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and Rescue Organizations; *Valuation in Veterinary Malpractice*; and *Separation, Custody, and Estate Planning Issues Relating to 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.

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NOTES & COMMENTS

Evolving Functions of Service and Therapy Animals and the Implications for Public Accommodation Access Rules

John Ensminger and Frances Breitkopf*

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I. Situations Demonstrating Problems Arising From the Lack ofUniformity in Trained Dog Access Rules

A blind man, allergic to dogs, uses a guide horse, a miniature horse less than three feet tall weighing only 30 pounds. A dog recognizes that his master is about to have an epileptic seizure and aggressively nuzzles the master's leg as a signal that the master should give himself a shot to avoid the seizure. A boy with autism has a canine companion that keeps him from going into a state of withdrawal. A woman who is troubled by the idea of leaving her dog at home brings him with her everywhere she can.

Which of these four people can bring the animal into a restaurant or other business?

The answer to this question will vary in each of these cases depending on the state or federal rules that are applied.

The man with the guide horse has a type of service animal that, if properly trained, would in some states and under federal air transportation rules qualify for access with its user. Recently proposed Department of Justice rules, however, state that a miniature horse is not a service animal, and would not have to be accepted by a business from its no-pets policy. The individual with epilepsy has a physical condition, though it will not be visible most of the time, and under the laws of most states, the master should be able to bring the dog in a restaurant because the dog satisfies the requirement of being a service or assistance dog to someone with a physical disability. Some states that define service animals as helping the "mobility impaired" might not allow this person to be accompanied by the dog if they apply state law in a situation, though they would if they applied federal law. The boy with autism has a mental health disability that in some states will entitle him to bring the dog into a restaurant even though he is not physically disabled. Indiana has recently amended its statutory definition of "service animals" to include "an autism service animal."[1] Under certain federal rules, access for the boy and his dog might depend on whether the dog performs any functions other than comfort, such as stopping the boy from engaging in self-destructive behavior, or barking to alert his parents when the boy gets out of bed in the night. The woman who feels guilty about leaving her dog at home will not qualify for restaurant access in any state. The Department of Transportation's air carrier access rules allow access for emotional support animals if the owner can document a diagnosed mental or emotional disorder. On the other hand, if she falsely claimed that the dog was a service dog, she could be prosecuted for her brashness in some states.

Jurisdictions also differ on how places of public accommodation may challenge the status of the animal. Some states provide unique documentation or tags to disabled individuals using service animals, while other states do not distinguish service animals from pets in issuing licenses and tags. Some states require that trainers carry identification, but do not apply such requirements to individual users of such

[1] IC 16-32-3-1 (amended by P.L. 15502009, § 2, in 2009).

dogs. In most states, the rights of individuals owning service animals are enumerated without any specification as to how a challenge for admission is deemed satisfied. Federal rules are equally inconsistent. The Department of Justice discourages inquiry by a business as to anything but what the service animal does for the individual. The Department of Transportation, however, allows a carrier to rely on a special tag issued by a state (or subdivision) to a service animal. The Department of Housing and Urban Development allows a housing authority to ask for a letter from a health authority verifying a nexus between the individual's disability and the service provided by the animal. Disabled individuals may have to provide specific evidence of an animal's status for one type of activity, but provide something else for another activity. If traveling from state to state, the burden can be even greater. When taking an airplane, an individual with an emotional support animal may be able to keep an animal with him in the cabin, but would be unable to take it into some of the facilities in the airport.

Consider another increasingly common situation. A trainer of therapy dogs regularly takes the dogs to the cancer ward of a children's hospital. The hospital is 75 miles away from her house and she lives in the Midwest where winters are very cold and summers stifling hot. She needs to go into a restaurant on her way home from the therapy dog assignment, but the only restaurant available refuses entry to the dog because it does not qualify as a service dog, and probably does not qualify as a service dog in training. Should she be allowed to bring the dog into the restaurant in these exceptional circumstances? In some states, a handler of a search and rescue dog would be able to bring a dog into a restaurant if going to or from a search and rescue assignment, but this would not be true in most states. Should there be some sort of intermediate access provision for certain categories of trained dogs that do not meet the definition of service dog? What about a cancer-sniffing dog that accompanies a nurse to remote villages in Alaska as a means of pre-screening patients that may be airlifted to a university hospital in Anchorage? No access provisions currently apply to such a handler and animal (and no such animals are yet known to exist, but the idea may someday be practical), though policy arguments strongly favor limited access.

There should be much greater uniformity among the federal regulatory agencies, and among the states, as to the access rights of handlers with mental disabilities who use service dogs. Although this uniformity might be provided if states follow federal rules issued under the Americans with Disabilities Act, the Act and implementing rules issued by the Department of Justice do not adequately consider appropriate training requirements and verification procedures. Further, the burden is placed on the places of public accommodation since the federal government is not generally involved in the registration, licensing, and tagging of dogs.

With the increasing use of service dogs, some trainers and training facilities have been known to certify poorly trained dogs for service and therapy purposes. The solution to this—at least a partial solution—is to assure that dogs whose trainers and owners claim are service and therapy dogs receive appropriate tests for the certifications they are given. This does not mean that any specific set of testing and certification organizations should be given a monopoly. States and political subdivisions that license specially trained dogs could do the testing, but given tight government budgets

the easiest approach is for these governments and agencies to recognize certifications by organizations, many of which are national in scope and operation, with a record of rigorous testing and certification requirements. It is also the position of the authors that there should be limited access rights for certain categories of trained dogs that need to travel for others to obtain the benefits of their training. The absence of uniformity on these issues leads to confusion, and makes it difficult for managers of restaurants, hotels, and other places of public accommodation to make fair decisions.[2]

II. Types of Service and Therapy Animals and Related Access Issues

This Part will discuss the types of service and therapy animals. Issues regarding access of the various types of service and therapy animals will be discussed for each type of service animal, but the discussion will be most expansive under those categories where there is the most confusion and which have produced the most discussion in recent regulatory releases and other developments.

A. Service Animals Defined

Most definitions of service animals or service dogs include guide dogs, signal dogs, and service dogs for the otherwise disabled. Department of Justice regulations, for instance, define a service animal as a—

> guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.[3]

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[2] This article discusses only certain aspects of state and federal statutory and regulatory law that are unique to trained dogs, specifically definitions of the various types of trained animals, access rights, and verification of status (including licensing and tagging). State laws often also distinguish such animals from pets with regard to (1) traffic precautions (right of way at intersections for the blind accompanied by guide dogs, and often for the deaf and mobility impaired), (2) crimes (separate crimes for interference with a disabled person's use of a guide, signal, or service dog; some states have separate cruelty statutes regarding trained dogs; some states have laws regarding interference or injury caused to a service dog by a house pet; some states specify that interference statutes do not apply if the disabled person with the animal was in the process of committing a crime when the interference occurred), (3) civil and criminal damages (veterinary bills for injuries, costs of different accommodations required by the loss of the animal, replacement costs including training costs), (4) license fees (often waived for service dogs), (5) rights to keep in disasters or emergencies, including the right to keep a service dog with the owner in an ambulance, (6) quarantine provisions (less rigorous quarantine provisions for service dogs), (7) exemption from state sales tax, (8) tax deductibility of service dog expenses (some laws specify disability supporting deduction must be physical), (9) costs of service dogs taken into consideration in determining eligibility for food stamps and other social services, (10) provision for school children (for mobility and safety), (11) programs for prisoners to train service animals, and (12) exemption from municipal fines for failure to clean up feces.

[3] 28 C.F.R § 36.104 (2009).

The same definitional regulation specifies that a disability "means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual…."[4]

The Department of Justice's recently proposed revision of the definition of service animal is broader:

> Service animal means any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection[5] or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure,[6] retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities….[7]

The trend in federal and state law has been to recognize that individuals with psychiatric conditions may have service animals, but at least eighteen state laws still require that the individual served by the animal must be physically disabled.[8]

[4] The Equal Employment Opportunity Commission proposed in September 2009 to expand the definition of major life activities as a result of the ADA Amendments Act of 2008, 122 Stat. 3553 (Sept. 25, 2008). It is likely that similar rules will be issued by other agencies. See EEOC, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended," 74 Fed. Reg. 48431, 48445-46. (Sept. 23, 2009) (proposing 29 C.F.R. § 1630.2(i) (2009)).

