*, http://www.vaa.org.au/index.php?option=com_content&task=view&id=11&Itemid=21 (accessed Oct. 23, 2007)(“How to Request an Animal Law Course”).

¹² Holly Anne Gibbons, *Origins of Animal Law: Three Perspectives 10* ANIMAL L. 1, 1 (2004).

¹³ Posting of Taimie Bryant, to <http://lawtalk.voiceless.org.au/forum/index.php/topic,269.0.html> (June 1, 2006, 12:59:20).

¹⁴ Favre, *supra* note 8, at 3.

The struggle for legitimacy is even starker outside the United States, where the growth of animal law in academic circles has been more gradual. As the first academic to launch an animal law course in New Zealand, I am well aware of the difficulties that exist for professors who wish to challenge the status quo and get a course of this nature up and running. While the “battle” for recognition may have shifted on the American academic landscape,¹⁵ this is not yet true elsewhere, as the struggle to place animal law on the agenda and create a sophisticated dialogue about these issues remains somewhat contentious outside of the United States.

Sadly, this ongoing institutional intransigence and unwillingness to recognize the value of animal law teaching and research is inhibiting the development of new scholars and the very growth of the discipline. In order to surmount these obstacles, it is critical to recognize that the progress being made in developing this teaching and research area is one of the strongest possible arguments in favour of treating it as a “serious” discipline. Those of us who wish to develop animal law as a core subject interest have a strong motive to publicize and make use of the gains made by our colleagues. Trying to get a “novel” course onto the curriculum at conservative faculties – especially where the subject is perceived as being on the fringes of legal study – is a much more challenging task than establishing a course that is already taught at reputed law schools like Harvard, Duke and NYU.

As I alluded to earlier, the animal law enthusiast who attends conferences, publishes in academic journals, and meets with like-minded colleagues to discuss matters of concern, is already aware that the field is expanding dramatically. Still, it is one thing to *feel* momentum and assume that such growth is occurring, and something else altogether to convince naysayers of the same. As a means of rebutting claims that animal law is nothing more than a niche topic, it is necessary to progress beyond

¹⁵ See Richard Katz, *Origins of Animal Law: Three Perspectives*, 10 ANIMAL L. 1, 1 (2004) (“No one is laughing at the hundreds of lawyers across the United States who practice animal law”). With respect to Katz, I think this proposition is overstated. As the survey responses make clear, the legitimacy of animal law as a discipline remains a work in progress, and many academics and practitioners continue to face skepticism and even downright derision from their colleagues.

the intuitive reaction and measure how much growth is actually occurring. In other words, is animal law still a subject on the fringe, or is it in the process of becoming a core topic in law faculties worldwide?

In late 2006, I began trying to answer these questions by undertaking the first comprehensive survey of animal law in education, with the goal of tracking down and documenting every animal law course that has ever been taught, and seeking to uncover how these courses came into existence. As an initial study, my objectives were modest. The primary goal was to discover where the courses were, who was teaching them, how long they had been in existence, what obstacles professors were encountering, and whether the courses were flourishing or struggling. An attempt was also made to uncover the types of subjects that are taught in the courses themselves, as a preliminary means of understanding what the teaching of animal law actually entails.

To accomplish this, I created a short survey and distributed it to the people teaching animal law courses around the world. The replies that flowed in were both fascinating and revealing, confirming the suspicions of those who felt that animal law was beginning to make a real impact on university campuses. Several primary conclusions can be drawn from the data. First, the sheer volume of courses is growing at a stunning rate – and there is little sign of any let up. Second, although most courses were originally concentrated in the United States, animal law is rapidly becoming a worldwide phenomenon, with offerings popping up around the globe at an extraordinary pace, virtually matching the rate of growth that occurred in the United States during the late 1990's and early 2000's. Third, the nature of the people who teach these courses is starting to change, with a higher number of full-time tenured and tenure track professors becoming involved in this area of study. This factor is spurring greater levels of written scholarship, and an increased proportion of permanent – as opposed to special topic – courses. In this regard, matters have already progressed considerably from just two years ago, when it was estimated that the number of full time professors teaching in this area numbered between six and eight.¹⁶

¹⁶ See Favre, *supra* note 8, at 3.

The news is not entirely positive. Not every course has been successful, and some of the failed initiatives seem to have created resistance at particular institutions, impeding courses from being re-established at these locations. Additionally, at many locations there remain obstacles to the continued success of animal law courses, obstacles felt most prominently by full-time academic staff seeking to move into or continue teaching in this area, and there is evidence that many professors are dissuaded – formally or informally – from teaching a course that is still viewed by many professors and faculty administrative officials as flaky or tangential. Hopefully, this article will help to provide evidence that animal law can no longer be designated in these terms, and has instead become a valid topic worthy of being taught to law students in every jurisdiction.

Methodology and Objectives

The first step in this project seemed simple enough when the idea to proceed initially took hold: track down every animal law course in existence. Not surprisingly, the task turned out to be much more complex than first anticipated. It began with a visit to the most authoritative directory of these courses currently in existence, the Animal Legal Defence Fund (ALDF) website,¹⁷ which provided an extremely useful starting point. For years, this site has been tracking North American universities that offer animal law courses as a means of doing something similar to this article – demonstrating that courses of this type are not unusual, novel, or on the fringe of legal academic study. While the information on the ALDF site did not turn out to be entirely accurate – understandable given the difficult task of keeping up with nearly 100 courses, who teaches them, and whether they remain on the curriculum – it was a very useful starting point, and remains a valuable reference for those seeking an updated list of animal law courses.

The search became much more difficult from this point forward. After some initial follow-up indicated that some of the courses listed on the ALDF site were no longer in existence, it

¹⁷ See ALDF, Programs: Animal Law Courses, <http://aldf.org/content/index.php?pid=83> (last visited Oct. 23, 2007).

occurred to me that there might be many more which were not listed. It was also necessary to track down courses outside of North America, as the ALDF does not list these offerings. For several months, a research assistant conducted web-based research, and attempted to track down and follow-up “rumors” of courses offered outside of the United States, confirmed the existence of those posted on the ALDF website, and obtained the email addresses of professors and practitioners who run the courses themselves. Once this process was completed, the survey was e-mailed.

The survey portion of the project officially began in early January 2007 with the majority of responses collected before March 1, 2007. Follow-up inquiries to confirm or expand upon the data continued until October 2007. The information presented in this article is regarded as substantially accurate in documenting courses taught at any time before or during the fall semester in 2007 in the Northern Hemisphere,¹⁸ and before or during the 2007 academic year in the Southern Hemisphere.¹⁹ In all, almost 100 surveys were obtained. The survey itself follows this article, in Appendix A.

To be clear, not all of the data presented below was obtained from surveys. In some cases, a response could not be obtained because the course was no longer in existence or the professor was unavailable or unwilling to provide information. In these instances – which represent a small minority of the overall data – it was often possible to unearth basic information about the courses themselves and when they had been taught by communicating with administrative staff, even though obtaining particular details about the course was not possible. For this reason, the numbers described below do not remain static across

¹⁸ Thus, courses scheduled for the Spring Semester 2008 or later were not included in the survey. This removed a number of courses from consideration but was necessary to ensure the current accuracy of the data. I am aware of at least seven new courses scheduled to run in the first half of 2008: University of Baltimore Law School; Cleveland-Marshall School of Law; Thomas Goode School of Law; University of Oregon; University of Ottawa (Canada); University of Wollongong (Australia); and Villanova University.

¹⁹ In the Southern Hemisphere, the academic year runs from March to the end of November. Any courses that began in 2007 were included.

each of the questions explored, as the number of respondents varies depending upon the question and the nature of the information we were able to discover.

As a preliminary matter of nomenclature, it is necessary to define an “animal law” course for the purposes of this article. Obviously, any course offered by an accredited university as part of a J.D. or LL.B. degree²⁰ designated in some way as relating to the law of animals, whatever its particular moniker, qualifies.²¹ More difficult is the assessment of courses possessing a significant animal law component, and in particular, to courses based on Wildlife Law. After careful consideration, I decided to exclude both of these categories as a means of maintaining the integrity of the overall data.²² In addition, any seminar or informal gathering that fell short of a standard undergraduate law course devoted entirely to the law relating to animals was excluded from the survey.²³

²⁰ Courses dedicated to animals and the law taught outside of a law faculty were not counted for the purposes of this survey.

²¹ These courses exist under many different names, with the most popular being the simplest: “Animal Law” (67 courses under this heading). There was also the more narrowly defined “Animal Welfare Law” (3 courses), and its philosophical opposite, “Animal Rights Law” (7 courses). Also in existence are some more esoterically titled offerings, including “Animals, Persons and Legal Relations” (McGill University), “Animal Subjects, Human Regulators” (Northwestern) and “Animals, Culture and the Law” (University of Victoria).

²² Sadly, this meant the exclusion of perhaps the longest running animal law related course in existence, that of David Favre at Michigan State. Professor Favre has offered a course in Wildlife Law, concentrating on the law of animals, since 1983. Including wildlife courses, however, became problematic for me once I began to discover a number of these courses abroad. I believed that including them would have inflated the survey numbers dramatically, and perhaps distorted the overall data.

²³ The Yale Animal Law Study group, for example, which is not a fully accredited course – despite being led by such notables as David Wolfson and Paul Waldau – was excluded from the survey. Also excluded were any animal law seminars taught as part of an informal or low-credit symposium.

Animal Law Courses in 2007 – The Raw Numbers

In this section, I intend to focus simply on the number of universities that actually offer animal law courses and consider where they are located. While many numbers have been informally mentioned over the years,²⁴ and some have suspected that as many as 100 universities worldwide now offer courses,²⁵ the actual number of law faculties offering an animal law course in 2007 is ninety-four.²⁶

Number of law faculties offering courses in animal law (current)	94
Law faculties that have ever offered an animal law course	109
Animal law courses currently in existence	102

FIGURE A – RAW NUMBERS

²⁴ See e.g., Clayton Gillette, *Symposium Introduction*, 13 ANIMAL L. 13, 13 (2007) (“well in excess of sixty”); Joyce Tischler, *Symposium Introduction*, 13 ANIMAL L. 13, 21 (2007) (“over seventy law schools”); Voiceless, *Where to Study Animal Law*, http://www.voiceless.org.au/index.php?option=com_content&task=view&id=366&Itemid=312 (last visited Oct. 24, 2007) (“taught at more than 85 law schools in the United States”).

²⁵ Steven White, *Law of the Jungle*, BRISBANE LEGAL, Oct. 4, 2007, 17 (more than 100 courses on animal law taught worldwide).

²⁶ It must be kept in mind that to a certain extent the numbers provided below only represent a snapshot of a particular period in time. Figure A shows that 94 law faculties currently offer courses in animal law, however it would be inaccurate to state that 94 “permanent” animal law courses exist. At least 12 surveys – usually involving the newest courses – reported that it was unclear whether the courses would be repeated in subsequent years. See the discussion on Course Frequency, below.

Figure A shows three important categories of data. The first row shows the number of faculties currently offering courses in animal law, a number which represents the total of “active” courses. This number is restricted to classes that were still in existence, in that they were being taught in 2007 or have been taught in the past, and were scheduled – either tentatively or definitively – to be taught again in future.²⁷ The second figure is the total number of law faculties that have ever offered an animal law course. Not surprisingly, this is a much larger number, as it includes courses that no longer exist, as well as courses offered on a specific short-term basis.²⁸ Finally, the third figure considers the total number of *courses* currently in existence, as opposed to the number of faculties that offer them. One of the most promising trends in this area of study is that many universities are now providing more than one animal law course. This initiative is being led by Lewis & Clark Law School, which now offers five different animal law courses.²⁹ Four other universities also offer more than one animal law course.³⁰

²⁷ As will be seen in Figure J below, not every animal law course is taught annually.

²⁸ The most difficult data to track down was the number of “short term” courses, usually offered by a visiting professor or lecturer. We were able to uncover four such courses - taught at Stetson University, University of British Columbia, University of Toronto and Vanderbilt University. It is highly likely that more of these courses exist, and that more will be offered in future. Unless specifically indicated, data from these courses is not counted in the other measurements in this article, as they are not “permanent” courses, and do not operate in the same manner. Eleven “terminated” courses have been considered for some of the data – specifically relating to impediments, but are not counted in the responses that focus on a measurement of current offerings.

²⁹ National Center for Animal Law, Lewis and Clark Law School’s Animal Law Classes and Seminars, <http://www.lclark.edu/org/ncal/lcanimalcourses.html> (last visited Dec. 10, 2007).

³⁰ These are: Duke (Animal Law; Animal Law Clinic); Georgetown (Animal Law Seminar; Animal Protection Litigation); George Washington (Animal Law and Wildlife Protection; Animal Law Lawyering); Whittier (Animal Law; International Animal Law).

Where are these courses located? Figures B and C provide further detail. Figure B shows the distribution of existing courses worldwide, while Figure C includes both current and terminated courses.

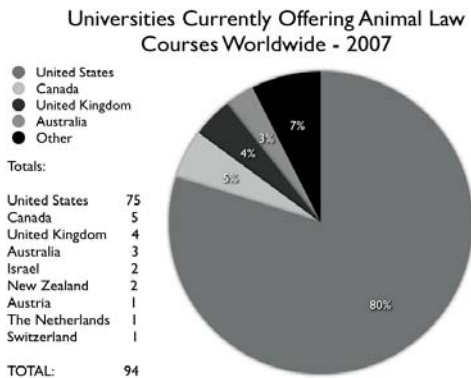


FIGURE B – LAW FACULTIES OFFERING COURSES (LOCATION)

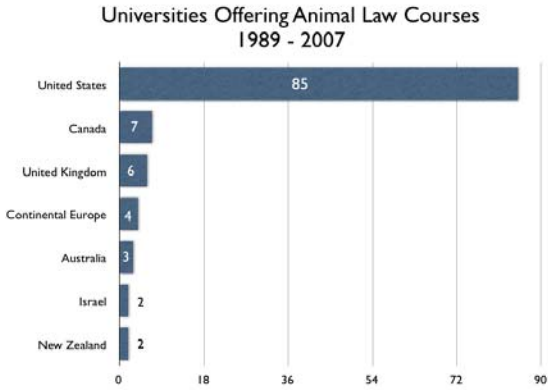


FIGURE C – UNIVERSITIES OFFERING ANIMAL LAW COURSES (EXISTING OR TERMINATED)

The raw data set out in Figures A to C allows a number of conclusions to be drawn. First, as an educational topic, it is apparent that animal law is in a relatively healthy state. While the subject can hardly be considered a “staple” of legal study given the hundreds of law faculties around the world, students no longer have to search far and wide to take a course in this area—especially in the United States. Figures B and C also reveal that animal law remains primarily an American subject of study. Although there has been considerable growth internationally, United States institutions continue to lead the way, and the study of this discipline has been concentrated in this part of the world.

Shifting to the international situation, it seems apparent that the study of the law relating to animals is restricted almost exclusively to common law jurisdictions, which is somewhat unusual. Schools teaching in common law countries account for all but four³¹ of the courses that have ever been offered.³² There is no real explanation for this trend, as issues relating to animal law are just as challenging in civil law jurisdictions, and some of the most promising initiatives at the legislative level have occurred in these regions.³³

³¹ This number could be disputed slightly. Israel should not be considered purely as a common law jurisdiction, and one of the Canadian courses is taught at a French language institution in Quebec that focuses on civil law.

³² It is possible that language difficulties and a lack of detail on some of the international university web pages inhibited my ability to be thorough in my searches for these subjects in foreign jurisdictions. That said, searches in Dutch, German and French were performed, and faculty members teaching animal law in European institutions were asked about other courses they were aware of. No other courses were revealed by these inquiries. Queries were also sent to people working in the field of animal law in Scandinavia, South Africa and India. From the responses received, it would seem that there are no law faculties teaching the subject in these jurisdictions.

³³ For example the constitutional recognition of animals found in Article 20a of the German Constitution (Art. 20a GG) and a recent Austrian case where personhood status and guardianship of Hiasl – a 26 year old Chimpanzee – was taken in an attempt to prevent his sale if the sanctuary where he is residing goes bankrupt: *Austrian Group Wants Chimpanzee Granted Basic Rights*,

Jurisdiction	Law Faculties Offering Animal Law	Law Faculties ³⁴	Percentage
Israel	2	4	50
New Zealand	2	5	40
United States	75	196	38
Canada	5	20	25
Australia	3	30	10
United Kingdom	4	78	5

FIGURE D – PERCENTAGE OF FACULTIES NATIONALLY OFFERING A COURSE IN ANIMAL LAW

Comment [JB3]: This needs to be on the same page as the figure.

Although great strides have been made in getting animal law courses on university curricula, the data in Figure D shows that there is still considerable room for future growth. In the United States, less than 40% of institutions offering a J.D. program list a course in animal law, and the figures are even sparser in some of the other common law countries. The development of animal law in the United Kingdom has been particularly slow, a somewhat

<http://www.foxnews.com/story/0,2933,270078,00.html> (last visited Dec. 11, 2007.)

³⁴ The number of law faculties is somewhat contentious. For the U.S., the number of ABA sanctioned J.D. programs is listed at: American Bar Association, ABA Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Dec. 6, 2007). In Canada, it is the institutions offering an LL.B. only. The World Law Guide, Law School Canada, <http://www.lexadin.nl/wlg/lawsch/nofr/oeur/lxlsca.htm> (last visited Feb. 8, 2008). In Israel, it is only universities. Israel Science and Technology Homepage, Law: Schools and Faculties in Israel, <http://www.science.co.il/Law-Schools.asp> (last visited Feb. 8, 2008). For Australia see: Council of Australian Law Deans, Law Schools, <http://www.cald.asn.au/schools.htm> (last visited Dec. 6, 2007). For the United Kingdom see: Hg.org, European Law Schools, <http://www.hg.org/euro-schools.html> (last visited Dec. 6, 2007). Finally, for New Zealand see: New Zealand Law Society, New Zealand University Law Schools, <http://www.nz-lawsoc.org.nz/oslnzlawsch.asp> (last visited Feb. 8, 2008).

unusual result since many of the most significant legal gains for animals have been made there,³⁵ and the movement for more humane treatment is such a powerful social force in that jurisdiction.³⁶

Animal Law Courses – Growth (by University)

The previous figures are useful in documenting a “snapshot” of animal law courses in 2007, but they fail to reveal how rapidly this area has expanded worldwide. The following charts and tables illustrate the statistics on this point and reveal some impressive numbers, demonstrating that the explosion of new animal law courses has been both sudden and dramatic.

³⁵ Examples include the banning of veal crates (Welfare of Farmed Animals (England)(Amendment) Regulations 2000); fox hunting and hare coursing (Hunting Act 2004); fur farming (Fur farming (Prohibition) Act 2000); and sow crates (Welfare of Farmed Animals (England)(Amendment) Regulations 2003).

³⁶ In addition to the legal reforms, animal welfare campaigns and the mass public protest that has followed have often helped bring issues to the fore and placed pressure for change. In the 1990s mass protests against live veal exports brought several of Britain’s ports to a standstill, Arkangel for Animal Liberation, UK Newspaper Stands up Against the Cruelty of Live Exports,

<http://www.arkangelweb.org/international/uk/20060627mirrorcalfexports.php> (last visited Dec. 11, 2007), similarly, large scale campaigns and the subsequent public outcry, resulting in protests up to 2,000 people strong, led to the closure of several laboratory animal suppliers including Consort Beagle breeders, and Hillgrove farm (a supplier of cats for research). Jill Phipps, Coventry Animal Alliance, <http://www.jillhipps.org.uk/covAA.htm> (last visited Dec. 11, 2007).

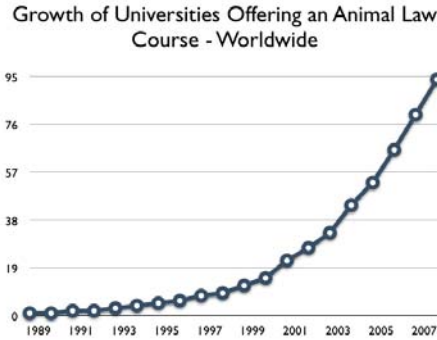


FIGURE E – GROWTH WORLDWIDE

Figure E shows the overall growth of animal law courses – counted by the number of universities offering such courses – over the past twenty years. In this chart, the data is cumulative, meaning that it takes into account both the new courses that have appeared and the courses that have been terminated.³⁷

The dramatic shape of the curve in Figure E should be enough to demonstrate how quickly the increase of courses has occurred, but to put this growth in its proper perspective, it is helpful to divide this data further by examining two separate periods of time. Leaving aside the initial three-year period of 1986-1988 during which the animal law course at Pace University was the only one in existence, it is useful to assess the remaining nineteen-year era in two separate blocks. The first, which I refer to as the “pioneering” period, measures growth between 1989-1999, a time in which each professor starting out to teach an animal law course could fairly be characterized as a pioneer. Not surprisingly, this initial ten-year period was one of sporadic growth. During this time, people like Professors Gary Francione, Taimie Bryant and Steven Wise in the United States, joined by Michael Radford and Simon Brooman in the United Kingdom, led the way by

³⁷ Courses offered only once by a visiting professor, with no possibility of being renewed, are not part of this data.

establishing new courses that paved the way for others in later years. Figure F below demonstrates the slow but steady rate of expansion in the U.S. and abroad in this period.

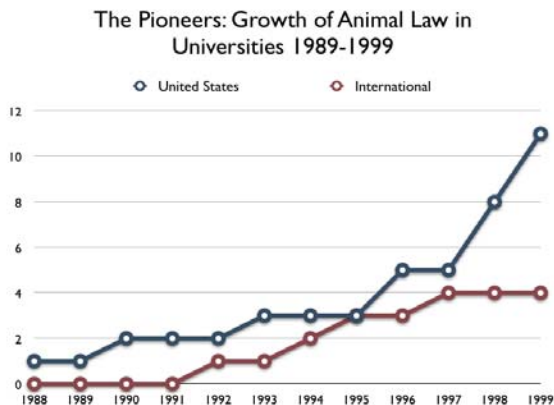


FIGURE F – EARLY GROWTH

As this figure demonstrates, new courses did occasionally appear during this early period, but growth was generally along the lines of being steady rather than spectacular. Between 1989 and 1996, the number of animal law courses went from one to just eight, essentially growing at a rate of about one new course per year. Within three years however, that number had doubled, with sixteen courses in place by the end of 1999. Outside of the U.S. however, growth was much slower. The three courses in place in 1995 had barely increased to four by the end of the decade.

Although sixteen courses worldwide was a good starting point, there was certainly no reason to expect in 1999 that the teaching of animal law would suddenly explode, but it did nonetheless. With Harvard University joining the fold in 2000, a new era had clearly begun, and during this period growth was much more dramatic, as Figure G reveals.

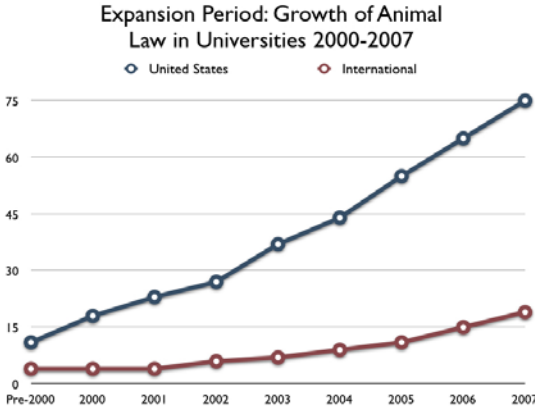


FIGURE G – A PERIOD OF EXPANSION

The data underpinning this chart is undeniably impressive. Since 1999, the number of available animal law courses has increased by almost 600%, with an average growth rate of close to 25% annually. In raw numbers, roughly 11 new courses are started each year.

<i>Year</i>	<i>Number of Courses</i>	<i># Increase</i>	<i>% Increase</i>
1999	15	3	25
2000	22	7	47
2001	27	5	23
2002	33	6	22
2003	44	11	33
2004	53	9	20
2005	66	13	25
2006	80	14	21
2007	94	14	18

FIGURE H – INCREASE OF UNIVERSITIES OFFERING COURSES WORLDWIDE

While the number of courses available has grown impressively, the rate of change has not been distributed evenly in a geographical sense. For a brief period in 1995 a student wishing to attend an animal law course would have an equal chance of doing so whether she lived in Europe or the United States. This parity did not last long, however. Since 1999, United States universities have offered at least four times as many courses as all the academic institutions in the rest of the world put together.

This trend seems to be in the process of changing, however. Although course growth outside of the United States stagnated for a seven-year period between 1995 and 2002, new interest abroad has stimulated a process of expansion similar to that which occurred in the United States between 1999 and 2007. Although the overall numbers are less impressive, the growth rate itself is similar. Moreover, as Figure I demonstrates, the gap in the distribution of courses between the United States and the rest of the world measured by percentage is narrowing - now at under 80%, from a high of almost 86% in 2001 - with more courses available each year in different countries around the globe. Obviously, there remains a large disparity, but it is encouraging to witness law faculties outside of the United States slowly waking up and recognizing the value of these types of courses.

<i>Year</i>	<i>United States Courses</i>	<i>Other Courses</i>	<i>% United States</i>
1995	3	3	50
1999	11	4	73
2000	18	4	81.8
2001	23	4	85.2
2002	27	6	81.8
2003	37	7	84.1
2004	44	9	83.0
2005	55	11	83.3
2006	65	15	81.2
2007	75	19	79.7

FIGURE I – DISTRIBUTION OF COURSES AS A PERCENTAGE

The data is certainly positive for those who believe that the teaching of these courses outside of the U.S. is desirable, as all trends point to this growth continuing, with each new course seeming to spur the development of several others. When I proposed my new course on animal law in New Zealand, I was aware of only one other course in the Southern Hemisphere – a graduate course offered at the University of New South Wales in Sydney. Two years later in April 2007, I was amazed to meet with no fewer than eight professors at an animal law teaching workshop in Sydney, Australia, all of whom were either teaching or interested in teaching a course on the topic. By late 2007, there were five courses up and running in Australia and New Zealand, with at least five more in the process of being established. The international scene looks ready to explode with new offerings over the next decade.³⁸

Frequency: How Often are Courses Offered?

The health of a particular subject can be measured in a number of ways. To be sure, the number of new courses that have been developed each year indicates the growth of animal law as a discipline, but it is one thing to get a new subject on the law school curriculum, and something else altogether to make it a “successful” course.

While it is hardly a definitive indicator, one measure of the success of a particular course is the frequency with which it is offered. Although this factor varies with each university and its available resources, there is a limit to the ability of a given faculty to offer every one of its courses in an annual period. As a very general rule, the most important and popular courses tend to be offered annually, while “niche” courses receive a lesser focus, and are taught on a bi-annual or occasional basis.

³⁸ As aforementioned, new courses are also in the works at several Canadian institutions, and there is interest in developing a course at Hong Kong University.

Frequency of Animal Law Course Offerings

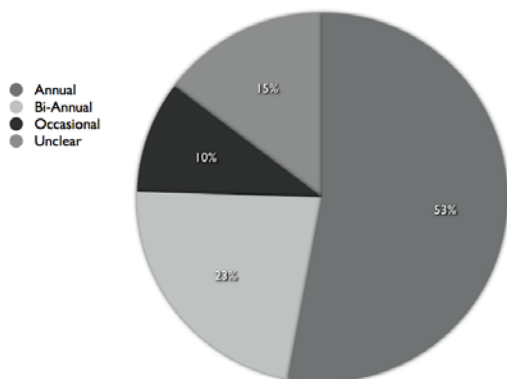


FIGURE J – FREQUENCY OF THE OFFERINGS

As Figure J demonstrates, if frequency is a valid indicator of health, animal law courses seem to be faring reasonably well in the quest for legitimacy, with over 50% offered on an annual basis. Twenty-three percent are offered on a bi-annual basis, and only 10% are provided less regularly.³⁹ A further 15% fall into a category that can only be described as “unclear,” mostly owing to the fact that they are simply too new to have a permanent place on the law school curriculum, though in most of these cases, survey respondents indicated that they hoped to teach the course on an annual basis.

In retrospect, it would have been useful to have asked professors whether their courses had always been taught at the same frequency, so as to be able to measure whether there is currently a higher percentage of courses offered annually than there was at an earlier date. Unfortunately, the survey was not designed in this manner. While it is possible to provide some idea

³⁹ An occasional course is any offering taught less than once during a two year period.

of teaching frequency for courses that were available at an earlier date by using the responses provided by older courses in the survey, there is no guarantee that these responses are accurate representations of how the courses were taught when they first originated. For this reason, I have avoided these sorts of comparisons.

Animal Law – Who is Teaching the Course?

In most law faculties, courses are taught by a mixture of different individuals. Tenured professors usually provide the bulk of the instruction, complemented by their younger colleagues on the “tenure-track”. In some institutions, courses are also taught by full-time staff who are not tenured – for example, the director of a research center or a member of the library. Almost every faculty also has members of the profession – known as “adjunct” professors – who teach courses as well.

Not surprisingly, people falling within each of these categories teach animal law, although the survey data (see Figure K) does reveal that a majority of the courses tend to be provided by adjunct professors. In a broad sense, there are advantages and disadvantages to this. Without question, adjunct professors are usually lawyers who bring a wealth of practical experience to the table. In the best instances, adjuncts are able to provide students with a “real world” perspective of cases involving animals and a sound understanding of the obstacles that await animal lawyers in the courtroom.

Permanent faculty members are not always able to provide this sort of perspective, but there are other gains in having full-time professors teaching in this area. To begin with, permanent faculty who teach animal law are also likely to conduct and supervise research in this area,⁴⁰ a development that permits graduate and post-graduate students to work on animal law related topics. It is somewhat speculative given the small amount of data, but the numbers also indicate that having a permanent member of staff teaching the course increases the likelihood of its long-term

⁴⁰ This is not always the case. Of the 46 full time members of faculty cited in Figure K who teach an animal law course, 11 show no signs of pursuing research in the area, though they may well do so in future.

survival. Of the eleven courses that have been terminated, only three have involved tenured faculty, and in two of these cases, the course only ended because the faculty member moved to another institution or retired.

An additional advantage provided by permanent professors is the presence these teachers provide on campus—a presence that is difficult to attain where the course is only taught by an adjunct. Worldwide there is a strong correlation between faculties where a permanent member of staff is involved and the development of activities related to animal law outside the classroom. Whether it involves the development of journals,⁴¹ the running of conferences or seminar series,⁴² the creation of research centers,⁴³ or the development of advocacy groups, full-time academics often tend to enrich the animal law experience for students inside and outside the classroom.⁴⁴ Notwithstanding the many benefits provided by adjuncts, they are seldom able to establish a robust presence at the faculty, as their teaching time tends to be the only contact they have with the institution. While such a hypothesis is impossible to

⁴¹ The first two animal law journals were developed at universities with permanent members of staff involved in animal law—the Animal Law Journal at Lewis & Clark and the Journal of Animal Law at Michigan State. Interestingly, the two newest law journals – the Journal of Animal Law and Ethics (Pennsylvania), and The Journal of Animal Law and Policy (Stanford), have started up at institutions where no permanent member of staff teaches animal law.

⁴² *E.g.*, Lewis & Clark Annual Animal Law Conference, <http://www.lclark.edu/org/saldf/conference.html> (last visited Dec. 14, 2007); Duke Animal Law Conference, <http://www.law.duke.edu/journals/lcp/articles/animallawconference.pdf> (last visited Dec. 14, 2007).