[5] The preamble to recently proposed revisions to regulations under the Americans with Disabilities Act of 1990, 28 C.F.R. § 36 (2009), Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, indicates that commenters urged elimination of the phrase regarding minimal protection, but the Department of Justice believes it should be retained but understood to exclude attack dogs that pose a threat to others. 73 Fed. Reg. 34508, 34516 (June 17, 2008). Some commenters had noted that the mere presence of a dog may act as a crime deterrent and thus provide minimal protection, but the Department argues that this interpretation was not contemplated. The Department cites dogs that alert individuals of an oncoming seizure, or responding to the seizure, as the sort of situation contemplated. Id. at 34521.

[6] The wording does not seem to cover seizure-alert dogs, as will be discussed further below, but the items specified are said not to be all inclusive.

[7] 28 C.F.R § 36.104 (proposed June 17, 2008).

[8] Arkansas (Ark. Code Ann. § 20-14-304(a) (2009)); Colorado (Colo. Rev. Stat. Ann. § 24-34-803(7) (2009)); Delaware (Del. Code Ann. tit. 6, § 45-4502(6) (2009)); Georgia (Ga. Code Ann. § 30-4-2 (2009)); Hawaii (Haw. Rev. Stat. § 347-13 (2009)); Idaho (Idaho Code Ann. § 56-701A(7) (2009)); Illinois (740 Ill. Comp. Stat. Ann. 13/5 (2009)); Louisiana (La Rev. Stat. Ann. § 46:1952 (2009)); Maine (Me. Rev. Stat. Ann. tit. 17 § 1312(7) (2009)); Massachusetts (Mass. Gen. Laws. ch. 272 § 98A (2009)); Mississippi (Miss. Code Ann. § 97-41-21(5)(g) (2009) referring to a service dog for a "physically limited" individual)); Missouri (Mo. Rev. Stat. § 209.150.4 (2009)); New Jersey (N.J. Stat. Ann. § 10:5-5(dd) (2009) (referring to disability but defining this with physical ailments, including seizures)); Oklahoma (Okla. Stat. tit. 7 § 19.1(D)(2) (2009)); Oregon (Or. Rev. Stat. § 346.680 (2009)); South Dakota (S.D. Codified Laws § 20-13-23.2 (2009)); and Tennessee (Tenn. Code Ann. § 62-7-112(a) (2009)).

Some state statutes are even narrower, referring to "mobility impaired."[9] Most states refer to service animals as serving the disabled, without limiting the reference to the physically disabled.

Even with states that define service animals as serving the physically disabled, or which provide access rights to the physically disabled when accompanied by service animals,[10] it is not clear that state enforcement would be denied a mentally disabled individual with a service animal. Many civil enforcement actions and tort suits refer to both federal and state rules. Some states may assume that federal coverage is a sufficient protection for the mentally disabled.[11]

B. Guide Dogs

Guide or "seeing eye" dogs have been used by blind people since after the First World War and are the most protected assistance dogs in the world.[12] As far as public accommodations are concerned, they are almost regarded as canes, wheelchairs, or other prosthetic devices. Although guide dogs, as with other service dogs, could be excluded from a place of public accommodation if out of control,[13] this is, given the rigorous selection procedures and the level of training guide dogs receive, almost unheard of.

[9] Connecticut (Conn. Gen. Stat. § 46a-44(a)-(b) (2009) (regarding transportation access)); Maryland (Md. Code Ann., [Developmental Disabilities Law] § 7-701 (West 2009); see also Md. Code Ann., [Developmental Disabilities law] § 7-705 (West 2009)); New Hampshire (N.H. Rev. Stat. Ann. § 12.167-D:1(IX) (2009)); and Ohio (Ohio Rev. Code Ann. § 955.011(B) (West 2009) (defining mobility impaired as including seizure disorders)).

[10] Some state statutory systems do not separately define any or all categories of service animals, but refer to such guide, signal, and service dogs (by whatever terms) in provisions providing access rights to users, discrimination and criminal interference statutes, and otherwise. Apparently in this category are Alaska, Arkansas, Connecticut, Georgia, Michigan, Nebraska, South Dakota, Tennessee, and Vermont. Some states do not post searchable versions of administrative codes and other pronouncements on which state officials may rely for enforcement purposes.

[11] A 1996 letter signed by the Assistant Attorney General of the Department of Justice Civil Rights Division and the President of the National Association of Attorneys General (posted on many websites including http://www.ada.gov/archive/animal.htm), provides some basic guidelines regarding access rules. The letter indicates that twenty-four state attorneys generals are distributing a similar document along with state-specific requirements "to associations representing restaurants, hotels and motels, and retailers for dissemination to their members." http://www.ada.gov/archive/animal.htm. The twenty-four states were: Alaska, Arizona, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin.

[12] Dorothy Harrison Eustis, The Seeing Eye, The Saturday Evening Post (Philadelphia), Nov. 5, 1927, at 43.

[13] Nevada Business Code (stating that a place of public accommodation may ask a person with a service animal or service animal in training to remove it if it is out of control and the person accompanying the animal fails to take effective action to control it or it poses a direct threat to the health or safety of others) Nev. Rev. Stat. § 651.075 (2009).

Two other exceptions to the general presumption of access for the blind or partially blind accompanied by guide dogs include owner-occupied rentals and zoos. In Wisconsin, for instance, a landlord may exclude a tenant with a guide dog from, say, a room in the owner's house, if the owner presents a certificate "signed by a physician which states that the owner or family member is allergic to the type of animal" the potential renter possesses.[14] Arizona[15] and California[16] have a specific exception to the guide/service dog access law by which zoos can prohibit trained dogs from coming in direct contact with zoo animals. Direct contact might occur in a petting zoo environment, or on an open-sided train running through a wild animal habitat. The zoo must provide an adequate place to leave the guide or service dog, and must provide a sighted individual to accompany the blind person, if requested.

A number of states, while permitting guide and other trained dogs access to public accommodations, specify that such dogs may not occupy seats in buses, trains or other vehicles of public transportation.[17]

C. Signal Dogs

Signal dogs alert their masters to specific sounds, often by nudging an arm or a leg, including the sound of a doorbell, alarm clock, someone calling the master's name, sirens, cars honking, a smoke or security alarm, or a sound made by a computer when an email is received. Statutory law in most states includes signal dogs, also known as hearing dogs or hearing ear dogs, in the same provisions that apply to guide dogs. Although many signal dogs receive extensive training, others may not be as well trained and disputes have arisen as to the qualifications of dogs alleged to be hearing dogs.[18]

[14] Wisconsin Employment Code, Wis. Stat. Ann. § 106.50(2r)(bm)(2) (West 2009).

[15] Arizona Counties Code, Ariz. Rev. Stat. Ann. § 11-1024(F) (2009).

[16] California Civil Code, Cal. Civ. Code § 54.7 (West 2009).

[17] Alaska (Alaska Admin. Code tit. 7, § 43.755: school or shop); Delaware (Del. Code Ann. tit. 31 § 2117: public conveyance); Kentucky (Ky. Rev. Stat. Ann. § 258.500 (West 2009)); Mississippi (Miss. Code Ann. § 43-6-155 (2009): public conveyance); Ohio (Ohio Rev. Code Ann. § 955.43(A) (West 2009): public conveyance); Pennsylvania (52 Pa. Code § 23.115(c) (2009): dog to be properly leashed and may not occupy seat in a public conveyance); and West Virginia (W. Va. Code § 5-15-4(c) (2009)). The U.S. Department of Transportation, in issuing final rules discussed in detail below, seemed not to be totally against the idea of a service animal occupying a seat, but indicated that it would not often be necessary: "If a flight is totally filled, there would not be any seat available to buy. If the flight had even one middle seat unoccupied, someone with a service animal could be seated next to the vacant seat, and it is likely that even a large animal could use some of the floor space of the vacant seat, making any further purchase unnecessary. Of course, service animals generally sit on the floor, so it is unlikely that a service animal would ever actually occupy a separate seat." 73 Fed. Reg. 27614, 27635 (May 13, 2008).

[18] See Brook v. Ineichen, 54 F.3d 425 (7th Cir. 1995) (Two profoundly deaf women who owned a dog named Pierre filed a complaint with the Madison Equal Opportunities Commission after their landlord tried to evict Pierre. The women claimed the dog was a signal dog and, after they lost their jobs and moved, they filed an action for discrimination in federal court. Pierre's status as a hearing dog was contested, and both sides produced evidence on the matter. "Other than their own protestations and self-serving affidavits which were undermined at trial, plaintiffs offered no evidence that Pierre had ever had any discernible skills. The defendant, on the other hand, introduced evidence that Pierre was not a hearing dog--the testimony of plaintiffs' former roommate and the defense expert—and impeached plaintiffs on a number of aspects of their testimony including the claim that Pierre had been certified at a training center." Though a jury could have rationally found for the defendant, the trial court's jury instructions were "a muddle" and the appellate court remanded for a new trial).