⁴³ *E.g.*, Lewis & Clark National Center for Animal Law, <http://www.lclark.edu/org/ncl/> (last visited Dec. 14, 2007); Duke Animal Law Project, <http://www.law.duke.edu/animallaw/index> (last visited Dec. 14, 2007).

⁴⁴ *E.g.*, Animal Rights Legal Advocacy Network, <http://www.arlan.org.nz> (last visited Dec. 14, 2007) (started at the University of Auckland with support of a faculty member); Griffith University Society for the Prevention of Cruelty to Animals, <http://lawtalk.voiceless.org.au/forum/index.php/topic,51.0.html> (last visited Dec. 14, 2007) (started at Griffith Law School with a lecturer as the group's advisor).

substantiate numerically, it stands to reason that student participation in animal law related activity is higher at institutions with permanent staff working or researching in this area.

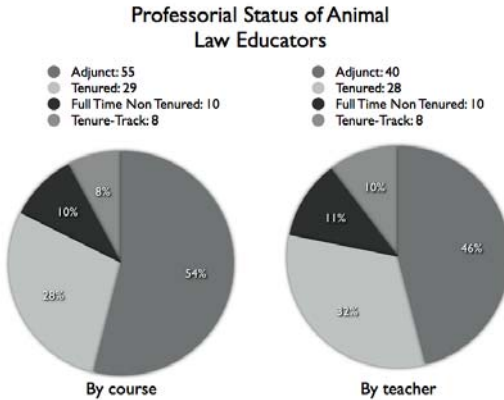


FIGURE K – STATUS OF THE PROFESSORS

Figure K breaks down the status of those people currently teaching courses in animal law. In terms of raw numbers, the split of full-time versus part-time teachers is almost even, with 55 of the 102 courses taught by adjunct professors and 47 taught by tenured, tenure-track or full-time faculty. Interestingly, if one focuses solely on the number of people teaching animal law, the percentages switch in the opposite direction, as several adjunct professors currently teach in more than one institution. Measured by individual, adjuncts represent only 46% of the people teaching animal law worldwide.

Of all the facts uncovered through the survey, this data may be the most surprising, especially given the persistent speculation suggesting that the teaching of animal law is undertaken almost entirely by adjunct professors.⁴⁵ This perspective is not entirely erroneous however, at least where the

⁴⁵ Favre, *supra* note 8, at 3.

United States is concerned. Figure L breaks down the status of professors by splitting the U.S. data off from the rest of the world, and the results demonstrate a marked disparity between the two regions.



FIGURE L – COMPARISON OF PROFESSORIAL STATUS (REGIONAL)

The differences here are significant. In the United States, adjunct professors teach over 60% of the available animal law courses, while that number drops to just 21% abroad. Despite there being almost four times as many courses in the United States, the number of tenured or tenure track faculty involved in teaching them is not even double: 24 professors in the United States and 13 abroad.

Discerning the reason for this disparity is not easy, though a few speculative suggestions can be advanced. The first relates to the general willingness of international institutions to hire adjunct lecturers to begin with. In contrast to many of their international counterparts, most United States institutions offer a bewildering array of elective courses and encourage adjuncts to teach some of the more eclectic offerings. Many of the international institutions – and here I speak from my own experience, supplemented by what I have learned from my colleagues – are much more reluctant

to expand their range of electives, as they tend to depend heavily on government funding for financial support, and there is often little to be gained from putting a wider range of courses on the curriculum.

Another factor may well be the manner in which the animal law movement began in the United States, as for the most part it started with lawyers rather than academics. The Animal Legal Defense Fund (ALDF) has been a powerful force in the United States for almost two decades, and no other country can boast a similarly influential legal group. Early on, the ALDF recognized the importance of encouraging the development of animal law courses, and many members of the ALDF have taught them. In the United States, animal law in education started from the ground up, while in other countries it seems to have sprouted from academics interested in what the movement was doing in America. In direct contrast to the United States experience, most international faculty members indicated in their surveys that the decision to start a course was their own initiative, and that there was no groundswell of support or interest from the administration, or even from students. For these professors, teaching animal law has been mostly a labor of love or pursuit out of intellectual interest.

Impediments to the Development of Animal Law Courses

Although the process undoubtedly varies by institution, getting a new course onto the academic calendar is rarely easy. Faculties have a certain number of compulsory courses they must provide, a finite amount of resources, and an endless demand for modern subjects from students and educators. In many universities, proposals for new courses must be run through a faculty curriculum committee, making the process even more rigorous.

With so many obstacles to overcome, the growth of animal law over the past decade seems even more remarkable, but that is not to say that the expansion process has been entirely seamless. Many professors have had to fight hard in order to get their courses on the agenda, and have faced challenges in keeping them there. For some, the barriers have been slight, simply a matter of having to endure jokes or unpleasant comments from colleagues, but

others have faced more serious problems. In several cases, the difficulties were severe enough to lead to the termination of the course.

It may be useful to begin this section by simply presenting the raw data. On the positive side, the majority of people teaching animal law courses reported facing no resistance whatsoever. Leaving aside the four one-time courses, 104 universities have offered animal law courses as part of their regular curriculum. In 68 of these - 65% of the total – professors reported that they faced no impediments whatsoever. Indeed, many of the professors newest to teaching indicated that they were actually *invited* by the school to teach the course, proof of the health and continuing evolution of the discipline. On the other hand, over the past ten years eleven animal law courses have begun and subsequently been terminated, and not surprisingly, impediments were cited in all of these cases. In addition to these instances, 25 other professors reported impediments of some degree of seriousness, sometimes more than one.⁴⁶

Obstacles to the teaching of an animal law course tended to fall into one of three categories. The first is low student demand, a factor that was occasionally expressed as a matter of concern (e.g. “students don’t seem interested in this class”), but sometimes tended to reflect a more serious problem, to wit, the lack of priority given to the course by the administration (e.g. “this course is often scheduled in a very poor time slot”). The second category tended to be exclusive to full-time academics: that other courses were given priority. Again, the nature of this impediment varied dramatically, with comments occasionally posited in a neutral manner (e.g. “I enjoy teaching other courses as well and cannot fit all of them in”); more commonly, the comments reflected a concern that animal law was not given priority by the institution (e.g. “I’d like to teach animal law more often, but the faculty wants me to teach other courses”). Finally, a common complaint was a more general type of “institutional resistance,” a category that encompassed everything ranging from jokes by

⁴⁶ For this reason, the number of impediments listed in Figures M and N is not equal. Thirty-six professors reported at least one type of impediment (Figure N), but a total of forty-five impediments are listed (Figure M).

fellow members of faculty to intense opposition to the course by university administration. The number of each type of impediment is shown in Figure M.

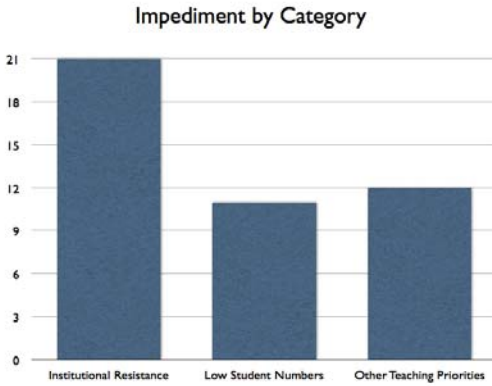


FIGURE M – IMPEDIMENTS TO TEACHING ANIMAL LAW

This data shows that animal law still has a long way to go before being accepted as a “core” legal studies course. Although I have not sourced any comparative figures, it would be highly unexpected if more than one in five courses (21 out of 104) on another legal topic faced institutional resistance from members of faculty. In my own faculty, courses of all sorts are regularly green-lighted once a professor expresses a strong interest in teaching them. Nonetheless, despite my persistence, it took five years for Animal Law to appear on the curriculum, and my experience was shared by other academics who took part in the survey.

The sheer number of courses facing resistance is only part of the problem. An equal source of concern relates to the identity of the professors who face this opposition, as the survey data revealed that it was full-time members of academic staff who confronted the biggest challenges in trying to establish animal law courses. As Figure N demonstrates, adjunct professors tend to meet with far fewer obstacles in teaching animal law courses than

their professional counterparts. While only 27% of adjunct professors faced any kind of difficulty with their animal law courses, that number rose to 44% of full-time academic staff.

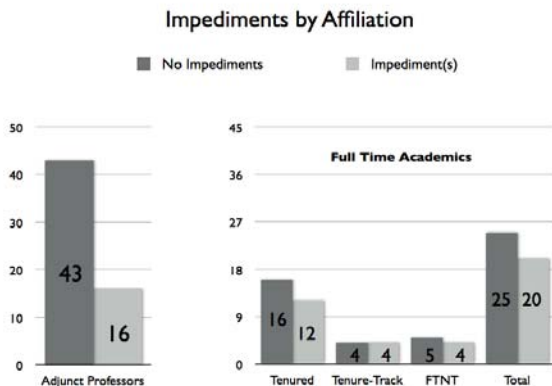


FIGURE N – IMPEDIMENT BY PROFESORIAL AFFILIATION⁴⁷

All things considered, this data is not particularly surprising. To begin with, many adjunct professors indicated that they were invited to teach courses in animal law, making it far less likely that they would report any type of institutional resistance. In addition, although it is not always the case, adjunct professors almost invariably teach just one course at the law faculty, and thus almost none reported the complaint that other courses took priority over their teaching time. Part-timers also tend to have far less contact with members of permanent staff, and thus remain immune to negative comments or efforts to alter the course's status on the academic calendar. Similarly, promotion and tenure are not a concern for adjuncts, and thus there is less reason for other academic staff to attempt to influence teaching and research choices with some form of subtle or explicit pressure.

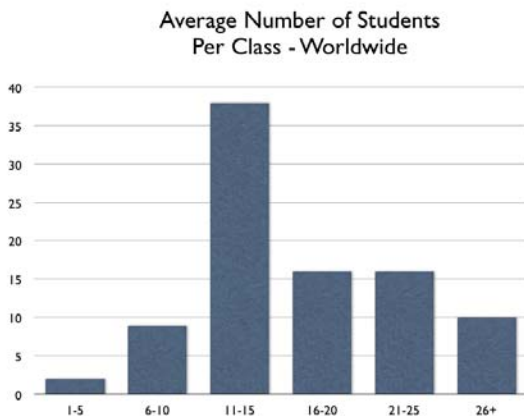
⁴⁷ FTNT stands for full-time non-tenured staff.

Naturally, all of these matters were concerns for full-time academic staff. Almost half of those surveyed reported an inability to focus on animal law issues as much as they would have liked, owing to some form of institutional pressure. Again, this pressure ranged from subtle comments of the administration that the energy put into the course would be better focused elsewhere, to overt demands to cease teaching the subject entirely. Several professors reported that they were only permitted to teach animal law if they offered it in addition to their ordinary course load.

It is hard not to imagine that lurking underneath many of these impediments was the continued perception amongst members of the legal academic world that animal law is not a subject worthy of intellectual study. Thankfully, this is likely to be the perception most easy to change over time. Over the past ten years, animal law has slowly begun making its way into the mainstream, and efforts like the law journals and conferences already discussed, along with some of the provocative new books written by animal lawyers and non-animal lawyers alike,⁴⁸ are forcing even the most conservative members of academic institutions to recognize that the study is a creditable subject of legal education.

What has also helped change negative perceptions is the relative health of animal law courses worldwide, in terms of students taking them. Only eleven out of 104 courses reported low student numbers as an impediment, and of those eleven, at least seven were new courses, and their professors attributed the low numbers as much to institutional resistance as student interest, with the courses placed in highly undesirable spots on the timetable.

⁴⁸ *E.g.*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass Sunstein & Martha Nussbaum, eds., Oxford U. Press 2004); ANIMAL LAW IN AUSTRALASIA: A NEW DIALOGUE (Peter Sankoff & Steven White eds., Federation Press 2008 (forthcoming)).



**FIGURE O – STUDENTS IN ANIMAL LAW COURSES
(AVERAGE)**

Figure O sets out the average number of students per animal law course.⁴⁹ While this Figure provides some idea of the relative health of animal law as a topic in law faculties, its usefulness is somewhat muted by the huge variation in the courses themselves, the size of the universities where they are located, and the requirements of the individual faculties regarding course enrollment. For example, while most animal law courses at American universities are intended to be small seminars and restricted to no more than 20-25 students, in elective courses at the University of Auckland, where I teach, enrollment is never capped, which explains the high average of sixty-five students per class. Indeed, student numbers of this sort are common outside of North American institutions, as universities in these regions tend to offer fewer elective courses, which leads to larger student numbers taking animal law. The differences are shown in Figure P.

⁴⁹ Figures O&P include data from any survey that was returned, and thus includes data from courses that no longer exist, though this represented a very small proportion of the overall results.

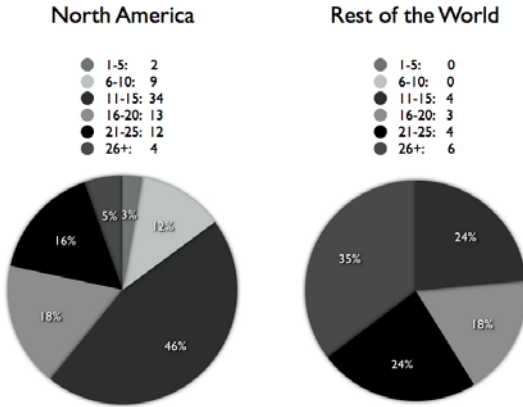


FIGURE P – AVERAGE NUMBER OF STUDENTS

With this level of disparity, it is not really possible to use student numbers as a strong indicator regarding the health of animal law as a subject. That said, the numbers are still of some interest and demonstrate that the topic is attracting a reasonable number of students. Almost 88% of respondents said that an average of eleven or more students enrolled in their courses annually, and 46% reported having at least sixteen students per year.

What is Being Taught?

The most difficult aspect of the survey lay in my attempt to discover what the teaching of animal law actually encompasses. Undoubtedly, much of the failure to uncover information on this matter rests with the survey itself, as only two questions related to the material covered in the animal law course: Question #3, which asked about the materials used in the course, and the request for a class syllabus. From these two queries, it was possible to draw some very rudimentary conclusions about the types of animal law

courses that currently exist. It is worth noting that many survey respondents did not have a syllabus or were unwilling to provide it, so the data in this section is restricted to a consideration of 77 courses that are currently being taught.

Of the seventy-seven, the easiest to separate are the small number of litigation courses, which have a very distinct focus. Only four of these courses exist.⁵⁰ These new offerings concentrate on how to use the law in court as a means of helping animals and have a very strong practical component. Often, students work in a clinic, and have only moderate course instruction.

Things become more difficult once the litigation courses are separated from the rest of the data. Looking over the syllabi as a whole, it is unquestionable that there are significant differences in the way in which animal law is taught, and these distinctions came through from the survey responses as well. Still, pinning down a precise distinction is not an easy task, although I believe the courses can be divided roughly into two categories: (a) courses that focus on law “in which the nature – legal, social or biological – of nonhuman animals is an important factor”⁵¹ and attempt to provide students with an overview of this law; and (b) courses focusing almost exclusively on broader jurisprudential themes relating to the law governing human-animal relations. For practical purposes, I have labeled Category A as Legal Courses, as these courses attempt to provide students with a survey of the major laws affecting animals. Category B is entitled Jurisprudential Courses, as these courses focus less on specific laws and the way they deal with animals, and more on the theoretical dimensions of the law related to animals.⁵²

⁵⁰ These include Duke (Animal Law Clinic), Georgetown (Animal Protection Litigation Seminar), George Washington (Animal Law Lawyering), and Lewis & Clark (Animal Law Clinic).

⁵¹ Pamela D. Frasch et al, *Animal Law*, 2d ed. (Carolina Academic Press, 2002) at xvii.

⁵² A division that might sound more familiar would be (a) Animal Law, and (b) Animal Rights Law: see Steven Wise, *Book Review: Animal Law – The Casebook*, 6 *Animal L.* 251 (2000). I chose not to use this terminology however, as I felt it did not truly reflect the courses that fell within the “jurisprudential” spectrum, for many specifically eschew the term “animal rights” in their syllabus.

To be sure, it is not a precise divide. Many Legal courses spend some time focusing on the theoretical aspects of the animal law debate, while most Jurisprudential courses spend some time on existing legislation or case law. Still, after looking at the focus of these courses in detail, it was impossible not to see distinctions between the two groups. Legal courses tended to cover a great deal more ground, exploring most of the major issues involving the law relating to animals, focusing upon legislation and case law. Questions of animal ownership, property concerns, tort law, contracts and constitutional law were all components of the course. In contrast, many Jurisprudential courses never touched on these matters at all. Instead, the courses tended to focus on philosophical and ethical questions and examine how animal interests are addressed in law. They grapple almost exclusively “with the difficult moral and legal questions that surround the legal personhood of nonhuman animals and whether we should be able to use and abuse them as we do”.⁵³ Not surprisingly, these courses tended to contain many references and excerpts from the work of Peter Singer, Tom Regan, Gary Francione, and Steven Wise.

Obviously, both types of courses have value, and the choice of how to approach the subject will depend heavily upon the desires of the individual professor and the demands of the institution. Interestingly, from what it was possible to divine from the information provided, animal law courses currently tend to break down almost evenly into the two categories, as Figure Q reveals. A third category, which I have defined as “Mixed”, constitutes courses that seem to cover an almost even balance of jurisprudential and legal topics.

<i>Category</i>	<i>Number of Courses</i>	<i>Percentage of Total</i>
Jurisprudential	36	48
Legal	28	36
Mixed	9	11
Litigation	4	5

FIGURE Q – TYPE OF ANIMAL LAW COURSES

⁵³ Wise, *id.* at 257.

Further information regarding the nature of the different animal law courses can be derived from the proscribed materials required for student reading. Not surprisingly, the *Animal Law* casebook – first released in 2000 and now in its third edition – is the most popular text, as indicated by Figure R.⁵⁴ Every one of the Legal courses utilized this text, but its usage was not restricted to this category. A number of jurisprudentially focused courses also relied upon this text for at least a portion of the allocated teaching time, though almost invariably, prepared materials or another book were provided as supplemental reading.

Animal Law: Use of Text Books

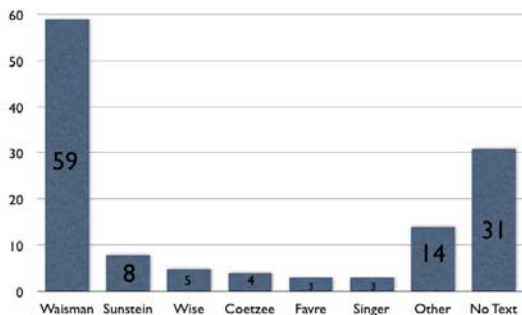


FIGURE R – TEXT BOOKS USED IN COURSES⁵⁵

⁵⁴ This popularity is restricted exclusively to the United States. With its strong focus on American law, *Animal Law* is not utilized by any of the international courses.

⁵⁵ These do not add up to the number of courses available, as a number of courses prescribed more than one book. The references are as follows: Waisman – *Animal Law*, supra n.51; Sunstein – *Animal Rights: Current Debates and New Directions*, supra n.48; Wise – Steven Wise, *Rattling the Cage – Towards Legal Rights for Animals* (Perseus Books, 2000); Coetzee – J.M. Coetzee, *The Lives of Animals* (Princeton University Press, 1999); Favre – David Favre, *Animals: Welfare, Interests and*

Conclusion

Comment [JB4]: Please note I included a page break here.

Although it is impossible to chart a road map showing the precise route to a legal system that better protects animals, there can be little doubt that education plays a major part in the process. If nothing else, the development of animal law courses worldwide has helped give the movement a subtle push forward, both by increasing the quantity and quality of available legal research upon which to build new ideas, and by providing knowledge and inspiration for the “soldiers” who take up the battle.

As this article demonstrates, the growth of animal law as an educational topic is also one of the movement’s most tangible gains. In just over twenty years, animal law has gone from a subject on the fringe of academia to one that can legitimately be regarded as a common topic of legal study. With representation in less than half of the world’s common law institutions, it would be an overstatement to anoint the subject as a core topic of legal study, but it can no longer be described as a fringe subject pursued by a small number of devotees either.

Another promising fact revealed by the survey data is the growing number of full-time members of faculty who are beginning to teach in this area, as teaching animal law should give professors the opportunity to conduct research on this topic as well. Aside from producing a broader spread of research, the work of tenured professors should eventually attract funding and more detailed interdisciplinary work that can only be a boon for the movement as a whole.

In addition to the rapid growth occurring across the United States, the survey reveals that the experiment begun at Pace University in 1985 is becoming a worldwide success. American institutions are clearly leading the way, but this solid foundation is now making it possible for universities in other countries to come on board as well. This is a significant trend, for the global trade in animal products makes the legal status of animals a worldwide concern, and creating a framework that better respects the interests of animals will require solutions at the national, regional and

Rights (Mich. St. U., Det. Coll. L., 2003); Singer – Peter Singer, *Animal Liberation* (Random House, 1975).

international level.⁵⁶ Until recently, the quality and quantity of scholarly research and legal advocacy outside of North America lagged significantly behind the progress made in the United States, but the continued development of animal law courses internationally can only help narrow this gap in the long-term.

Perhaps more than anything else, what the survey data demonstrates most clearly is that success in getting one animal law course on a university curriculum tends to pave the way for many more. With each new course, animal law becomes a more entrenched and viable platform for those who wish to be pioneers in their own law faculties. Hopefully, five to ten years from now, neither full-time nor adjunct members of academic staff will face impediments in getting a course up and running in their own institution. Although there is still a long way to go in terms of using the law to attain a better world for the animals that live in it, the continued development of the subject in law schools is doing an excellent job of putting in place a framework that will give future lawyers the tools to take up this vital challenge.

⁵⁶ This is especially true where the World Trade Organization rules are concerned, as these rules are likely to have a major impact on any domestic reform in the long-term. See Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of their Impact on Animal Welfare* 8 *Animal L.* 107 (2002); Laura Donnellan, *Animal Testing in Cosmetics: Recent Developments in the European Union and the United States* 13 *Animal L.* 215 at 262-265 (2006) (WTO impact on national legislation); Edward M Thomas *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception* 34 *B. C. Envtl. Aff. L. Rev.* 605 (2007) (Examining GATT's impact on reforming EU standards, import restrictions/bans).

APPENDIX A – ANIMAL LAW SURVEY 2007

1. When was the first time you taught animal law in a Faculty of Law? [If you have taught the course at multiple law schools, please list the first time at each] If the course has not yet been taught, when is it scheduled to be taught for the first time?
2. Is your course still being offered? If so, how frequently? [e.g. Annually, bi-annually, occasional]

IF THE ANSWER TO QUESTION #2 IS “NO”, PLEASE ANSWER QUESTIONS 2A, 2B AND 2C, OTHERWISE SKIP TO QUESTION 3.

- 2a. When was the course last offered?
- 2b. Do you plan to teach the course again at any point?
- 2c. Why did you stop teaching the course?
3. Do you use a prescribed text for your course, or your own materials? If you do require students to purchase a text, which one?
4. On average, how many students tend to enroll in the course?
5. Have you encountered impediments, institutional or otherwise, to this course being offered at your faculty? [e.g. Resistance from other faculty, low student support, priority to teach other subjects]
6. What is your affiliation with the University? [e.g. Tenured faculty, tenure-track faculty, adjunct Professor]
7. How many years of experience do you have teaching in a University setting?

IF POSSIBLE, PLEASE INCLUDE A CLASS SYLLABUS FOR
YOUR COURSE AS AN ATTACHMENT

**APPENDIX B – LIST OF UNIVERSITIES
OFFERING ANIMAL LAW COURSES**

United States

<u>LOCATION</u>	<u>FIRST TAUGHT</u>
1. American University Washington.....	2007
2. University of Arizona, James Rogers College.....	2006
3. Arizona State University.....	2005
4. University of Arkansas, Little Rock.....	1998
5. University of California - Berkeley.....	2004
6. University of California - Davis.....	2000
7. University of California - Hastings.....	1996
8. University of California - Los Angeles.....	1993
9. California Western School of Law.....	1998
10. Benjamin N. Cardozo School of Law.....	1999
11. Case Western Reserve University.....	2002
12. Chapman University.....	2005
13. Chicago-Kent College of Law.....	2003
14. University of Cincinnati.....	2003
15. Columbia University.....	2006
16. University of Connecticut.....	2003
17. Cornell University.....	2007
18. DePaul University.....	2004
19. Duke University.....	2000
20. Emory University.....	2006
21. Florida Coastal School of law.....	2005
22. University of Florida Levin.....	2001
23. Georgetown University.....	2000
24. George Washington University.....	2002
25. George Mason University.....	2007
26. Harvard University.....	2002
27. Hofstra University.....	2001
28. University of Houston.....	2006
29. Indiana University.....	1999
30. John Marshall Law School.....	1998
31. Lewis & Clark, College of Law.....	1998
32. University of Louisville.....	2001
33. Loyola Law School - Los Angeles.....	2005

34. Marquette University.....	2005
35. University of Maryland	2003
36. University of Massachusetts.....	2004
37. Mercer University.....	2004
38. University of Miami	2007
39. Michigan State University.....	2000
40. University of Michigan.....	2000
41. University of Missouri-Kansas City.....	2003
42. University of New Mexico	2007
43. New York University	2006
44. Northeastern University.....	2007
45. Northwestern University	1999
46. Nova Southeastern University.....	2005
47. Pace University.....	2003
48. University of Pennsylvania.....	2006
49. Pepperdine University	2005
50. Rutgers University – Camden	2007
51. Rutgers University - Newark.....	1989
52. University of San Diego.....	2004
53. University of San Francisco	2003
54. Santa Clara University.....	2006
55. Seattle University	2003
56. South Texas College of Law	2006
57. Southern New England School of Law	2004
58. Southwestern University	2007
59. Stanford University	2005
60. University of St Thomas.....	2006
61. Temple University	2007
62. University of Tennessee	2005
63. University of Texas	2007
64. Texas Wesleyan University.....	2006
65. Tulane University	2005
66. Valparaiso University.....	2006
67. Vermont Law School.....	1990
68. Wake Forest University.....	2004
69. University of Washington.....	2003
70. Washington & Lee University.....	2006
71. Western State University.....	2007
72. William Mitchell College of Law.....	2005
73. Whittier College	1996

74. Widener University	2005
75. University of Wisconsin	2003

International

<u>LOCATION</u>	<u>FIRST TAUGHT</u>
1. University of Aberdeen (Scotland)	2000
2. University of Alberta (Canada)	2002
3. University of Auckland (New Zealand)	2006
4. University of Canterbury (New Zealand)	2006
5. Dalhousie University (Canada)	2004
6. Griffith University (Australia)	2007
7. University of Leeds (England)	2007
8. Liverpool John Moores University (England)	1994
9. McGill University (Canada)	2006
10. University of New South Wales (Australia)	2005
11. Northumbria (England)	2005
12. Quebec University (Canada)	2007
13. Ramat Gan Law School (Israel)	2002
14. Southern Cross University (Australia)	2006
15. Tel Aviv University (Israel)	2003
16. University of Utrecht (Netherlands)	1997
17. University of Victoria (Canada)	2007
18. University of Vienna (Austria)	2007
19. University of Zurich (Switzerland)	1995

Courses No Longer in Existence

<u>LOCATION</u>	<u>FIRST TAUGHT</u>
Boston College Law School (USA)	2003
University of Denver (USA)	2007
University of East Anglia (England)	2000
Golden Gate University (USA)	2004
Hamline University (USA)	2004
Florida State University (USA)	2005
Kingston University London (England)	2006
San Joaquin College of Law (USA)	2004
University of Southern California (USA)	2003

Suffolk University (USA)	2005
University of Lisbon (Portugal)	2004

THE HUMANE METHODS OF SLAUGHTER ACT: DEFICIENCIES AND PROPOSED AMENDMENTS

JENNIFER L. MARIUCCT*

I. INTRODUCTION

A cow enters a slaughterhouse stun box. The captive bolt swiftly impacts her frontal lobe, intended to render her insensate.¹ However, she remains conscious and proceeds towards the cutting machines with sensibilities intact. As she is cut, stuck, and dismembered, she feels excruciating pain. Most Americans are unaware of these practices. They hold to the ideal that their meat was raised on a family farm and decently slaughtered. The meat industry views farming and raising livestock solely as a business.² Cruel practices are a part of that business and economics is king. Economics decides the manner in which animals are slaughtered. Ethics and such are encumbrances.³

The Humane Methods of Slaughter Act of 1978 (HMSA)⁴ was passed to prevent slaughterhouse cruelty. The HMSA should be amended to apply to *all* animals raised for slaughter. It should state that humane slaughter comprises techniques that render animals insensate prior to slaughter through reliable chemical means where applicable and through the captive bolt method where chemical means are not feasible.

This note will analyze the current HMSA, compare it to analogous laws in Canada, the United Kingdom, and the European Union, and propose a statute intended to secure actual humane slaughter of livestock. Part I sets out a brief history of the statute.

* This note is dedicated to my husband, Vince.

** The author would also like to extend her sincere gratitude to Professor David Favre and to Professor Chris McNeil for all their help and advice during the writing of this note.

¹ See A. Shimshony & M.M. Chaudry, *Slaughter of Animals for Human Consumption*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 693, 702 (2005).

² See MATTHEW SCULLY, DOMINION 254 (2002).

³ *Id.* at 257.

⁴ Humane Methods of Slaughter Act of 1978, 7 U.S.C. § 1901 *et seq.* (1978).

Part II demonstrates the HMSA's inherent weaknesses. Part III compares the HMSA to its counterparts in other parts of the world. Part IV discusses solutions to the HMSA's problems that have been proposed and discarded as ineffectual or unviable. Part V sets forth proposed statutory language for an amended HMSA and the advantages of such a statute.

II. PART I: HISTORY

a. HISTORY OF HMSA

The United States has declared a policy of humane slaughter for animals.⁵ Congress announced this in the original 1958 HMSA. It declared itself an act intended "to establish the use of humane methods of slaughter of livestock as a policy of the United States, and for other purposes."⁶ The other purposes included a safer working environment and better slaughter economics.⁷ This first piece of legislation was fueled by public interest in securing humane slaughter for animals. It allowed for research into humane slaughter methods and an accompanying advisory committee.⁸ It did not provide any authority for the United States Department of Agriculture (USDA) or any other agency to enforce the Act. It lacked any penalties for violations of the Act or any inspection scheme.⁹ Congress amended the statute in 1978 to provide the USDA the authority to inspect slaughterhouses for compliance with the statute and to penalize violators.¹⁰ The 1978 HMSA remains the authoritative law on humane methods of slaughter.¹¹

⁵ *Id.*

⁶ The Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, 72 Stat. 862 (1958).

⁷ *Id.*

⁸ The Humane Methods of Slaughter Act of 1958 §§ 4-5.

⁹ *Id.*

¹⁰ The Humane Methods of Slaughter Act of 1958, Pub L. No. 95-445, § 2, 92 Stat. 1069 (1978).

¹¹ In May 2007, an amendment to the current HMSA was proposed in Congress. The amendment would expand the Act's applicability to chickens under the "other livestock" phrase in 7 U.S.C. § 1902(a). This amendment is not yet effective.