D. Service Dogs for Individuals with Other Physical Disabilities

As noted in the discussion of the definition of a service animal, service dogs may perform functions, such as helping with balance for someone who is mobility impaired, pulling a wheelchair, fetching dropped items for someone who cannot bend over, etc. Most legal and regulatory definitions of "service animal," "service dog," "assistance animal," etc., include references to such functions. Three of the most common disabilities with which service dogs have been associated are mobility impairment, seizure-alert and seizure response functions.

1. Mobility Impairment

Federal and state laws and rules often mention functions that dogs perform for the mobility impaired,[19] "providing physical support and assistance with balance and stability to individuals with mobility disabilities."[20] Missouri defines a "mobility dog" as "a dog that is being or has been specially trained to assist a person with a disability caused by physical impairments."[21] New Hampshire provides that a "mobility impaired person using a service dog shall provide the dog with a leash colored blue and yellow."[22]

2. Seizure-Alert Dogs

The Department of Justice's proposed revision to 28 C.F.R. § 36.104 states, in the definition of "service animal," that such an animal is "individually trained to do work or perform tasks for the benefit of an individual with a disability, including,

[19] See 28 C.F.R. § 36.104 (2009) (also in the revision to this regulation proposed in June 2008), Arizona Counties Code Ariz. Rev. Stat. Ann. § 11-1024(J)(5) (2009); California Civil Code, Cal. Civ. Code § 54.1(6)(C)(iii) (West 2009); Delaware Commerce & Trade Code, Del. Code Ann. tit. 6 § 4502 (2009); Florida Social Welfare Code, Fla. Stat. § 413.08(1)(d) (2009); Georgia Criminal Code, Ga. Code Ann. § 16-11-107.1 (2009); Illinois Civil Liabilities Code, Ill. Comp. Stat. Ann. 13/5 (2009); Kansas Welfare Code, Kan. Stat. Ann. § 39-1113(e) (2009), Missouri Public Health & Welfare Code, Mo. Rev. Stat. § 209.150.4 (2009); New Jersey Civil Rights Code, N.J. Stat. Ann. § 10:5-5(dd) (2009); North Dakota Disability Code, N.D. Cent. Code § 25-13-01.1 (2009); 3 Pa. Cons. Stat. Ann. § 459.102 (2009); and Utah Human Services Code, Utah Code Ann. § 62A-5b-102(7) (2009).

[20] 28 C.F.R. § 36.104 (proposed June 17, 2008).

[21] Missouri Public Health & Welfare Code, Mo. Rev. Stat. § 209.150.4 (2009).

[22] New Hampshire Public Safety Code § 12.167-D:5. A deaf or hearing impaired person is to provide a "hearing ear dog" with a leash and harness colored international orange. No color is specified for guide dogs for the blind but they are to have "a leash and harness designed specifically for this purpose."

but not limited to … assisting an individual during a seizure….”[23] The wording is curious as it does not refer to alerting an individual of an oncoming seizure, though the Department of Transportation, in a guide published in 2005, noted that service animals may assist people with disabilities by “[a]lerting persons with epilepsy of imminent seizure onset.”[24]

Some states have included seizure-alert dogs among those animals that qualify as service animals.[25] Illinois law provides:

> When … a person who is subject to epilepsy or other seizure disorders is accompanied by a dog which serves as a … seizure-alert, or seizure-response dog for such person or when a trainer of a … seizure-alert, or seizure-response dog is accompanied by a … seizure-alert, or seizure-response dog or a dog that is being trained to be a … seizure-alert, or seizure-response dog, neither the person nor the dog shall be denied the right of entry and use of facilities of any public place of accommodation … if such dog is wearing a harness and such person presents credentials for inspection issued by a school for training guide, leader, seizure-alert, or seizure-response dogs.[26]

Thus, Illinois law conceives of trainers of seizure-alert dogs, though the wording might not have to mean that the trainer is teaching the dog to recognize seizures. New Jersey also provides that a service dog includes “a ‘seizure dog’ trained to alert or otherwise assist persons subject to epilepsy or other seizure disorders.”[27] It is likely that most states, even without specific reference in their codes, would recognize seizure-alert dogs as service animals.[28]

The authors believe that seizure-alert dogs are appropriately classified as service dogs, but note that there is a problem where statutes refer to service dogs as trained for the functions they perform. The Epilepsy Institute states on its website:

> [T]o date, there is no scientific proof that animals can alert humans to seizures. Even if this ability is confirmed, *it is not known that this apparent ability can be acquired through training* and/or what kind of training is effective…. Some reports appear quite viable and warrant scientific research to confirm this ability.[29]

[23] 28 C.F.R. § 36.104 (proposed June 17, 2008).

[24] 70 Fed. Reg. 41482, 41488 (July 19, 2005).

[25] Fla. Stat. Ann. § 413.08(1)(d) (2009) The National Conference of State Legislatures states in “Epilepsy-Related Legislation 2000-2002,” that Florida was the first state to allow people with seizure disorders and epilepsy the right to be accompanied by a trained service dog in specific circumstances.” (www.ncsl.org/programs/health/epilepsy3.htm).

[26] 720 Ill. Comp. Stat. Ann. 630/1 (2009).

[27] New Jersey defines a mobility impaired person as an individual with a seizure disorder. N.J. Stat. Ann. § 10:5-5dd (West 2010).

[28] Ohio, for instance, defines a mobility impaired person as an individual with a seizure disorder. Oh. Agric. Code § 955.011(B)(1).

[29] Epilepsy Institute, “Seizure Alert Dog Study” (emphasis added) (www.epilepsyinstitute.org/forms/index.htm).

The Epilepsy Institute began one study of the issue, using EEG and video monitoring of people with their dogs, but had to discontinue the study due to limited funding.

In a case report, two researchers at the Jefferson Hospital for Neuroscience in Philadelphia evaluated the detection abilities of seizure-alert dogs in an inpatient epilepsy care unit where patients were undergoing continuous computer-assisted EEG.[30] The authors concluded:

> Between March and May of 2004 we monitored two patients who owned “seizure dogs” in the Epilepsy Care Unit at Thomas Jefferson University Hospital in Philadelphia. Both patients were accompanied by their “seizure dogs” during their admission, as the patients felt more secure with the dogs. The dogs’ performance in alerting before a seizure was poor for patient 1 and misleading for patient 2. In our limited but objective experience, the “seizure dogs” were not as effective as previously thought in predicting the seizure activity. At the same time we must be fair and recognize the limitations that the environment of the Epilepsy Care Unit places not only on patients but also on seizure-alert dogs. Similar studies (in epilepsy monitoring units) of larger samples of patients are needed to determine if these trained dogs are responsible for clinical improvement in epilepsy patients.[31]

One study surveyed families of epileptic children in families that owned a dog. About 40% of such dogs showed anticipatory ability, with the anticipatory behavior being specific. The research indicated that quality of life was higher in families where the dog responded to seizures.[32] A study of a program that trained seizure-response dogs working with individuals who had an average of 36 seizures per month, with an average medication failure of 4.8 per month, found that 59% of the dogs developed spontaneous alerting behavior.[33] Owners must become aware when the dog is demonstrating the alerting behavior.[34] Even if the ability arises spontaneously, it is likely that rewarding the dog for such alerts will encourage the continuation and perhaps refinement of the behavior.

The scientific literature on seizure-alert dogs is relatively slight and more study is needed to verify that this skill can be identified in scientifically designed studies beyond surveys relying on self-reporting by users and families.[35] Social

[30] Rafael Ortiz and Joyce Liporace, “Seizure-Alert Dogs: Observations from an Inpatient Video/EEG Unit,’ 6(4) Epilepsy & Behavior, pp. 620-622 (June 2005).

[31] *Id*.

[32] A. Kirton, E. Wirrell, J. Zhang & L. Hamiwka, Seizure-alerting and –response behaviors in dogs living with epileptic children, 62(12) Neurology 2303-2305 (June 2004).

[33] A. Kirton, A. Winter, E. Wirrell &O.C. Snead, Seizure Response Dogs: Evaluation of a Formal Training Program, 13(3) Epilepsy Behavior 499-504 (Oct. 2008).

[34] D.J. Dalziel, B.M. Uthman, S.P. Mcgorray & R.L. Reep, Seizure-Alert Dogs: A Review and Preliminary Study, 12(2) Seizure 115-120 (Mar. 2003).

[35] The skill, where it exists, may not be correlated with the dog’s smelling some chemical change. Cancer sniffing dogs may be trained and have a far higher success rate. One study found dogs were particularly good at detecting lung cancer (99% overlap with biopsy-confirmed diagnoses), but very

and legal acceptance of seizure-alert dogs appears to be rather premature, and it must be questioned whether a seizure-alert ability can be trained, at least initially. It may not be accidental therefore, that in its June 2008 proposals for modifying the definition of service animal in 28 C.F.R. § 36.104, the Department of Justice referred only to seizure-response functions. If further studies do not demonstrate that seizure alerts are really happening in most cases, some seizure-alert dogs (i.e., ones with no seizure-response or other service dog functions) will, in effect, be more properly classified as pets or emotional support animals whose masters have seizure conditions. They might also appropriately qualify as psychiatric service dogs under certain circumstances.

The Department of Housing and Urban Development squarely faced the issue of service tasks that do not need to be trained in the preamble to recently finalized regulations:

> [T]here are animals that have an innate ability to detect that a person with a seizure disorder is about to have a seizure and can let the individual know ahead of time so that the person can prepare. This ability is *not the result of training*, and a person with a seizure disorder might need such an animal as a reasonable accommodation to his/her disability. Moreover, emotional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities. Emotional support animals by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress.[36]

Kansas defines a service dog as one that has been "specially *selected*, trained and tested to perform a variety of tasks for persons with disabilities."[37] Seizure-alert dogs may belong in a category that has been selected, but not necessarily trained, for a specific service function. Even though such dogs may be tested, it is doubtful that governmental agencies would want to require those subject to seizure disorders to undergo testing for animals they believe give them advance warning of impending seizures.

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good with breast cancer as well (88% overlap). *See* M. McCulloch, T. Jezierski, M. Broffman, A. Hubbard, K. Turner & T. Janecki, Diagnostic Accuracy of Canine Scent Detection in Early- and Late-Stage Lung and Breast Cancers, 5(1) Integr. Cancer Ther. 30-39 (Mar. 2006).

[36] Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63836 (emphasis added) (Oct. 27, 2008). The "reasonable accommodation" concept is also found in Department of Labor requirements. *See* 29 C.F.R. § 1630.2(o), 1630.9. The Appendix to 29 C.F.R. § 1630 states "it would be a reasonable accommodation for an employer to permit and individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee." *See also* Timberlane Mobile Home Park v. Human Rights Commission ex rel. Campbell, 122 Wn. App. 896 (2004) (dog that responded to migraines of tenant and alerted friends of the tenant of tenant's need for assistance was not a service animal because the animal's behavior was not the result of training).

[37] Kan Stat. Ann. § 39-1113(e) (emphasis added).

3. Seizure-Response Dogs

Dogs can also respond to a seizure, and may carry medicines, attempt to arouse unconscious handlers during a seizure, keep persons having seizures from walking into obstacles, and activate a medical alert or pre-programmed phone.[38] Such dogs, given the tasks they are trained to perform, clearly fall within most definitions of service animals.[39]

4. The Problem of Non-visible Physical Disabilities

An easier distinction than that between physical and mental disabilities might be between visible and non-visible disabilities. A person using a guide dog has lost some or all of his sight, as a person using a hearing dog has lost some or all of his hearing, but individuals with physical disabilities, other than mobility impairment, may not to others have an obvious need of an accompanying animal.[40] An individual with a seizure-alert dog, for instance, will not appear, except while having a seizure, to be different from another individual walking a pet. Many disputes regarding access to public accommodations begin when an individual with a non-visible disability attempts to bring a service dog into a restaurant, theater, or other public location. Although the distinction between visible and non-visible disabilities is not commonly acknowledged in access provisions, there are situations where this will be a significant issue. For instance, rules of the Department of Housing and Urban Development, discussed below, allow housing providers "to verify the existence of the disability, and the need for the accommodation--*if either is not readily apparent*."[41]

E. Service Dogs for Individuals with Mental Health Disabilities and Emotional Support Animals

Dogs owned by individuals with mental or emotional disabilities often do not qualify as service dogs because they are pets according to most Governmental perspectives. However, dogs can be taught to respond to anxiety attacks with physical actions. For example, dogs can circle an affected individual in order to provide assurance that they are there. Dogs can also retrieve someone else to help the master during a severe anxiety attack, or bark to achieve the same result. One area where dogs have been found particularly useful concerns autistic children.

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[38] Seizure Response Dog, Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/seizure_response_dog.

[39] States that restrict functions of service animals to the blind, deaf, and mobility impaired, might not include such animals, but as noted previously, Ohio defines mobility impairment as including seizures.

[40] The invisibility of mental health disabilities has been recognized as a reason why the rights of individuals with such disabilities are too easily ignored. *See* Michael L. Perlin, Lecture: A Law of Healing, 68 U. Cin. L. Rev. 407, 424 (Winter 2000).

[41] Department of Housing and Urban Development 73 Fed. Reg. 63835, (Oct. 27, 2008) (emphasis added).

Categorizing dogs owned by individuals with mental disabilities has produced more debate than any other aspect of the access rules for service dogs; This will be clear from consideration given by three federal agencies discussed below. The largest issue involves the question of how, or perhaps whether, an emotional support animal is to be distinguished from a service animal.

1. Dogs and Autism

One organization that trains dogs for children with autism suggests that such dogs should accompany children at all times, including going to school, because the mere presence of the dog calms an autistic child and reduces outbursts. (revise this sentence and restructure…confusing).[42] Another training organization, Wilderwood Service Dogs, lists autistic symptoms and specific reactions dogs can be trained to have to the symptoms:

> (1) *Impulsive running*. The dog retrieves the child to a parent.
> (2) *PICA (impulsive eating of nonfood items such as dirt, chalk, coffee grounds, cleaning chemicals, feces, soap, etc.)*. The dog interrupts the behavior.
> (3) *Self stimulation (slapping the face, etc.) and self harming.* The dog interrupts the behavior.
> (4) *Mood swings.* The dog crawls onto the child's lap and calms him.
> (5) *Night awakenings.* The dog barks to alert the parents.
> (6) *Refusal to speak.* The dog maintains eye contact when child tries to speak and responds to verbal commands; other people may engage with the child by paying attention to the dog.[43]

Thus, those legal definitions that require that service dogs be trained to engage in specific behaviors can be satisfied by dogs given to autistic children.[44]

[42] Autism Service Dogs of America website (http://autismservicedogsofamerica.com/about.cfm).

[43] Wilderwood Service Dogs, a nonprofit organization, maintains a website with materials including an embedded video that demonstrates dogs working with autistic children (http://autism.wilderwood.org).

[44] A Canadian program training dogs for placement with autistic children teaches the dogs to respond to the commands of the parent though the dog is on a leash with the autistic child and the leash is tied around the child's waist to prevent him or her from running into traffic or other danger. The parent may hold a separate leash. The dog is taught to slow down when coming to a curb. Kristen E. Burrows, Cindy L. Adams, and Suzanne T. Millman, Factors Affecting Behavior and Welfare of Service Dogs for Children with Autism Spectrum Disorder, 11(1) Journal of Applied Animal Welfare Science 42-62 (2008).

2. Service Animals for Individuals with Mental Health Disabilities in Department of Justice Rules

In proposing revisions to service animal regulations in June 2008, the Department of Justice noted that there was considerable confusion as to whether individuals with mental disabilities can have animals qualifying as service animals.[45]

> The Department believes that psychiatric service animals that are trained to do work or perform a task (e.g., reminding its owner to take medicine) for individuals whose disability is covered by the ADA [Americans with Disabilities Act] are protected by the Department's present regulatory approach.
>
> Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.(justify margins)[46]

The preamble also notes that, "A psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place."[47] This appears to be 'work' without a specific 'task.' Some of the tasks listed in the prior discussion might be more easily defined than others. Turning on lights or interrupting self-mutilation, if the dog can demonstrate the skills, are certainly impressive.[48] Keeping disoriented individuals from danger might be more difficult to assess in a training setting. Most dogs will search a new environment automatically, so it is not clear how room searching should be demonstrated.

Although an individual with a mental health disability can have a service animal, the animal must do more, in the current view of the Department of Justice, than provide emotional comfort and support to qualify as a service animal.

> Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.[49]

[45] See discussion of comfort animals vs. psychiatric service animals, 73 Fed. Reg. 34516 (June 17, 2008).

[46] *Id*.

[47] 73 Fed. Reg. 34521 (June 17, 2008).

[48] Stopping self-mutilation is often part of training of service dogs' serving autistic children.

[49] 8 C.F.R. § 36.104 (proposed June 17, 2008).

The Department, in the previously referenced rules, acknowledges that there are situations in which an animal providing emotional comfort and support should be covered by access provisions, but seems to regard this as largely a perspective appropriate for employment environments and housing:

> [T]here are situations …, particularly in the context of residential settings and employment,[50] where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.[51]

An animal that provides comfort and support may be used by an individual whose impairments "do not rise to the level of a disability."[52] The preamble to the proposed DOJ rules notes that "emotional support" animals are covered under the Air Carrier Access Act and implementing regulations, but as described in the following section air carrier access involves separate considerations than access to other places of public accommodation.[53]

3. Service and Support Animals for Individuals with Mental Health Disabilities in Department of Transportation Rules

The Department of Transportation (DOT),[54] in the preamble to recently issued final rules on air carrier responsibilities, summarized comments on the issue of emotional support animals as follows:

> Unlike other service animals, emotional support animals are often not trained to perform a specific active function, such as path finding, picking up objects, carrying things, providing additional stability, responding to sounds, etc. This has led some service animal advocacy groups to question their status as service animals and has led to concerns by carriers that permitting emotional support animals to travel in the cabin would open the door to abuse by passengers wanting to travel with their pets.[55]

[50] The preamble notes that the Department of Housing and Urban Development uses the term "assistance animal," and that this usage denotes "a broader category of animals than is covered by the ADA." 73 Fed. Reg. 34521 (June 17, 2008).
[51] 73 Fed. Reg. 34516 (June 17, 2008).
[52] 73 Fed. Reg. 34521 (June 17, 2008).
[53] See discussion in preamble at 73 Fed. Reg. 34522 (June 17, 2008).
[54] Department of Transportation rules regarding access to "vehicles and facilities" under 49 C.F.R. 37.167 (2009), mention service animals in connection with sight, hearing, and mobility impairments, but do not mention individuals with mental disabilities. See Appendix D to 49 C.F.R. § 37 (2009), 61 Fed. Reg. 25416 (June 17, 2008).
[55] 73 Fed. Reg. 27636 (May 13, 2008).

While acknowledging that there could be abuse here, the final rules limit access of emotional support animals to individuals with a diagnosed mental or emotional disorder, and carriers may insist on "recent documentation from a licensed mental health professional to support the passenger's desire to travel with such an animal."[56] The final rule fleshes out the documentation requirement:

> If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation (i.e., no older than one year from the date of the passenger's scheduled initial flight) on the letterhead of a licensed mental health professional (e.g., psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger's mental or emotional disability[57]) stating the following:
>
> (1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders--Fourth Edition (DSM IV);
> (2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger's destination;
> (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and
> (4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.[58]

Carriers may also require advance notice of 48 hours of a passenger's wish to travel with an emotional support animal.[59] This may be a significant burden if the individual must fly on an emergency basis, such as to a funeral. "Of course, like any service animal with a passenger wishes to bring into the cabin, an emotional support animal must be trained to behave properly in a public setting."[60]

The Department of Transportation noted that businesses in airport terminals, such as restaurants and stores, are not covered by the rules applicable to airlines, but rather to those imposed by the Department of Justice, and that Department of

[56] *Id*.
[57] The final phrase was added in technical corrections. 74 Fed. Reg. 11469, 11471 (Mar. 18, 2009).
[58] 14 C.F.R. § 382.117(e) (2009).
[59] The advance notice requirement and other issues were criticized by the Psychiatric Service Dog Society in a petition to the Department of Transportation, which sought public comment on the issues raised by the Society in September 2009. Department of Transportation, "Nondiscrimination on the Basis of Disability in Air Travel: Request for comments on petition for rulemaking," Department of Transportation, 74 Fed. Reg. 47902 (Sept. 18, 2009).
[60] 73 Fed. Reg. 27636 (May 13, 2008).

Justice rules (described earlier) may deny access to an animal that the airlines might have to accept. Therefore, an individual with an emotional support animal might arrive at an airport and not be able to take an animal into a restaurant, despite being able to later take the animal onto an airplane. The DOT is reduced to counseling on this issue:

> [A] concession could, without violating DOJ rules, deny entry to a properly documented emotional support animal that an airline, under the ACAA [Air Carrier Access Act], would have to accept. On the other hand, nothing in the DOJ rules would prevent a concession from accepting a properly documented emotional support animal. We urge all parties at airports to be aware that their services and facilities are intended to serve all passengers. Airlines, airport operators, and concessionaires should work together to ensure that all persons who are able to use the airport to access the air transportation system are able equally to use all services and facilities provided to the general public.[61]

In 2005, the Department of Transportation issued technical assistance regarding the rights of the disabled to air transportation, which included directives regarding access of the disabled with service animals.[62]

The Department of Transportation recently issued regulations concerning flights to the United Kingdom, noting that UK carriers have more restrictive pet policies than U.S. carriers.[63] UK law generally provides that only guide and assistance dogs may accompany owners in the passenger cabin on a flight.[64]

4. Assistance Animals for Individuals with Mental Health Disabilities in Federal Housing Rules

Regulations under Title 24 of the Code of Federal Regulations, Housing and Urban Development, create requirements regarding service animals in three separate locations:[65]

[61] *Id*.

[62] A Guide to the Air Carrier Access Act and Its Implementing Regulations, 70 Fed. Reg. 41481 (July 19, 2005). *See also* the section of the preamble to the final regulations in 2008 entitled "Guidance Concerning Service Animals," 73 Fed. Reg. 276567 (May 13, 2008).

[63] Department of Transportation, Notice of Guidance Concerning the Carriage of Service Animals in Air Transportation from the United States to the United Kingdom," Department of Transportation, 72 Fed. Reg. 8268 (May 13, 2008).

[64] 72 Fed. Reg. 8271 (May 13, 2008) (citing the UK's Civil Aviation Authority's Flight Operations Department Communication 3/2005 (Mar. 11, 2005)).

[65] *See also* Notice PIH 2002-01 (HA) (Jan. 31, 2003), in which the Office of Public and Indian Housing of the Department of Housing and Urban Development issued accessibility guidance under which recipients of federal housing funds must "allow a tenant with a disability to have an assistive animal if the animal is needed as a reasonable accommodation." ("However, all provisions of the lease apply, such as maintaining the premises in clean and sanitary condition and ensuring that neighbors enjoy their premises in a safe and peaceful manner.")

1. 24 C.F.R. § 100: Discriminatory Conduct under the Fair Housing Act; Subpart D: Prohibition against Discrimination Because of a Handicap, under the section concerning "Reasonable Accommodations."[66]
2. 24 C.F.R. § 5: General HUD Program Requirements; Waivers; Subpart C: Pet Ownership for the Elderly or Persons with Disabilities, under the section concerning "Exclusion for Animals that Assist Persons with Disabilities." This section provides rules for the elderly, as well as persons with disabilities.[67] As will be discussed below, this section was recently amended.
3. 24 C.F.R. § 960: Admission to, and Occupancy of, Public Housing; Subpart G: Pet Ownership in Public Housing, under the section concerning "Animals that Assist, Support, or Provide Service to Persons with Disabilities."[68]

(a) Reasonable Accommodations under the Federal Fair Housing Act. Under the first item on the preceding list, it is unlawful for a person to refuse to make reasonable accommodations to afford a person with a disability an equal opportunity to use and enjoy a dwelling unit, including public and common use areas.[69] An example in the regulations indicates that refusing to rent an apartment to an applicant with a guide dog because of a no-pets policy is a violation of the "reasonable accommodations" requirement.[70]

(b) Pet Ownership in HUD-Assisted Housing for the Elderly and Disabled. In October 2008, the Department of Housing and Urban Development amended regulations governing requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities.[71] The amended provision, 24 C.F.R. § 5.303, reads as follows:

[66] 24 C.F.R. § 100.204 (2009). Under 24 C.F.R. § 100.5(b) (2009), "[t]his part [Part 100] provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions." Additional requirements may be imposed on federal and federally-assisted housing, so this requirement is included in the types of housing referred to in the following two items of the list. 24 C.F.R. § 100.5(c) (2009).