III. PART II PROBLEMS WITH THE HMSA

a. THE STATUTE IS TOO NARROW

Humans recognize that other animals are sentient and able to feel pain.¹² This recognition led to the creation of the HMSA. However, the HMSA is too narrow to achieve its intended purpose. The statute's main requirement for a humane slaughter is that animals be rendered unconscious prior to slaughter.¹³ The statute states "in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical, or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut."¹⁴ Noticeably absent from this list of livestock are chickens, turkeys, rabbits, fish, and bison—all animals which are raised and slaughtered for food in the U.S. The Poultry Production Inspection Act (PPIA) pertains to the slaughter and inspection of poultry, but it states nothing about a humane slaughter.¹⁵ Rabbits, fish, bison, and other animals are ignored completely.

The definition of "humane" goes beyond a mere state of unconsciousness. A standard dictionary defines "humane" as "characterized by kindness, mercy, or compassion."¹⁶ The word's plain meaning demonstrates that a humane slaughter requires much more than an animal be unconscious prior to dismemberment. Humane slaughter requires humane treatment and care leading up to the slaughter, during the process, and after the animals are deceased. The USDA regulations require slaughter facilities "be maintained in good repair." This includes maintaining floors, pens, ramps, and driveways to prevent injuries.¹⁷ Animals are to

¹² See Stephanie J. Engelsman, "World Leader"—*At What Price? A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 331 (2005).

¹³ For this paper, the author ignores 7 U.S.C. § 1902(b) which pertains slaughter of animals in accordance with Jewish and Muslim religious rituals. The HMSA declares such slaughter *per se* humane.

¹⁴ 7 U.S.C. § 1902(a).

¹⁵ Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*(1957).

¹⁶ AMERICAN HERITAGE DICTIONARY (4th ed. 2004).

¹⁷ 9 C.F.R. § 313.1 (2007).

be led to confinement pens with little stimulation and in a calm manner.¹⁸ These regulations are paltry attempts. The current HMSA inadequately protects animals during the slaughter stages. Animals experience inhumane treatment during all parts of the slaughter process.¹⁹ The present statute and the present practices are in conflict. The United States requires a statute with broader language and broader application if it desires a policy of humane slaughter.

a. THE STATUTE IGNORES ANIMALS TO WHICH IT SHOULD APPLY.

i. "OTHER LIVESTOCK"

The HMSA applies only to cattle, horses, sheep, mules, and pigs. Other animals besides these are exposed to horrific slaughterhouse processes. The HMSA includes under its protection "other livestock."²⁰ The phrase's interpretation has not included many of the animals that are slaughtered in this country, chickens being the primary example. A standard dictionary defines livestock as "domestic animals, such as cattle or horses, raised for home use or for profit, especially on a farm."²¹ The first step in statutory interpretation is to use the plain language approach. Chickens fit the definition of "livestock" under this approach. Chickens are domestic animals. Chickens have been a barnyard mainstay for generations. They are not raised as pets. Chickens have always been raised for their meat, their eggs, or for the profit stemming from the eggs or meat.

The USDA, Congress, and the courts have avoided using this interpretation method for the HMSA. This does millions of animals a great disservice. It also is against rudimentary statutory interpretation rules. Generally, this method is the first method employed in any case regarding statutory language.²² Courts are

¹⁸ 9 C.F.R. § 313.2 (2007)

¹⁹ See GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLIGENCE, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 42-47 (1997).

²⁰ 7 U.S.C. § 1902(a).

²¹ AMERICAN HERITAGE DICTIONARY (4th ed. 2004).

²² See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).

required to defer to an agency's interpretation if two prerequisites exist. The agency must be interpreting its own authorizing statute and the statute must be ambiguous. Deference is only granted if the agency's interpretation of the statute is reasonable.²³

An interpretation of "other livestock" that excludes chickens is not reasonable. The dictionary definition of livestock includes many other animals than those to which the statute actually applies. The statute should apply to not only cattle, horses, mules, sheep, and pigs but also to poultry, fowl, rabbits, reindeer, elk, bison, antelope, ostrich, and fish. These animals are all raised domestically for home use and for profit. They fit the dictionary definition, the plain meaning definition and they experience pain and suffering in slaughterhouses just as do cattle, sheep, horse, mules, and pigs. Most of these animals merely have the disadvantage of being newer additions to the American farm.

Chickens do not have that disadvantage. Ninety percent of the animals slaughtered in the each year are chickens.²⁴ Because chickens are not covered by the HMSA, they do not require a humane slaughter. The result is that 90% of the animals slaughtered in the U.S. have less protection than lab rats.²⁵ Most chickens are slaughtered by being shackled by their legs, slit across the throat, dipped in scalding water and then dismembered. This process is cruel and inhumane. The shackles often break legs and panic occurs when the birds are hung upside down causing further injuries from wing flapping and struggling. This process often fails to cut birds adequately so that they do not reach the scalding water insensate.²⁶ The large number of chickens slaughtered per year assures that many are inhumanely slaughtered. This process is most used although chickens can be stunned using chemical means and then easily slaughtered without pain.²⁷

²³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²⁴ AR Media Institute, *FarmStats Resource Page*, <http://www.armedia.org/farmstats.htm> (last visited June 6, 2007).

²⁵ LYLE MUNRO, *COMPASSIONATE BEASTS* 111 (2001).

²⁶ Virgil Butler, *Tyson Foods Under Fire for Inhumane Slaughter of Chickens & Cover Up*, 412 THE AGRIBUSINESS EXAMINER, July 5, 2005 (<http://www.organicconsumers.org/foodsafety/tysonfoods0705.cfm>) (last visited June 7, 2007).

²⁷ See Shimshony & Chaudry *supra*, note 1 at 704.

The PPIA governs the slaughter of chickens and other poultry. Its terms govern chicken slaughter to ensure the meat is not adulterated and spoiled for human consumption.²⁸ The PPIA prohibits the sale of adulterated poultry²⁹ and allows inspections of poultry slaughtering facilities.³⁰ The Meat Inspection Act (MIA) reiterates the humane slaughter requirement for cattle, sheep, swine, and equines while simultaneously serving the same purpose as the PPIA.³¹ The MIA further allows inspectors to stop slaughterhouse production if animals are not humanely slaughtered.³² Chickens should be included under the MIA, or the PPIA should be amended to parallel the HMSA and MIA. This would afford some protection to 90% of animals slaughtered in the U.S.

ii. PERSONAL CONSUMPTION

The HMSA does not apply to animals that are slaughtered for personal consumption.³³ This mostly means animals slaughtered by farmers on family farms. The HMSA and similar statutes were written and intended to apply only to industrial farms and slaughterhouses. Such entities slaughter enormous amounts of animals and require governmental supervision to protect both the animals and consumers. Animals on family farms and family farmers do not pose the same concerns. However, animals on family farms feel pain and deserve equal legal protection as those bound for industrial slaughterhouses.

Enforcing any provision for humane slaughter on private property would be difficult.³⁴ Violations would be difficult to find, and this would hinder the ability to obtain a warrant to search the premises.³⁵ Furthermore, enforcement would likely fall under the

²⁸ 21 U.S.C. § 451(1957).

²⁹ 21 U.S.C. § 458(a)(2)(1957).

³⁰ 21 U.S.C. § 454 (1957).

³¹ The Meat Inspection Act, 21 U.S.C. § 601 *et seq.* (1906).

³² 21 U.S.C. § 603(b).

³³ 21 U.S.C. § 623.

³⁴ David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 132 (1996).

³⁵ *Id.*

USDA's or FSIS's jurisdiction and inspectors may be prone to ignoring small family farms for industrial slaughterhouses with larger numbers of animals and corresponding numbers of violations. These hurdles may prompt some to label such legislation as likely ineffective and not worth pursuing. Such legislation would be a first step toward guaranteeing all animals a humane slaughter. Opposition would be minimal. Any opposition would stem from arguments that a farmer is autonomous and able to do as he pleases with his property. Opposition against the actual humane slaughter would be non-existent; no one favors inhumane slaughter. Legislation of this sort is achievable and worth putting on the books to protect farm animals.

Animals that are outside interstate commerce are also exempted from the HMSA.³⁶ Such a distinction is absurd. All animals feel the same pain when slaughtered. A humane slaughter ought not depend on whether the carcass will be shipped to another state or not. The HMSA is a federal statute. Dormant Commerce Clause challenges that are concerns with state laws regulating slaughterhouse practices do not exist.³⁷ Federal statutes have the advantage of preemption. No significant obstacle exists that requires this distinction. Any amended HMSA should not include this distinction.

c. THE SLAUGHTER PROCESS DOES NOT MEET THE
DEFINITION OF "HUMANE"

The USDA regulates slaughter and stunning methods under the HMSA. Not all of the approved methods meet the definition of "humane" as adopted in this paper. Those methods that do not meet the definition should be discarded. Only one stunning method sanctioned by USDA has humane characteristics. Research for new methods as stated in the 1958 version of the Act is needed.³⁸

1. THE PROCESS DESCRIBED

³⁶ 21 U.S.C. § 623(a).

³⁷ Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 LAW & INEQ. J. 363, 389-90 (2005).

³⁸ See The Humane Methods of Slaughter Act of 1958 §§ 4-5.

Modern slaughterhouses are large factory-like facilities. Animals are first unloaded from transports and then herded toward slaughter pens. Slaughterhouse workers are given prods to keep the animals moving. Workers are instructed to not to prod animals on the head or near the eye area. Electrical prods are intended for sparing use. From the slaughter pens, animals travel through shutes toward the "stun box." The animals' heads are stabilized in a restraining device. Animals are then stunned.³⁹ This is supposed to make the animals unconscious. The animals are then shackled, hoisted and stuck. The animals are lifted so that the blood drains from the body. The hide, head, and limbs are removed. The animals are then cut in half and inspected for impurities.⁴⁰

2. CHANGING THE PROCESS

A. SLOWING THE LINE SPEED

The slaughter process occurs so that a large slaughterhouse can slaughter a hundred or more cattle per hour and several hundred hogs per hour.⁴¹ These numbers are the result of a 200 to 300 percent increases in the slaughter line speed since 1978.⁴² Slaughterhouse workers and USDA inspectors are unable to keep up with the rapid pace.⁴³ As a result, some animals are not properly stunned and go to the line conscious. The HMSA has no provision regarding line speed and is ill equipped to deal with this problem. Slowing the line speed in slaughterhouses is a simple and effective way to ensure humane slaughter. It would allow workers the time to properly stun animals and inspectors the time to do proper inspections.

³⁹ United States Department of Agriculture Animal Welfare Information Center, *Guidelines for the Slaughter of Animals for Human Consumption*, <http://awic.nal.usda.gov> (last visited June 5, 2007).

⁴⁰ Eisnitz, *supra* note 19, at 24.

⁴¹ Animal Welfare Institute Quarterly, *Cutting the Gordian Knot*, <http://www.awionline.org/pubs/Quarterly/fall00/f00gordian.htm> (last visited June 25, 2007).

⁴² *Id.*

⁴³ *Id.*; Eisnitz, *supra* note 19, at 189.

B. GOOD MANAGEMENT

Phasing in other changes while simultaneously altering the HMSA can forward humane animal slaughter. Most important is ensuring that slaughterhouses are properly managed.⁴⁴ Slaughterhouse managers who care for the animals' welfare run slaughterhouses with better humane slaughter statistics.⁴⁵ Such a person is generally one who did not rise to manager from the bottom up but entered the position in another way.⁴⁶ A good slaughterhouse manager can prevent inhumane slaughter through employee training and proper supervision.⁴⁷ Many slaughterhouse workers are illegal immigrants willing to work for meager wages.⁴⁸ The language barrier and little training increase animal suffering. A manager who requires adequate training for all workers ensures that each knows how to handle animals to minimize suffering at all stages of the process.

C. GUIDELINES AND PRIVATE INSPECTORS

Implementing specific, objective guidelines in the slaughter process is a third way to support humane slaughter. Such guidelines as those developed by Dr. Temple Grandin, a well known expert on animal slaughter facilities, help workers recognize a properly stunned animal and help inspectors recognize humane or inhumane facilities.⁴⁹ Using such guidelines in the

⁴⁴ Temple Grandin, Professor of Animal Science at Colorado State University, Animal Welfare in Slaughter Plants, Paper presented at the 29th Annual Conference of American Association of Bovine Practitioners. Proceedings (1996) available at <http://www.grandin.com/welfare/general.session.html> (last visited June 25, 2007).

⁴⁵ Temple Grandin, *Commentary: Behavior of Slaughter Plant and Auction Employees Toward Animals*, 1 ANTHROZOOS 205 (1988).

⁴⁶ *Id.*

⁴⁷ Animal Welfare Institute Quarterly, *Cutting the Gordian Knot*, <http://www.awionline.org/pubs/Quarterly/fall00/f00gordian.htm> (last visited June 25, 2007).

⁴⁸ *Id.*

⁴⁹ Temple Grandin, *Progress and Challenges in Animal Handling and Slaughter in the U.S.*, 100 APPLIED ANIMAL BEHAVIOR SCIENCE 109 (2006).

slaughter process helps standardization in slaughterhouse practices. They provide workers with an easy way to tell if they are following the correct procedures. Fast food chains McDonald's and Wendy's and some grocery store chains support such innovations.⁵⁰ Both McDonald's and Wendy's have private inspectors that audit slaughterhouses providing meat for their products.⁵¹ Such audits have forced improvements in those slaughterhouses. Similar guidelines and inspections in all slaughter facilities would force improvements in other facilities.

3. PRE SLAUGHTER PRACTICES ARE INHUMANE

The USDA requires that slaughterhouses maintain facilities so that inadvertent injuries to animals do not occur. This is a paltry attempt by the USDA to protect animals when they enter slaughterhouse gates. These measures are largely ineffective. They protect the meat industry and its profits more than the animals for which they are intended.

The USDA regulations state that slaughterhouses must not have equipment with sharp corners on which animals could hurt themselves in passing.⁵² Floors must not be slippery.⁵³ Wooden floors must not have holes into which animals could sink or harmful splinters.⁵⁴ Slaughter experts recommend using textured, matte floors and avoiding metals that would cause animals to become frightened of their own reflections.⁵⁵ Veterinarians advise that animals proceed to their deaths calmly, at a normal pace, and with as little stimulation as possible. Electric prods are to be used sparingly and never around the eyes, nose, or anal-genital area.⁵⁶ The regulations also mandate that slaughterhouses provide water and feed to animals.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 9 C.F.R. § 313.1(a) (2007).

⁵³ 9 C.F.R. § 313.1(b) (2007).

⁵⁴ *Id.*

⁵⁵ See Shimshony & Chaudry, *supra* note 1, at 698-99.

⁵⁶ See Lisa Baker, *Humane Slaughter Systems*, (2004)(unpublished DVM thesis, Virginia-Maryland College of Veterinary Medicine)(on file with author).

⁵⁷ 9 C.F.R. § 313.2(e)(2007).

These regulations have little to no effect on whether an animal receives a humane slaughter. An injury an animal might receive from a sharp corner of a chute pales in comparison to the pain it will feel if it is chopped apart while conscious. These regulations and those that require animals be stunned prior to slaughter are the only protection animals in slaughterhouses receive. They need reconsideration so that they actually provide protection. These regulations favor the meat industry more than the animals.

An animal that proceeds calmly to slaughter without any cuts or bruising on its body will fetch a higher market price. Evidence suggests calm animals that are slaughtered are healthier for human consumption because their carcasses resist bacterial growth.⁵⁸ One infected animal can contaminate all the meat produced from a slaughterhouse.⁵⁹ This can result in human illnesses and lost profits. Viewed in this light, the regulations offer little actual protection to the animals. Only the mandate that animals must be provided food, water, and resting space benefits the animals.