[67] 24 C.F.R. § 5.303 (2009). Subpart C "implements section 227 of the Housing and Urban-Rural Recovery Act of 1983 (12 U.S.C. § 170(1)(r)(1)) as it pertains to projects for the elderly or persons with disabilities…." 25 C.F.R. § 5.300(a) (2009).

[68] 24 C.F.R. § 960.705 (2009). Under 24 C.F.R. 960.101 (2009), "[t]his part [Part 960] is applicable to public housing."

[69] 24 C.F.R. § 100.204 (2009).

[70] 24 C.F.R. § 100.204(b) (2009), Example 1.

[71] Department of Housing and Urban Development, "Pet Ownership for the Elderly and Persons with Disabilities," RIN 2501-AD31, 73 Fed. Reg. 63834 (Oct. 27, 2008). Proposed rules were issued for comment in October 2007. 72 Fed. Reg. 58448 (Oct. 15, 2007).

Exclusion for animals that assist, support, or provide service to persons with disabilities.

> *(a)* This subpart C does not apply to animals that are used to assist, support, or provide service to persons with disabilities. Project owners and PHAs [public housing agencies] may not apply or enforce any policies established under this subpart [such as no-pet policies] against animals that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities. This exclusion applies to animals that reside in projects for the elderly or persons with disabilities, as well as to animals that visit these projects.
> *(b)* Nothing in this subpart C:
> (1) Limits or impairs the rights of persons with disabilities;
> (2) Authorizes project owners or PHAs to limit or impair the rights of persons with disabilities; or
> (3) Affects any authority that project owners or PHAs may have to regulate animals that assist, support, or provide service to persons with disabilities, under federal, state, or local law.[72]

This amendment substantially conforms 24 C.F.R. § 5.303 to 24 C.F.R. § 960.705, the latter applying to animals that reside in public housing other than housing developments for the elderly or persons with disabilities. Prior to the amendment to Part 5, a tenant had to certify that he or a member of his family was a person with a disability, the animal had been trained to assist persons with that specific disability, and the animal actually assisted with that disability. This requirement was eliminated. Now, according to the preamble, public housing agencies—

> are authorized to verify that the animal qualifies as a reasonable accommodation under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Section 504) and the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. § 3601-3631)). An animal qualifies as a reasonable accommodation if: (1) An individual has a disability, as defined in the Fair Housing Act or Section 504, (2) the animal is needed to assist with the disability, and (3) the individual who requests the reasonable accommodation demonstrates that there is a relationship between the disability and the assistance that the animal provides.[73]

Thus, the certification requirement may have been eliminated, but a demonstration requirement remains. The preamble elaborates:

[72] 24 C.F.R. § 5.303 (2009).
[73] 73 Fed. Reg. 63834 (Oct. 27, 2008).

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the person's disability. Thus, in the case of assistance/service animals, an individual with a disability must demonstrate a nexus between his or her disability and the function the service animal provides. The Department's position has been that animals necessary as a reasonable accommodation do not necessarily need to have specialized training. Some animals perform tasks that require training, and others provide assistance that does not require training. This position is also articulated in the Public Housing Occupancy Guidebook and the Multifamily Occupancy Handbook.

Housing providers are entitled to verify the existence of the disability, and the need for the accommodation--if either is not readily apparent. Accordingly, persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.[74]

In addition, housing providers are not required to provide any reasonable accommodation that would pose a direct threat to the health or safety of others. Thus, if the particular animal requested by the individual with a disability has a history of dangerous behavior, the housing provider does not have to accept the animal into the housing. Moreover, a housing provider is not required to make a reasonable accommodation if the presence of the assistance animal would (1) result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by a reasonable accommodation; (2) pose an undue financial and administrative burden; or (3) fundamentally alter the nature of the provider's operations.[75]

HUD indicates a willingness to interpret an appropriate animal's functions broadly enough to include emotional support:

> Examples of disability-related functions, include, but are not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, *or providing emotional support to persons with disabilities who have a disability-related need for such support.*[76]

To commenters who objected that HUD was creating different standards than those issued by the Department of Justice under the Americans with Disabilities Act, HUD noted:

[74] See the discussion of In re Kenna Homes Cooperative Corporation below.
[75] 73 Fed. Reg. 63835 (Oct. 27, 2008).
[76] 73 Fed. Reg. 63836 (Oct. 27, 2008) (emphasis added).

There is a valid distinction between the functions animals provide to persons with disabilities in the public arena, i.e., performing tasks enabling individuals to use public services and public accommodations, as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities. Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress. Conversely, persons with disabilities who use emotional support animals may not need to take them into public spaces covered by the ADA.

> *(c) Other Public Housing.* As noted above, HUD also has rules for public housing other than housing developments for the elderly or persons with disabilities in 24 C.F.R. § 960.[77] Here, HUD also allows a refundable deposit for pets, and other requirements, but excepts service animals from these requirements.[78]

5. State Laws on Use of Service Animals by Individuals with Mental Disabilities

As noted previously, many states confine the legal protections of individuals with service animals to those who are physically disabled or mobility impaired. Individuals with psychological disabilities have more often been successful in obtaining permission to retain animals that provide emotional support in housing accommodations than elsewhere, in large part because other individuals are less likely to be bothered by what a neighbor does behind the door of his apartment.[79]

One case from Washington concerned a dog that would put herself between her master and other people, thereby lessening the owner's anxiety attack.[80] There was some question as to whether the dog had been trained to engage in this "circling" behavior, and the appellate court remanded the case for trial on the issue of the animal's qualifications as a service animal. Similar cases will be discussed below in the section regarding verification disputes.

[77] 24 C.F.R. § 960.703 (2009).

[78] 24 C.F.R. §§ 960.705, 960.707 (2009).

[79] Crossroads Apartments Associates v. LeBoo, 152 Misc.2d 830 (N.Y. 1981) (tenant permitted to demonstrate emotional and psychological dependence on cat); Prindable v. Association of Apartment Owners of 2987 Kalakaua, 304 F. Supp.2d 1245 (D. Haw. 2003) (condominium complex could impose restrictions on access of emotional support animal to common areas); Terrace Associates v. Hampshire, 532 N.E.2d 712 (Mass. 1989) (tenant had emotional attachment to and perhaps psychological dependence on cat, so question for court was whether burdens on housing project were undue given benefits to tenant; absence of noises, odors, and fact tenant was ideal tenant indicate only reason for eviction was that she had a dog; "a narrow exception to the rigid application of the no-pet rule, involving no untoward collateral consequences, will enable a handicapped person to continue to function successfully on her own.")

[80] Storms v. Fred Meyer Stores, Inc., 120 P.3d 126 (Wash. Ct. App. 2005).

F. Atypical Service Animals

Most state laws refer to guide dogs and hearing or signal dogs, but many refer to service or assistance animals. In Iowa, an assistive animal is a trained "*simian* or other animal…."[81] The Department of Transportation in elaborating on the requirement that service animals be allowed to accompany individuals with disabilities "in vehicles and facilities," states:

> Service animals shall always be permitted to accompany their users in any private or public transportation vehicle or facility. One of the most common misunderstandings about service animals is that they are limited to being guide dogs for persons with visual impairments…. Other animals (e.g., *monkeys*) are sometimes used as service animals as well. In any of these situations, the entity must permit the service animal to accompany its user.[82]

Monkeys and even apes can therefore sometimes qualify as service animals. Miniature horses have been trained to be guides, though only a small number are so far working with blind people.[83] Cats have been recognized as providing support to the emotionally impaired, at least in the cases involving rental accommodations.[84]

The suitability of unusual animals was considered by the Department of Justice in proposing revisions to 28 C.F.R. § 36. The current definition of service animal in Part 36 states that a service animal is "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability…."[85] The change proposed in June 2008 would define a service animal as "any dog or other common domestic animal…. The term service animal does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse,[86] miniature

[81] Iowa Human Services Code § 216C.11.1 (emphasis added).

[82] Appendix D to 49 C.F.R. § 37 (2009); 56 Fed. Reg. 45621 (Sept. 6, 1991) (emphasis added).

[83] The Guide Horse Foundation, founded in 1999, is seeking volunteers to try using miniature horses, which commonly live 25 to 35 years, a third longer than large horses and much longer than guide dogs, which are often old at 12. Miniature horses can be under two feet high and weigh not much above 20 pounds, making them smaller than many guide dogs. To be in the foundation's program, a horse has to be less than 26 inches high at the withers. The Foundation says that guide horses do not crave affection as dogs do, allowing them to focus on their guide tasks. They do not get fleas and have bladder control up to six hours. The Guide Horse Foundation has a website devoted to this cause (www.guidehorse.org).

[84] See *Janush v. Charities Housing Development Corp.*, 169 F. Supp.2d 1133 (N.D. Cal. 2000) (denying defendant's motion to dismiss on grounds plaintiff's two birds and two cats could not be service dogs, noting that 28 C.F.R. § 36.104 (2009) defines a service animal as a guide dog, signal dog, "or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability….").

[85] 28 C.F.R. § 36.104 (2009).

[86] The exclusion of farm animals would cover horses. Horses are widely used in animal-assisted therapy (AAT), but one survey paper noted that while it is generally believed that cats are used in AAT, "we found no qualified studies that used a cat." Janelle Nimer and Brad Lundahl, "Animal-Assisted Therapy: A Meta-Analysis," 20(3) Anthrozoos 225-238 (2007). There is a growing literature on horses in animal-assisted therapy. *See* C.K. Chandler, Animal-Assisted Therapy in Counseling (Routledge 2005).

horse, pony, pig, or goat), ferrets, amphibians, and rodents."[87]

The preamble describes the concern of the Department of Justice with the proliferation of animals used by individuals, finding that the area "needs some parameters."

> When the regulations were promulgated in the early 1990s, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas….
>
> To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to "dog or other common domestic animal" by excluding the following animals: Reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, or goats), ferrets, amphibians, and rodents.[88]

Although miniature horses are being used as guides, it appears that they are not common domestic animals. The preamble also notes: "The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, and performing arts venues."[89]

The Department of Justice finds support for excluding monkeys in a position statement of the American Veterinary Medical Association, which stated: "The AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury and zoonotic [animal to human disease transmission] risks."[90] Thus, in the state of Iowa at least,

[87] 28 C.F.R. § 36.104 (proposed June 17, 2009). Department of Justice, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 73 Fed. Reg. 34478 (June 17, 2008) (proposed amendments to 28 C.F.R. § 36 (2009), concerning nondiscrimination in public accommodations and in commercial facilities). See also 73 Fed. Reg. 34465 (June 17, 2008) (proposed amendments particularly to 28 C.F.R. § 35 (2009), concerning nondiscrimination in provision of state and local governmental services). Two appendices "inadvertently omitted" from the latter release were subsequently published in the Federal Register on June 30. DOJ, Civil Rights Division, RIN 1190-AA46, 73 Fed. Reg. 36963 (June 30, 2008). Neither document mentions service animal issues. The following description cites page numbers of the release beginning on page 34508 of the Federal Register.

[88] 73 Fed. Reg. 34521.

[89] *Id*.

[90] Citing AVMA, "Nonhuman Primates as Assistance Animals" (2005) (www.avma.org/issues/policy/nonhuman_primates.asp). There are also behavioral arguments against the use of monkeys. An article concerning the welfare of service and therapy animals has this to say regarding capuchin monkeys as assistance animals: In most cases, these programs [training capuchin monkeys to assist individuals with serious disabilities] have found it necessary to neuter and surgically extract the canine teeth from the monkeys before they can be used safely with such vulnerable human partners. Monkeys may also be required to wear remotely controlled, electric shock-collars or harnesses in order to provide the user with a means of controlling the animal's potentially aggressive and unreliable behavior. Clearly, the necessity of using of such extreme and invasive measures raises doubts about the practical value of such programs, as well as serious ethical questions concerning the welfare of the animals involved. James A. Serpell, Raymond Coppinger, and Aubrey Fine, The Welfare of Assistance Animals, Chapter 18 in Fine, Aubrey (ed.), Handbook on Animal-Assisted Therapy: Theoretical Foundations and Guidelines for Practice (Academic Press, 2000).

a monkey might be recognized as a service animal for state law purposes, but not for certain federal law purposes.

This is another area where federal regulatory agencies do not fully agree. In May 2008, the Department of Transportation revised air travel regulations under the Air Carrier Access Act, including applying the rules to foreign carriers.[91] Significant changes were made to the provisions regarding access for individuals traveling with service and support animals. The Department of Transportation, like the Department of Justice, noted the proliferation of unusual animals as pets and supposed service animals, but stated the following:

> Because they make for colorful stories, accounts of unusual service animals have received publicity wholly disproportionate to their frequency or importance. Some (e.g., tales of service snakes, which grow larger with each retelling) have become the stuff of urban legends. A number of commenters nevertheless expressed concern about having to accommodate unusual service animals. To allay these concerns, the Department has added language to the final rule specifying that carriers need never permit certain creatures (e.g., rodents or reptiles) to travel as service animals. For others (e.g., miniature horses, pot-bellied pigs, monkeys[92]), a U.S. carrier could make a judgment call about whether any factors (e.g., size and weight of the animal, any direct threat to the health and safety of others, significant disruption of cabin service) would preclude carrying the animal. *Absent such factors, the carrier would have to allow the animal to accompany its owner on the flight.* Any denial of transportation to a service animal would have to be explained, in writing, to the passenger within 10 days.[93]

[91] Department of Transportation (DOT), "Nondiscrimination on the Basis of Disability in Air Travel; Final Rule," RINs 2105-AC97, 2105-AC29, 2105-AD41, 73 Fed. Reg. 27613 (May 13, 2008). The Department had issued a notice of proposed rulemaking (NPRM) in November 2004 to apply the Air Carrier Access Act to foreign carriers. DOT, RIN 2105-AC97, 69 Fed. Reg. 64363 (Nov. 4, 2004), among other things proposing to move the provisions of 14 C.F.R. § 382.55 (2009), regarding access with service animals, to 382.117. Another NPRM, which included proposals included in the final rules of 2008, concerned medical oxygen and portable respiration assistive devices, but did not mention service animals. DOT, RIN 2105-AC29, 70 Fed. Reg. 53108 (Sept. 7, 2005). A third NPRM, issued in 2006, concerned accommodations for individuals who are deaf, hard of hearing, or deaf-blind, but also did not mention service animals. DOT, RIN 2105-AD41, 71 Fed. Reg. 9285 (Feb. 23, 2006).

[92] It is not clear whether the Department of Transportation meant for monkeys to have this somewhat optional category in 49 C.F.R. § 37.167 (2009), as to which its own commentary stated that "[o]ther animals (e.g. monkeys) are sometimes used as service animals…. In any of these situations [service animals that are not guide dogs], the entity must permit the service animal to accompany its user." Appendix D to 49 C.F.R. § 37 (2009); 56 Fed. Reg. 45621 (Sept. 6, 1991).

[93] 73 Fed. Reg. 27636 (May 13, 2008) (emphasis added).

Thus, it would appear that miniature horses, which can weigh less than many dogs, receive some level of recognition from the Department of Transportation. Presumably a carrier could use the afore-cited position statement of the American Veterinary Medical Association to argue that monkeys pose a direct threat to the health of others.[94]

G. False and Questionable Claims of Service Animal Status

In the preamble to its recently proposed revisions to access provisions regarding service animals, the Department of Justice notes that it "continues to receive a large number of complaints from individuals with service animals."

> At the same time, some individuals with impairments—who would not be covered as individuals with disabilities--are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to hotels, restaurants, and other places of public accommodation.[95]

[94] The Department of Transportation also issue rules regarding accessibility standards for cruise ships and other passenger vessels. See "Transportation for Individuals with Disabilities: Passenger Vessels," RIN 2105-AB87, 72 Fed. Reg. 2833 (Jan. 23, 2007) ("[F]oreign countries may limit entry of service animals; this should not affect the carriage of service animals on the vessel, however, since there is no requirement that the animal leave a cruise ship.").

[95] 73 Fed. Reg. 345156 (May 13, 2008).