4. STUNNING METHODS ARE INHUMANE

A. CAPTIVE BOLT

There is a variety of stunning methods. The “captive bolt” method causes pressure in the brain or enters the brain cavity to cause immediate unconsciousness.⁶⁰ It is used for larger animals such as cattle, sheep, horses, and hogs. If the first stun fails, facilities have second stunning devices on hand to re-stun the animals. Multiple stuns are not always effective to render large, adult animals unconscious. Incorrectly stunned animals try to escape the slaughterhouse. This can result in human injuries.⁶¹

This method of stunning is not humane. It conflicts with the HMSA’s intent. Animals surely suffer from botched stunnings. Guidelines exist to determine whether an animal is sufficiently

⁵⁸ See Baker, *supra* note 56.

⁵⁹ Eisnitz, *supra* note 19, at 159-62.

⁶⁰ 9 C.F.R. § 313.15(a)(2007).

⁶¹ Eisnitz, *supra* note 19, at 45.

stunned. These include a tongue that is hanging limply from the mouth, no head or eye movement, and no vocalization.⁶² These signs declare an animal successfully stunned. Animals *undoubtedly* feel pain if they are slaughtered after an unsuccessful stun. This occurs in facilities with high line speeds. Economics demands that the slaughter line not be stopped for an unsuccessfully stunned animal. This results in inhumane and a horrific death for animals.⁶³ Humane slaughter requires that animals be treated with dignity and respect, kindness and compassion. Slaughtering an improperly stunned animal does not meet these criteria.

B. ELECTRICAL SHOCK AND GUN SHOT

The USDA deems stunning animals through electrical shock⁶⁴ or a gun shot to the head⁶⁵ acceptable stunning methods. Electrical shock is intended to instantaneously produce a “surgical anesthesia”⁶⁶ state. The shock itself may cause an animal undue pain and suffering when used correctly. When used incorrectly the method absolutely causes pain and suffering. Documented abuses of the electrical shock method include torturing an animal with multiple shocks before unconsciousness is achieved.⁶⁷ Employees that work at a particular slaughterhouse job for an extended duration can be prone to such behavior. A good manager who rotates employees through the various jobs can remedy this.⁶⁸ Shooting an animal is equally inhumane. It is too unreliable to be humane. For shooting to be effective, the animal must be calm. This method is difficult to use on excited, anxious animals and on large groups. If the first shot misses, the calm is shattered and the stunning method becomes unviable.

⁶² See Baker, *supra* note 56.

⁶³ Joby Warrick, *They Die Piece By Piece*, THE WASHINGTON POST, April 10, 2001, at A01.

⁶⁴ 9 C.F.R. § 313.30(a) (2007).

⁶⁵ 9 C.F.R. § 313.16(a) (2007).

⁶⁶ 9 C.F.R. § 313.30(a) (2007).

⁶⁷ Eisnitz, *supra* note 19, at 69.

⁶⁸ Temple Grandin, *Commentary: Behavior of Slaughter Plant and Auction Employees Toward Animals*, 1 ANTHROZOOS 205 (1988).

None of these stunning methods display any characteristics of a humane slaughter. There are no indicia of kindness, mercy, or compassion. There is only fear, pain, and indignity. The animals suffer needlessly. These methods demonstrate that the U.S. has no actual policy of humane slaughter. It merely has a statement that there shall be humane slaughter.

C. CHEMICAL STUNNING

Chemical stunning is the sole stunning method sanctioned by the USDA, which displays humane characteristics. Chemical stunning entails animals being loaded onto a conveyor belt that travels through a tunnel saturated with carbon dioxide or another gas mixture.⁶⁹ When the animals emerge from the tunnel, they are unconscious. This stun method is acceptable to stun sheep, calves, and swine.⁷⁰ It is also an acceptable slaughter method for swine.⁷¹ Chemical stunning is employed in other parts of the world with poultry.

Chemical stunning requires a gaseous mixture that will render the animals unconscious while in the tunnel. The mixture varies for different animals.⁷² Chemical stunning requires animals be cut quickly after emerging from the tunnel so that the anesthesia effect does not dissipate.⁷³ This process requires technology that some slaughterhouses are unwilling to install and worker training which some slaughterhouses see as an unnecessary expense.

Chemical stunning is the most humane stunning process. It creates an unconscious state. It does so in a manner without trauma for the animals. It is akin to euthanasia. Euthanasia derives from the two ancient Greek words “eu” and “thanatos” translated literally as “good death.”⁷⁴ It requires removing an animal’s pain and suffering, reducing anxiety and fear, and inducing a “painless and distress free death.”⁷⁵ Euthanasia is a

⁶⁹ 9 C.F.R. § 313.5(a)(1)(2007).

⁷⁰ *Id.*

⁷¹ 9 C.F.R. § 313.5(a)(3)(2007).

⁷² See Shimshony & Chaudry *supra*, note 1 at 703-04.

⁷³ *Id.*

⁷⁴ “Eu” and “θανάτος”

⁷⁵ See The Merck Veterinary Manual, *Euthanasia: Introduction*, <http://merckvetmanual.com> (last visited May 21, 2007).

term generally associated with dearly loved family pets. Family pets and farm animals raised for slaughter are not inherently different. Nothing makes cattle or chickens less worthy of a good death than a golden retriever.

Chemical stunning is a feasible stunning method for many animals. Methods that cause chemical residue on animals for human consumption require approval from the USDA.⁷⁶ Chemical stunning requires research so that the method can be adopted for all animals bound for slaughterhouses. These requirements hinder widespread use of chemical stunning in the U.S. Such considerations should not obscure the U.S.'s humane slaughter policy. Because of economic considerations, millions of animals are inhumanely slaughtered each year when there are methods available to give them a dignified, painless death.

B. THE HMSA IS POORLY ENFORCED

i. HMSA LACKS MEANS TO ENSURE COMPLIANCE

The HMSA lacks any teeth to encourage slaughterhouses to comply with the statute. The penalty for violating the HMSA is insignificant. Inspectors may only "tag" an unacceptable area or piece of equipment that is a statute violation.⁷⁷ The tag states "U.S. Rejected" on the equipment. The slaughterhouse then must bring that equipment into compliance with the statute. The tag is then removed once an inspector is satisfied there is no longer a violation.⁷⁸

This is utterly ineffective at stopping HMSA violations. Odds are that the tag is simply removed after the inspector's departure and business goes on as usual. The intervening time between tagging and fixing the violation causes all animals slaughtered during that time to experience an inhumane death. Time intervals for serious violations should not be permitted. Such intervals undermine the statute's purpose.

⁷⁶ *See Id.*

⁷⁷ 9 C.F.R. § 313.5 (2007).

⁷⁸ *Id.*

The HMSA does not authorize imposing fines for violations. Fines are the most effective means to bring industries into compliance with statutes like HMSA. The fines must be correlated to the violation's seriousness and be enough to sting the industry. The HMSA also fails to allow an inspector to suspend slaughterhouse production if multiple or severe violations are found.⁷⁹ The MIA does allow an inspector to suspend production.⁸⁰ However, the MIA is not an animal protection statute. Congress was willing to impose fines to protect consumers, but not to protect the animals. Without fines or authority to stop production, the HMSA offers no motivation for slaughterhouses to comply with humane slaughter requirements.

ii. POOR ENFORCEMENT

The Food Safety and Inspection Service (FSIS) is the agency within the USDA charged with enforcing the HMSA.⁸¹ There is evidence to suggest agency inspectors are poorly trained and unmotivated to enforce the HMSA.⁸²

In January 2004, the General Accounting Office (GAO) did a study on "1) frequency and scope of humane handling and slaughter violations, 2) actions to enforce compliance, and 3) the adequacy of existing resources to enforce the act [HMSA]"⁸³ to improve FSIS enforcement. The report names several problems pertaining to FSIS and the HMSA. It cites "incomplete and

⁷⁹ 7 U.S.C. § 1901.

⁸⁰ 21 U.S.C. § 603(b).

⁸¹ USDA Food Safety and Inspection Service, *Humane Slaughter Fact Sheet*, http://www.fsis.usda.gov/Fact_Sheets/Key_Facts_Humane_Slaughter (last visited June 7, 2007).

⁸² Constantinos Hotis, *The Anthropological Machine at the Abattoir: The Humane Methods of Slaughter Act*, 2006 U. CHI. LEGAL F. 503, 513-17 (2006).

⁸³ United States General Accounting Office, *Humane Methods of Slaughter Act: USDA Has Addressed Some Problems But Still Faces Enforcement Challenges* (Jan. 2004), available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=d04247.pdf&director=y=diskb/wais/data/gao> (last visited June 7, 2007).

inconsistent inspection reports” from FSIS. FSIS admitted that its inspectors did not always document violations.⁸⁴ Inspectors were not aware of the regulations and did not document violations they considered minor. The report states that FSIS inspectors did not “address non compliance with the act and regulations” consistently and used inconsistent standards. This includes inconsistent enforcement with serious violations.⁸⁵ Most importantly, this report names ineffective stunning as the most common violation.⁸⁶

This report demonstrates the poor enforcement the HMSA receives. Ineffective stunning should not be the most common violation. Stunning is at the heart of the HMSA. The FSIS inspectors must be familiar with the HMSA and the regulations. Uniform standards like those developed by Grandin must be implemented.⁸⁷ All violations must be documented consistently. The inspectors must enforce the HMSA for the animals’ benefit. The HMSA was enacted primarily to protect animals. Inspectors must keep this in mind. Human benefit was certainly another motivating factor,⁸⁸ but there are other statutes and inspectors geared toward protecting consumers from slaughterhouse practices. The HMSA must be enforced properly.

IV. PART III: OTHER COUNTRIES’ HUMANE SLAUGHTER LAWS

Most of the world’s sophisticated countries have identified humane animal slaughter as something worth pursuing. To this end, all have enacted laws similar to the HMSA. Most of these laws have significant advantages for the animals. Part III will analyze the laws from the United Kingdom, European Union, and Canada. It will demonstrate the advantages animals in these countries enjoy which the U.S. should incorporate into an updated HMSA.

a. UNITED KINGDOM

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Grandin, *supra* note 49.

⁸⁸ Hotis, *supra* note 70, at 511-12.

The United Kingdom's Welfare of Animals (Slaughter or Killing) Regulations 1995 (WAR)⁸⁹ correlates to the HMSA. It provides for humane slaughter and requires stunning to achieve this. This statute has three main advantages over the HMSA. First, it is much broader in application and definition than HMSA. Second, violations result in convictions for the guilty party. Third, it allows for poultry slaughter through gaseous means.

i. BROADER APPLICATION

WAR is a much broader statute than HMSA. It applies to the "movement, lairaging, restraint, stunning, slaughter and killing of animals bred or kept for the production of meat, skin, fur, or other products, to methods of killing animals for the purpose of disease control and to the killing of surplus chicks and embryos in hatchery waste."⁹⁰ HMSA applies to a much more limited group of animals. It applies to the slaughter of animals for meat in commercial slaughterhouses. It does not require humane slaughter for animals that are slaughtered solely for their skins, furs, or other parts. HMSA also does not require humane slaughter for diseased animals or for surplus chicks and embryos. WAR protects a much larger range of animals than HMSA.

WAR also applies to various stages of animal handling that accompany slaughter. HMSA pertains to the actual slaughter and centers on the stunning requirement. WAR encompasses the whole process. It requires that animals receive humane treatment before, during, and after slaughter and during transport to slaughterhouses. WAR explicitly states that animals must be treated humanely prior to slaughter.⁹¹ HMSA does not contain such language. The USDA regulations require similar treatment, but the language is buried in the regulations. Regulations are less powerful and more easily altered than statutes. This lessens the regulations' impact and makes a much less powerful statement than WAR's explicit statutory requirement. The U.S. has separate

⁸⁹ Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 731, s. 1 (U.K.).

⁹⁰ *Id.* at s. 3.

⁹¹ *Id.* at s. 4.

statutes that govern slaughter and transport of animals. WAR incorporates the two into one set of animal regulations. This creates a stronger and more cohesive animal protection statute.

An important advantage of WAR is the definition of protected “animal” under the regulations. WAR states that the definition of “animal” shall include birds⁹² and rabbits⁹³ in addition to cattle, horses, pigs, sheep, goats, and mules. HMSA applies neither to birds nor to rabbits. The WAR definition of “birds” includes “any domestic fowl, turkey, pheasant, quail, partridge, goose, duck, or guinea fowl.”⁹⁴ This requires that in the U.K. all chickens be humanely slaughtered. This is WAR’s most noteworthy advantage over the HMSA. WAR also surpasses HMSA by specifying geese, ducks, and turkeys as animals that are covered under the statute. All of these birds are consumed in the U.S., but are all excluded from the HMSA.

Similar to HMSA, WAR excludes certain categories of animals. Included are animals killed for personal consumption and animals killed not for a commercial purpose.⁹⁵ WAR does not apply to animals killed during sporting events⁹⁶ and wild game killed by hunters.⁹⁷ The first is a tribute to the U.K.’s history of foxhunting. WAR also does not protect laboratory animals,⁹⁸ but like the U.S., there is a separate statute governing animals and scientific experiments. A distinct advantage to WAR is its penalty provision. WAR, unlike HMSA, states that violations of the statute make a person “guilty of an offense.”⁹⁹ The U.K. recognizes that actual penalties are required for such a statute to work. Overall, WAR is much more effective than HMSA.

ii. GAS KILLING OF BIRDS

⁹² *Id.* at s. 2(1).

⁹³ *Id.* at s. 2(3).

⁹⁴ Welfare of Animals (Slaughter or Killing) Regulations 2007, s. 15, sch. 7a (U.K.).

⁹⁵ Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 731, sch. 1 (U.K.).

⁹⁶ *Id.* at s. 3(3).

⁹⁷ *Id.* at s. 3(4).

⁹⁸ *Id.* at s. 3(2)

⁹⁹ Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 731, s. 26(1) (U.K.).

Gas is used in the U.S. to stun and kill pigs. It is available to kill chickens but is not the preferred method. The U.K. amended WAR in 2007 to require that birds be killed by exposure to gaseous mixtures.¹⁰⁰ This is a distinct advantage to HMSA and demonstrates the U.K.'s commitment to humane slaughter.

Gas killing of birds is an innovative slaughter method. It allows birds to be killed painlessly, but it requires construction of gas chambers and requires that slaughterhouse personnel be trained in chamber methodology. All of this requires that slaughterhouses invest money in the technology. The U.S. is so far unwilling to require slaughterhouses to invest money in innovative slaughter methods. Economics is the biggest opponent to humane slaughter. Congress has not required such investment likely because the slaughter industry is politically powerful. Both economics and politics are poor reasons for not amending the HMSA similar to this 2007 WAR amendment. Such an amendment would not only be a strong statement on behalf of animals but would also save *millions* of animals from an inhumane death. Both are sufficient reasons to promote such an amendment in the U.S.

b. CANADA

Canada's Meat Inspection Act (CMIA) allows humane slaughter for Canadian animals. The HMSA has many flaws, but the statute does state that humane slaughter is the U.S.'s policy. The CMIA's main purpose is not the humane slaughter of animals and does not state a similar policy. The CMIA is a general statute that prescribes standards for various issues pertaining to meat. The issues range from import and export of meat products to trademark use. The statute itself does not require humane slaughter in Canada. It merely allows regulations pertaining to humane slaughter.¹⁰¹ The CMIA's one advantage over the HMSA is its inclusion of birds in its definition of "animal."¹⁰²

¹⁰⁰ Welfare of Animals (Slaughter or Killing) Regulations 2007, s. 15, sch. 7a (U.K.).

¹⁰¹ Meat Inspection Act, R.S.C., ch. 25 (1st Supp.), s. 20(f) (1985) (Can).

¹⁰² *Id.* at s. 2.

The regulations for humane slaughter in Canada total three. Two parallel the USDA regulations for the HMSA. One requires that “every food animal that is slaughtered shall, before being bled, (a) be rendered unconscious in a manner that ensures that it does not regain consciousness before death.”¹⁰³ The methods approved for stunning include the captive bolt, gas exposure, electric shock, and decapitation for chickens and rabbits only.¹⁰⁴ The second regulation requires only food animals shall not be exposed to avoidable distress or pain.¹⁰⁵ The third states that only chickens and rabbits are to be shackled for slaughter without being unconscious.¹⁰⁶ This last regulation is disturbing. It unambiguously allows inhumane treatment of animals. This is in direct contradiction of the purpose of the three regulations on humane slaughter.

Similar to the U.S., Canada’s regulations do not apply to meat products that are not for commercial use.¹⁰⁷ Animals slaughtered to provide animal food or slaughtered for medicinal purposes are also excluded from humane slaughter.¹⁰⁸ This is something that is not mentioned in the HMSA. Although, horses, often slaughtered for animal food, are protected under the HMSA. Canada’s regulations do protect domesticated reindeer, caribou, and muskox from inhumane treatment.¹⁰⁹ These animals are not mentioned in the HMSA but are equally deserving of humane treatment and slaughter. Canada’s unique environment and culture influenced this provision. It is something that could easily be included in an amended HMSA as it is pertinent in the U.S. as well.

The few regulations for humane slaughter and the absence of a humane slaughter statute clearly demonstrate that Canada has not yet seriously considered inhumane slaughter and its repercussions. The HMSA has many flaws. However, compared to Canada’s similar legislation, the HMSA makes a clear statement in favor of humane slaughter and treatment of animals and has

¹⁰³ Meat Inspection Act Regulations SOR/90-288, s. 79 (Can).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at s. 62.

¹⁰⁶ *Id.* at s. 78.

¹⁰⁷ *Id.* at s. 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

some influence to support that statement. Canada's legislation and regulations need extensive reconsideration.

c. EUROPEAN UNION

Among the countries examined, the EU's Council Directive 93-119 of 1993 (CD 93-119)¹¹⁰ and its amendments comprise the most generous humane slaughter law. The EU has a liberal policy regarding animal rights and animal welfare. The EU enacted CD 93-119 for animal benefit. Hardly any exemptions are granted. Only a few member countries grant exemptions for religious rites.¹¹¹ Unlike the HMSA and CMIA, human considerations were less important and did not taint the final product to the same degree.

Similar to the other slaughter laws, CD 93-119 applies to the "movement, lairaging, restraint, stunning, slaughter and killing of animals bred and kept for the production of meat, skin, fur, or other products and to methods of killing animals for the purpose of disease control."¹¹² The original law names horses, cows, pigs, rabbits, goats, sheep, and poultry as the protected animals and requires that they be stunned prior to slaughter.¹¹³ Wild game¹¹⁴ and animals killed for personal consumption, in scientific experiments, and in cultural or sporting events are excluded from the law.¹¹⁵

The original CD 93-119 goes beyond the HMSA protections by including poultry. It also protects animals that are not slaughtered for their meat, hide, and fur but for "other products." This acts as a "catch all" category and protects animals slaughtered for pet food. Such a provision is an advantage over HMSA, WAR, and CMIA.

The original CD 93-119 failed to protect exotic animals such as reindeer, ostriches, and fish. In 2004, the European Commission sought recommendations and advice from the Scientific Panel on Animal Health and Welfare regarding slaughter

¹¹⁰ Council Directive 93/119/EC O.J. (L340)(hereinafter CD 93-119).

¹¹¹ The EFSA Journal 326, 1-18 (2006).

¹¹² CD 93-119, art. 1.

¹¹³ *Id.* at art. 5.

¹¹⁴ *Id.* at art. 9.

¹¹⁵ *Id.* at art. 1.

practices for not only animals covered under CD 93-119 but also for farmed fish.¹¹⁶ The EU adopted the recommendations on June 15, 2004 and became the first to include fish in humane slaughter legislation. The report included a recommendation for gas stunning for swine and poultry and an admonition against shackling of rabbits, chickens, and turkeys before slaughter.¹¹⁷ The European Commission went one step further in 2006. It requested a similar report for deer, rabbits, goats, ostriches, ducks, geese, and quail.¹¹⁸ This report was adopted on February 13, 2006. It gave the EU the most expansive list of animals covered under a humane slaughter program.

The EU is moving forward with humane slaughter for all animals at a quicker pace than the rest of the world. It frequently takes action to update its humane slaughter legislation to ensure it is up to date with modern technology. It has also expanded the legislation's scope. The EU makes a strong statement for animal rights and welfare with these actions and its minimal exemption policy. The U.K. updates its legislation somewhat less frequently, but its program appears headed in a similar direction as the EU's.

The U.S. has only updated the HMSA once. A few other attempts have failed. Presently, an amendment is pending in Congress. History suggests it is unlikely the amendment will pass. The HMSA is hampered by the poor consideration it was given initially and the fact that it was passed not entirely for animal benefit. Still, it surpasses the Canadian equivalent, which is little more than an afterthought stuck into the CMIA. The U.S., however, needs a new statute. The current HMSA in its current form is unable to evolve in the direction of the U.K. and EU, which lead the pack with the humane slaughter issue.

V. Part IV: Past Attempts At Changing The Statute

Animal welfare and animal rights groups have tried various solutions over the years to change the HMSA and propel the U.S. toward a more liberal stance on humane slaughter. All have failed; the HMSA has not changed for almost thirty years.

¹¹⁶ The EFSA Journal 45, 1-29 (2004).

¹¹⁷ *Id.*

¹¹⁸ The EFSA Journal 326, 1-18 (2006).

Lack of public recognition is the main problem that attached itself to these attempts.

a. PUBLIC SUPPORT

Most of the general public have never heard of the HMSA and are unaware of its shortcomings. Books like Eric Schlosser's *Fast Food Nation* have garnered some attention, but the issue remains mostly hidden. That results in the current situation. Most Americans are doing nothing to further humane slaughter change. Results do not come from doing nothing. Change in the HMSA requires the public be aware of the problem. That was the impetus for the birth of the HMSA; it is integral for the statute's evolution. The American public, particularly voters, are a powerful entity when united behind an issue. Humane slaughter is not a controversial issue. Gathering support for it is not an insurmountable problem.

b. GRASS ROOTS GROUPS

Grass roots groups attempt to bring issues such as the HMSA to the public's attention and effect change in this way. Grass roots groups are often stigmatized as ultra liberals who want to save the animals and the environment at the cost of everyday conveniences and luxuries.¹¹⁹ Such preconceptions preclude grass roots groups from being taken seriously. They are known for "publicity stunts."¹²⁰ Farm Animal Task Force's (FARM) Great American Meatout is an example. It encourages Americans to give up meat and refers to meat as "flesh" to emphasize its point. Events like this and protests organized by similar groups are intended to spread the group's message through the mass media but usually do not have any long ranging effects. Often they simply irritate the public. An irritated public is not likely to support a group's cause. This results in a failure to accomplish the intended goal. The idea to disperse the message is sound, but the execution is poor. Grass roots groups like FARM are generally ineffective on a large scale. However, inserting the HMSA's

¹¹⁹ MUNRO, *supra* note 25, at 114.

¹²⁰ *Id.* at 113.

problems into an average person's everyday knowledge is a good starting point for changes in the HMSA.

c. VEGETARIANISM

A simple but unpopular way to destroy humane slaughter issues is to do away with the need to slaughter animals for food. Vegetarianism and veganism are popular suggestions. Both are unviable. Most humans are raised as meat eaters and enjoy meat too much to want to give it up. Ensuring humane slaughter of animals does not require such extreme measures. It merely requires ensuring that slaughtered animals receive respect and humane treatment at death. Offering up vegetarianism as an option only scares supporters of innovation away. Changing the HMSA requires support in a way that an everyday person can participate. Vegetarianism and veganism do not meet this criterion.

d. PREVIOUS LEGISLATION

Previous legislation to alter the HMSA has failed. The amendments were not well known. Politicians are not motivated to change statutes like HMSA without public pressure as an incentive to do so. However, new legislation that overhauls the HMSA remains the best method to change the HMSA. The federal government is really the only entity with enough authority and resources to implement a uniform, workable solution. It must have the public's support. Grass roots groups and others who support changing the HMSA would be well advised to lobby long, hard, and carefully so that a new amendment is visible and can acquire public support.

The current proposed amendment to the HMSA intends to alter the "and other livestock" phrase to include chickens. This would be a significant improvement on the current HMSA if it passes, but the HMSA contains many other flaws beside an exclusion of chickens.

Legislation has drawbacks. The process is slow and the HMSA is not high on most politicians' agendas. Changing the HMSA this way will take time and patience. New legislation will also require new rules and regulations, which take time to create and codify. The FSIS and its inspection standards must also

be overhauled and revamped. Legislators must approach a new HMSA carefully or doom the project to failure.

VI. PART V: FUTURE CHANGES IN THE STATUTE

a. LEARN FROM THE PAST

Future attempts to amend the HMSA should keep in mind the past's failures. New attempts must be visible to the public. They must be presented in a manner to garner public support and create political pressure on politicians. Legislation should be the preferred method and supporters must be prepared for the process to be time consuming.

b. BASIC REQUIREMENTS

Any amendment to the HMSA must also meet certain requirements. New legislation should be based on the EU's CD 93-119. It should provide protection for all animals that are likely to be slaughtered by humans, including but not limited to cattle, horses, sheep, mules, pigs, goats, fish, bison, deer of any kind, chickens, poultry, quail, antelope, and ostriches. It should apply to both animals slaughtered for commercial use and those slaughtered not for commercial use. A new HMSA must apply to animals that are slaughtered for reasons other than for food. Examples include animals that are slaughtered for their hides or furs and animals slaughtered for some other product. A "catch all" provision would not be misplaced.

c. REQUIRE BETTER SLAUGHTER AND STUN METHODS

One of the advantages other humane slaughter laws have over the HMSA is that they strongly promote humane slaughter and the use of new stunning and slaughter methods. A new HMSA should strengthen the U.S.'s policy by allowing minimal exemptions to the statutory requirements of humane slaughter. The statute should mandate chemical or gas methods of stunning or slaughter for swine and poultry and for other animals if it becomes acceptable for larger animals. Electrical shock and the gun shot

method of stunning should be discarded. Neither fit the dictionary definition of humane.

The captive bolt method is the recommended method for stunning larger animals.¹²¹ It should be the only permitted method. Opposition will likely argue that economics makes such provisions impossible. Economics should not enter the equation. Allowing economics to play a part in a new HMSA pollutes it with the same human considerations as the current and original HMSA. Furthermore, the economic argument is not persuasive. Such provisions work in other countries; there is no reason one should not work in the U.S. Supporters of a new HMSA and drafters of the new statute should consider incentives for the meat industry to invest in new technology. Low interest loans or grants and tax benefits could ease the transition for the meat industry to any new requirements and lessen the industry's resistance.

d. BETTER ENFORCEMENT

An updated HMSA will only be effective if the USDA and the FSIS tighten enforcement. Mandatory labeling regarding how the animal was slaughtered should begin. It would motivate inspectors to enforce standards more strictly. It would also keep the public informed and interested in the issue. This allows the public to decide at the supermarket whether it prefers meat slaughtered in a manner approved under this statute or not. The labeling must be standardized and supervised by the USDA. Such labeling has helped organic food gather support, but organic labeling is not standardized. Protecting animals at slaughterhouses requires that consumers be able to rely on the type of labeling. If this is not controlled, it would become a loophole for the meat industry to sidestep its obligations.

The statute should also require biannual reports on violations. The FSIS has shown that it does not keep good records. This would fix that problem and would add to the information available to the public. Transparency encourages the meat industry slaughter to conform to the statute and makes positive results more likely. The statute should give the FSIS a worthy penalty for violations. Fining slaughter facilities should be allowed. Hefty

¹²¹ The EFSA Journal 326, 1-18 (2006).

finest and criminal charges for multiple violations should be authorized. Ideally, inspectors should have ability to stop production until all serious violations are rectified. This would include the most common violation, improper stunning.

e. HOW TO BEGIN THE PROCESS OF CHANGE

i. GRADUALLY

Changing federal legislation is a time consuming process. Change in the HMSA must occur gradually so the meat industry has time to adapt to the new requirements. Many reformers expect change to occur overnight. That simply is not possible given the magnitude of changes required. The simplest way to start this process is to start with state laws. Federal lawmakers and federal legislation are more difficult for an interest group to influence than state lawmakers and state legislation. States are generally more receptive to progressive legislation¹²² and positive results are more likely. Historically, progressive trends in state laws have helped create progressive federal laws.¹²³ If a state trend toward stricter slaughter requirements arises, then the possibility of altering federal law increases.

Gradual change also will help to avoid alienating the meat industry.¹²⁴ Reforms can be phased in over time and incentives given to encourage the meat industry to comply without a struggle. The meat industry is very powerful politically. Many congressional representatives are elected by states that slaughter huge amounts of animals per year. Angering the meat industry by moving too fast will sabotage any HMSA change. Sponsors of any new HMSA must stress what humane slaughter will do for the meat industry. One of the initial reasons for passing the HMSA was that it was believed that humane treatment increased the quality of meat produced. There is still evidence to suggest this.¹²⁵ Better quality meat can only be good for the meat industry. The American consumer is increasingly interested in environmental and

¹²² Kreuziger, *supra* note 37, at 383-84.

¹²³ *Id.* at 383.

¹²⁴ *Id.* at 401.

¹²⁵ See Baker, *supra* note 56.

animal protection. Organic foods and free-range chickens and turkeys are increasingly popular. It has become trendy to eat organic foods. A similar trend for humanely slaughter beef and pork would affect the meat industry and promote change.

f. PROPOSED STATUTORY LANGUAGE

It is unlikely that every reform mentioned in this paper will find its way into such a statute. A statute incorporating most of the suggested reforms would appear similar to the following proposed statutory language. The proposed statutory language encompasses the best humane slaughter provisions from around the world and some other possible suggestions.

**Humane Methods of Slaughter
Act of 2007**

§1: Humane Slaughter

a) No method of slaughtering or handling in connection with slaughtering shall comply with the public policy of the United States unless it is humane. Humane as used in this statute shall indicated slaughter methods

1) Characterized by kindness, mercy, or compassion; and

2) Characterized by care and respect for the animals prior to and immediately following slaughter; and

3) In conformance with any rules and regulations issued by United States

Department of Agriculture
intended to protect
animals from inhumane
slaughter practices.

b) Slaughtering in accordance with ritual requirements of any religious faith that prescribes a method of slaughter whereby the animal loses consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering are deemed humane and exempt from the further requirements of this Act.

§2: Application

a) This statute shall apply to fish, bison, deer, poultry, rabbits, antelope, ostrich, cattle, horses, mules, sheep, goats, swine and any other animals deemed appropriate by the USDA.

b) This statute shall apply to all animals slaughtered regardless of the reason for slaughter.

§3: Stunning

a) All animals shall be stunned and rendered insensible to pain before slaughter.

§4: Stun and slaughter method

a) Chemical methods shall be used to slaughter or stun all animals for which this method is available. Scientific information shall deem when this method is appropriate to slaughter or stun an animal.

b) Animals for which chemical stunning or slaughter is unavailable shall be rendered insensible to pain through the captive bolt method prior to being shackled, hoisted, thrown, cast or cut.

c) Slaughter facilities must keep all stunning and slaughter devices in working order such that one blow renders animals insensate with minimal pain, fear, and discomfort.

d) Pens, holding areas, shutes, and all other equipment and areas must be maintained in such condition to avoid causing inhumane treatment or injury to the animals.

§5: Rules and Regulations

a) The United States Department of Agriculture is given authority to promulgate rules and regulations for this Act including equipment standards and other reasonable violations.

b) The United States Department of Agriculture shall promulgate rules and regulations pertaining to mandatory labeling regarding the slaughter method of all slaughterhouse products.

§6: Inspections

a) The United States Department of Agriculture and the Food Safety Inspection Service are authorized to inspect slaughter facilities for violations of this Act.

§ 7: Violations and Penalties

a) Violations shall be characterized as either major or minor.

1) Minor violations shall incur a minimum fine of Five Hundred Dollars (\$500.00) per animal per violation.

2) Major violations shall incur a minimum of One Thousand Five Hundred Dollars (\$1,500.00) per animal per violation.

3) The United States Department of Agriculture shall have discretion to increase the fine amount.

4) The United States Department of Agriculture

is authorized to stop production at any slaughter facility with five or more separate violations. The minimum shut down shall be one day for each separate violation.

5) More than ten separate instances of violations shall constitute a misdemeanor.

6) More than twenty separate instances of violations shall constitute a felony.

§8: Biannual Reports

a) The United States Department of Agriculture shall provide and publish biannual reports of all violations of any slaughterhouse facility in the United States. The report shall state what action was taken to rectify the situation and the end result.

§9: Line Speed

a) A slaughterhouse shall limit its line speed such that workers properly stun each animal before it proceeds to slaughter.

- b) Violation of the preceding provision shall be a major violation under this Act.

VII. CONCLUSION

The United States needs a new HMSA and improved regulations. The United States is a world leader in many arenas and enjoys that position. Humane slaughter of animals is not one of those areas. Changes would benefit the meat industry, consumers, and, most importantly, animals that end their lives in a slaughterhouse. The current proposed legislation is a step in the right direction, but more reforms are necessary. Federal legislation is the only feasible way of remedying the current situation. The U.S. must seriously consider changes to the Humane Methods of Slaughter Act so that the legislative process may begin and changes may be implemented as soon as possible. Delay causes millions of animals per year to suffer through an inhumane death.

CASE LAW SUMMARIES
JENNIFER BUNKER

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
Allen v. Municipality of Anchorage	168 P.3d 890 (Alaska Ct. App. 2007)	After pleading no contest to two counts of cruelty to animals, Allen was ordered to serve a 30 day sentence and was placed on probation for 10 years. Her probation included a condition that prohibited her from possessing any animals other than her son's dog. It is this condition that Allen contested.	<p>The Court of Appeals of Alaska affirmed. It held that the district court was justified in imposing the probation condition because (1) it is difficult to supervise possession of animals; (2) Allen has a history of cruelty to animals; (3) it is reasonably related to Allen's rehabilitation and to protecting the public; and (4) the probation condition was not unduly restrictive of her liberty.</p> <p>The dissent argued that under Alaska law, Allen does not have the right to appeal any condition of her sentence to the court of appeals under Alaska law because her sentence was less than 120 days.</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
American Society For Prevention of Cruelty to Animals v. Ringling Brothers and Barnum and Bailey Circus	502 F. Supp. 2d 103 (D.D.C. 2007)	Animal rights organizations brought suit arguing that the defendant was harassing and harming elephants in violation of the taking provision of the Endangered Species Act (ESA). ESA delegates power to the Secretary of the Interior to issue permits to allow activities pertaining to captive-bred wildlife that are otherwise prohibited by ESA for scientific purposes or to enhance the propagation or survival of the affected species. It also includes a pre-Act exemption. Defendant filed a motion for summary judgment	<p>The District Court for the District of Columbia granted defendant's motion for CBW permitted elephants. Because defendant provided evidence that his CBW permitted elephants were born in captivity in the United States, the court found no issue of contention.</p> <p>The court denied defendant's motion for elephants claimed to be pre-Act exempted because ESA is unambiguous and Congress only granted pre-Act exemptions for two subsections of ESA—neither of these subsections pertains to the defendant. The court also noted that the Fish and Wildlife Service's failure to amend its regulation to conform with an ESA amendment</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		based on its captive-bred wildlife (CBW) permits and the ESA pre-Act exemption.	does not result in an ambiguity in ESA.
California Veterinary Medical Association v. City of West Hollywood	152 Cal. App. 4th 536 (2007)	The Superior Court of Los Angeles County, California, declared invalid a West Hollywood ordinance that banned animal declawing unless necessary for a therapeutic purpose and enjoined its enforcement. The City of West Hollywood appealed.	The Court of Appeal of California held that the California Veterinary Medical Practice Act (VMPA) did not preclude an otherwise valid local regulation of the manner in which a business or profession was performed nor did it preempt the ordinance. It also held that the ordinance's purpose of preventing animal cruelty was within the city's police power and only had an incidental effect on the veterinary field. The court reversed and directed the trial court to grant the City of West Hollywood's motion for summary judgment.

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
Cavel International, Inc. v. Madigan	500 F.3d 551 (7th Cir. 2007)	On May 24, 2007, the Illinois Horse Meat Act was amended to prohibit any person in the state to either slaughter a horse for human consumption or to import into or export from Illinois horse meat to be used for human consumption. Cavel owned the only horse slaughterhouse remaining in the United States at the time of this case. The meat was exported to countries such as Belgium, France, and Japan. Cavel claims that the Act violates the federal Meat Inspection Act and the commerce clause of the United States Constitution.	The Court of Appeals for the Seventh Circuit affirmed and dismissed the slaughterhouse's suit with prejudice. The court held that the Meat Inspection Act does not preempt the Illinois amendment because at the time the Act was passed, horse slaughtering for human consumption was legal in some states and the federal government had a legitimate interest in regulating the production of human food. The Act did not mandate that horse slaughtering must be allowed in the States. The court also held that the Illinois amendment does not unduly interfere with the foreign commerce of the United States and states have a legitimate interest in prolonging the lives of animals that their population favors (such as horses).

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>The district court declined to grant Cavel a preliminary injunction against the enforcement of the Illinois amendment because he failed to make a strong showing that he would prevail on the merits of the case.</p>	<p>Therefore, there is no violation of the commerce clause of the United States Constitution. The court also distinguished between rendering plants (in which owners of horses must pay the plant to take the horses and have them disposed of) and slaughterhouses, which pay for live horses.</p>
Center For Biological Diversity v. Lohn	483 F.3d 984 (9th Cir. 2007)	<p>The National Marine Fisheries Service made a proposed ruling that due to its Distinct Population Segment Policy, listing the Southern Resident killer whale as an endangered species under the Endangered Species Act was not warranted because it was not significant to its taxon. The Center for Biological Diversity</p>	<p>The Court of Appeals for the Ninth Circuit dismissed the case as moot, because the Southern Resident killer whale had been listed as an endangered species. Therefore, the court refused to rule on the lawfulness of the Service's Distinct Population Segment Policy.</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>challenged this determination. The court set aside the Service's "not warranted" finding because it did not use the best available scientific data and ordered the Service to reexamine their proposed decision. The Service next recommended that the Southern Resident killer whale be listed as a threatened species then later issued a final rule listing the Southern Resident killer whale as an endangered species.</p>	
<p>Earth Island Institute v. Hogarth</p>	<p>484 F.3d 1123 (9th Cir. 2007)</p>	<p>In 1992, the United States joined with various Latin and South American countries to</p>	<p>The Court of Appeals for the Ninth Circuit affirmed and agreed with the district court that: (1) the Secretary did</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>create the Panama Declaration, a legally-binding agreement in which the United States agreed to weaken the dolphin-safe labeling standard and allow such a label when the tuna was caught with purse-seine nets as long as no dolphins were observed to be killed or seriously injured. In 1997, pursuant to the Panama Declaration, Congress passed the International Dolphin Conservation Program Act, which required the Secretary of Commerce through the National Oceanic and Atmospheric Administration (NOAA) to conduct scientific studies to determine if purse-seine nets were killing or</p>	<p>not conduct studies required by 16 U.S.C. § 1414a(a)(3) to produce data from which scientists could draw population inferences; (2) the Secretary's "no adverse impact" determination ran so counter to the best available evidence that its finding was implausible; and (3) the Secretary's Final Finding was, to some degree, influenced by political concerns (relations with Mexican and South American governments) rather than scientific concerns.</p> <p>The Court of Appeals for the Ninth Circuit rejected the district court's order that the Secretary and NOAA not allow tuna caught in purse-seine nets to be labeled dolphin-safe. It also rejected the district court's requirement that any agent or employee of the agency who</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>seriously injuring dolphins. In 1999, the Secretary made an Initial Finding that using purse-seine nets had no adverse impact on dolphins. Environmental groups brought suit in federal district court. The court rejected the Initial Finding and held that the agency's determination was arbitrary and capricious in light of the inconclusive evidence used to make the determination. The Court of Appeals for the Ninth Circuit affirmed. The agency did more studies and concluded that purse-seine nets were not harming dolphins in a 2002 Final Finding. The district</p>	<p>knew of impermissible labeling to notify the appropriate enforcement agencies.</p> <p>The Court of Appeals for the Ninth Circuit did note that pursuant to its holding, and until a new Congressional directive, there will be no change in tuna labeling standards. Therefore, tuna caught by purse-seine nets will not be allowed to be labeled "dolphin-safe."</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		court vacated the Final Finding and declared that dolphin-safe labeling may not be used for tuna caught with purse-seine nets.	
Feldman v. Bomar	--- F.3d ----, 2008 WL 90235 (9th Cir.)	Plaintiffs brought suit in district court and argued that defendants had violated the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEAQ) by adopting the National Park Service's (NPS) program to restore the fox population on Santa Cruz Island by killing the island's feral pig population rather than sterilizing or transporting the	The Court of Appeals for the Ninth Circuit dismissed plaintiffs' appeal as moot because the feral pigs had already been killed. The court found no policy reasoning that would counter this decision, because the plaintiffs waited two years after the NPS plan was approved before bringing their case to court. Also, the plaintiffs' requests for a temporary restraining order and a preliminary injunction for both denied and affirmed on appeal. The court noted that the pigs created an environmental hazard that necessitated quick action.

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		feral pigs. The district court granted defendants' motion for summary judgment.	
Natural Resources Defense Council, Inc. v. Gutierrez	2008 WL 360852 (N.D. Cal.)	In a prior 2003 case, the court held that defendants had violated the Marine Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA), and it issued a stipulated permanent injunction that set out specific terms under which the Navy was to operate Low Frequency Active (LFA) sonar. Congress subsequently amended MMPA to exempt military readiness activities from its small	The District Court for the Northern District of California ordered the parties to meet and confer on the precise terms of a preliminary injunction that reduces risk to marine animals by restricting the use of LFA sonar when not necessary for detection and tracking of submarines. In deciding that a preliminary injunction is appropriate, the court decided that plaintiffs have shown that they are likely to prevail on establishing violations of MMPA, NEPA, and ESA, and have shown probability of harassment and irreparable injury to marine life—many of which is endangered. The court also balanced the harms and weighed the

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>numbers and specified geographic region requirements. Later, the National Marine Fisheries Service (NMFS) issued a Final Rule that required the Navy to use a three-point monitoring scheme in order to take marine mammals incidental to testing, training, and military operations. Plaintiffs brought suit to limit the federal government's peacetime use of LFA sonar and alleged that such use as approved by NMFS violates MMPA, NEPA, and ESA because LFA sonar causes irreparable injury to marine mammals.</p>	<p>public interest. It held that there is a strong public interest in the survival and flourish of marine mammals, and there is also a compelling interest in protecting national security by ensuring military preparedness and protecting those serving in the military from hostile attacks. Therefore, the preliminary injunction must be carefully tailored to ensure that both of these interests are served.</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
Seeton v. Pennsylvania Game Commission	937 A.2d 1028 (Pa. 2007)	The Tioga Boar Hunt Preserve sells canned boar hunts in which customers can pay a fee to shoot and kill an enclosed animal that may be drugged, tied to stakes, or lured to feeding stations. Seeton wrote to the Pennsylvania Game Commission asking for enforcement of the Pennsylvania Game and Wildlife Code against the Preserve. The Commission responded that the Code did not apply to the Preserve because the boars were kept within enclosures and therefore not “wild mammals” that are	<p>The Supreme Court of Pennsylvania reversed and held that the commonwealth court erred in deferring to the Commission’s interpretation of the Code because the Code defines “wild animals” as all mammals that are not designated domestic. The court found no evidence that wild boars are domestic animals. Therefore, because the Commission has jurisdiction over the matter, it remanded the case for further proceedings by the Commission.</p> <p>The dissent argued that Seeton does not have legal standing because she does not have a substantial, direct, and immediate interest in the matter. The dissent further argued the Seeton does</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>protected by the Code. However, neither the Code nor the Commission's regulations define "wild mammals." Seeton then filed a Complaint in Mandamus alleging that this was an improper conclusion and claiming that she had taxpayer standing. The commonwealth court rejected Seeton's challenge because both interpretations of "wild mammal" were reasonable and it must defer to the Commission.</p>	<p>not have taxpayer standing because she is seeking to force a governmental agency to spend money rather than to cease spending tax dollars. Finally, the dissent argued that the Commission's interpretation should be upheld because it is not plainly erroneous or inconsistent with the Code.</p>
State v. West	741 N.W.2d 823 (Table) (Iowa Ct. App. 2007)	<p>West raised deer on his property that he sold to petting zoos, game preserves, and breeders. He shot two dogs</p>	<p>The Court of Appeals of Iowa reversed West's convictions because Iowa Code provides an absolute defense when a dog is caught in the act of chasing any</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
	2007 WL 2963990 (Iowa Ct. App. 2007)	owned by his neighbor when he witnessed them running along his fence and barking at the deer. The next day, he found his prize fawn buck dead from a broken neck that he claimed was due to the dogs' agitation. The trial court convicted West of two counts of animal abuse and the lesser included offense of criminal mischief in the fifth degree.	domestic animal. There was no dispute between the parties that the deer were "domestic animals." The court further held that the Iowa legislature determined that killing dogs under this circumstance was reasonable, and therefore the trial court should have acquitted West.
Toledo v. Tellings	871 N.E.2d 1152 (Ohio 2007)	Tellings owned three pit bulls and was charged for violating an ordinance that limits one pit bull per household and a state statute that mandates that pit bull owners have liability	The Supreme Court of Ohio reversed and held that the ordinance and state statute are constitutional because Ohio has a legitimate interest in protecting citizens against unsafe conditions caused by pit bulls, and the ordinance

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		<p>insurance for damages, injury, or death that may be caused by the dog. The trial court found that the ordinance was unconstitutional but the state statute was constitutional. On appeal, the Ohio Court of Appeals held that the ordinance and the state statute were unconstitutional because it violated procedural due process, violated equal protection and substantive due process, and was void for vagueness.</p>	<p>and state statute are rationally related to this interest. The court found no violation of procedural due process, equal protection, substantive due process, nor did it find that they were void for vagueness.</p> <p>The concurrence noted disapproval for the identification of pit bulls as vicious per se in the state statute.</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
<p>VIVA! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.</p>	<p>162 P.3d 569 (Cal. 2007)</p>	<p>VIVA! Filed suit against Adidas for importing and selling shoes made from kangaroo hide in violation of California Penal Code §6530. Adidas did not deny that it imports into and sells in California shoes made from kangaroo hide. The district court granted summary judgment in favor of Adidas because the Code was pre-empted by the Endangered Species Act (ESA), which allows the importation of kangaroo products in exchange for the Australian government's implementation</p>	<p>The Supreme Court of California reversed and held that Penal Code §6530 can coexist with the ESA because it prohibited what ESA does not prohibit and this poses no obstacle to current federal policy. The court noted that there is evident federal intention within the ESA that there be significant room for state regulation.</p>

Case Name	Citation	Summary of the Facts and Procedural History	Summary of the Holding
		of kangaroo population management programs. Judgment was affirmed.	