[96] California (CAL. FOOD & AGRIC. CODE § 30850(b) (2009) (person applying for assistance dog tag must sign affidavit that the dog is a guide, signal, or service dog); CAL. PENAL CODE § 365.7(a) (2009) (punishable by imprisonment of not more than six months, or a fine no above $1,000, or both)), Hawaii (HAW. REV. STAT. § 3-143-5 (2009) (unlawful to counterfeit a license tag; guide, signal, and service dogs are designated as such on licenses); Kansas (KAN. STAT. ANN. § 39-1112 (2008) (misdemeanor to represent oneself as having the right to be accompanied by an assistance dog or professional therapy dog into a place of public accommodation; also a misdemeanor to represent oneself has having a disability to acquire an assistance dog)), Maine (ME. REV. STAT. ANN. 17.43, § 1314-A (2009) (civil violation to fit a dog with a harness to represent that a dog is a guide dog, fine of not more than $500)); Missouri (MO. REV. STAT. § 209.204 (2009) (impersonating a person with a disability to receive accommodations provided to people with service dogs is a misdemeanor; second or subsequent violation increases the level of the misdemeanor; impersonating a person with a disability can be by word or action)); Nevada (NEV. REV. STAT. § 426.510.6(a) (2009) (using a service animal contrary to public welfare law is a misdemeanor); NEV. REV. STAT. § 426.805 (2009) (fraudulent misrepresentation of an animal as a service animal or service animal in training subject to fine of not more than $500)); New Hampshire (N.H. REV. STAT. § 167-D:7 (II) (2009) (unlawful to fit a dog with a collar, leash, or harness so as to represent it as a guide, hearing, or service dog, and thus to misrepresent the physical status of the person)); New Jersey (N.J. STAT. ANN. § 10:5-29.5 (2009) (fitting a dog with a harness to represent the dog as a guide dog, or otherwise interfering with the rights of a person with a disability accompanied by a guide or service dog, is a crime with a fine of not less than $100 or more than $500)); North Carolina (N.C. GEN. STAT. § 168-4.5 (2009) (unlawful to disguise an animal as a service animal or service animal in training)); Texas (TEX. HUM. RES. CODE ANN. § 121.006 (2009) (fitting animal to represent it as an assistance animal when training has not been provided is a misdemeanor punishable by a fine of not more than $200)); Utah (UTAH CODE ANN. § 62A-5b-106 (2009) (crime to misrepresent an animal as a service animal or to misrepresent a material fact to a health care provider to obtain documentation to designate an animal as an assistance animal)); and Washington (WASH. REV. CODE § 70.84.060 (2009) (unlawful to use a dog guide to secure rights and privileges of blind or partially blind, hearing impaired, or physically disabled)).

Some states have explicitly criminalized misrepresentation of a dog as a guide, signal, or service dog,[97] though other states may be able to bring a criminal action for such a misrepresentation under general fraud statutes.

H. Therapy Dogs

Therapy dogs are usually privately owned pets that have received behavioral training to provide comfort to individuals in institutional settings: including hospitals, nursing and retirement homes, mental institutions, schools, facilities for autistic and abused children, halfway houses for prisoners, and other environments including individuals who have been in stressful situations such as natural disasters. The similarities in training of service and therapy dogs, as well as the American Kennel Club test to become a "canine good citizen," are indicated in Table 1: Testing Criterion for Service Dogs, Therapy Dogs, and Canine Good Citizen Designation. Although the particular testing program for service dogs used here (Assistance Dogs International) requires three tasks specific to the disabled individual served, the other testing requirements are substantially the same as those for the other two categories. Even though a service dog would be covered by most access rules, a therapy dog would only be covered by access provisions in few circumstances, and a canine good citizen would, without other qualifications, probably never be covered by access rules. This is not meant to be a complete survey of training approaches, but does indicate that high levels of training often overlap to a considerable degree among the more established and recognized therapy dog organizations.

TABLE 1:

Testing Criterion for Service Dogs, Therapy Dogs, and Canine Good Citizen Designation

	Service Dogs[97] *(Assistance Dogs International)*	**Therapy Dogs** *(Therapy Dogs International)*	**Canine Good Citizen**
Basic Obedience	Required commands (90% of time for training completion)	Required commands:	Required commands:
Sit	Required	Required (CGC)	Required
Sit-stay	Required	Required (CGC)	Required
Lie down	Required	Required (CGC)	Required
Heel	Required (staying near handler)	Required (walking on a loose lead, heeling next to handler)	Test 3[2] (walking on loose lead, heeling next to handler)
Come	Required	Required	Test 7 (come when called)
Urinate and defecate on command	Required	Cannot during test or working	
Calm demeanor in public	Required (does not annoy member of the general public, disrupt normal course of business, vocalize unnecessarily)	Required: Test 1 (acceptance of friendly stranger); Test 2 (sitting politely for petting); Test 4 (walking through a crowd)	Required (walking on loose lead; no jumping)
Reaction to distractions	"[A]ble to perform tasks in public"	Loud sound, jogger running; walk by items being dropped, thrown, people yelling	Test 9 (reaction to distraction)
Leave-it command	Required	Required	
Reaction to medical equipment	Not specifically mentioned but would be required if individual served used specific medical equipment	Dog must be tested around and not negatively reactive to common medical equipment (wheelchair, crutches, cane, walker, etc.)	
Reaction to strangers	Required (no aggression towards people or other animals)	Required: Test 11 (say hello); tolerant of being held very tightly (sometimes done by mental patients, Alzheimer's patients), yelled at, poked, etc.	Test 1 (accepting a friendly stranger); Test 2 (sitting politely for petting); Test 4 (walking through a crowd); Test 8 (reaction to another dog)
Supervised separation		3 minutes	Test 10 (supervised separation)
Appearance and grooming	Required to be neat	Required	Required: Test 3

	Service Dogs[97] *(Assistance Dogs International)*	**Therapy Dogs** *(Therapy Dogs International)*	**Canine Good Citizen**
Specific tasks	3 tasks to mitigate the client's disability	N/A	N/A
Identification	Laminated ID card	Laminated photo ID	Certificate
Gear	Cape, harness, backpack, or other similar piece of equipment or clothing with a logo	Anything that helps (and does not impede) dog being handled, held, stroked, hugged, etc.	N/A

Therapy dogs are only referred to in the statutes of a few states, although the therapy dog movement has been around for more than 20 years and there are tens of thousands of therapy dogs providing many functions in the United States. Kansas defines a professional therapy dog as—

> [A] dog which is selected, trained and tested to provide specific physical or therapeutic functions, under the direction and control of a qualified handler who works with the dog as a team, and as a part of the handler's occupation or profession. Such dogs, with their handlers, perform such functions in institutional settings, community based group settings, or when providing services to specific persons who have disabilities.[98]

The final sentence of the provision would exclude most certified therapy dogs, however, by stating that a professional therapy dog "does not include dogs, certified or not, which are used by volunteers for pet visitation therapy."

A "qualified handler of a professional therapy dog" may bring such a dog on public transportation, into motels, hotels, and other temporary lodging places, and into businesses and establishments to which the public is invited, "including establishments which serve or sell food."[99] Because the definition of professional

[97] Kan. Stat. Ann. § 39-1113(d) (2008).

[98] Combined with "Assistance Dogs in Public". Assistance Dogs International, Inc., (http://www.assistancedogsinternational.org/Standards/AssistanceDogPublicStandards.php)

[99] Test numbers refer to the test of Assistance Dogs International, Inc., which requires that dogs be Canine Good Citizens and pass additional testing requirements. Therapy Dogs International, Testing Requirements, (http://www.tdi-dog.org/HowToJoin.aspx?Page=Testing+Requirements).

therapy dog presumes that the animal lives in an institutional setting, no rental accommodations are mentioned.

> If a question arises as to whether a dog handler is qualified, or whether the dog accompanying the handler is qualified as a professional therapy dog, to enter in or upon the places [of public accommodation], and amendments thereto, an employee or person responsible for such places may request, and the qualified handler shall produce, an identification card or letter, provided by the training facility, school or trainer who trained the dog. Such card or letter shall contain the following information: (1) The legal name of the qualified dog handler; (2) the name, address and telephone number of the facility, school or trainer who trained the dog; (3) information documenting that the dog is trained to provide therapeutic supports; and (4) a picture or digital photographic likeness of the qualified handler and the dog. If a card is used, the picture or digital photographic likeness shall be on the card. If a letter is used, the picture or digital photographic likeness shall either be printed as a part of the letter or be affixed to the letter.[100]

It is a misdemeanor in Kansas to represent oneself as having the right to be accompanied by an assistance dog or professional therapy dog into places of public accommodation.[101]

In New York, a therapy dog "any dog that is trained to aid the emotional and physical health of patients in hospitals, nursing homes, retirement homes and other settings and is actually used for such purpose, or any dog owned by a recognized training center located within the state during the period such dog is being trained or bred for such purpose."[102] A therapy animal, as defined under the Oregon criminal interference statutes, is an "animal that has been professionally trained for, and is actively used for, therapy purposes." [103]

Access to public accommodations should be legislatively permitted when therapy dogs are being taken to and from appointments, similar to the limited access provisions in a few states regarding search and rescue dogs.[104] Such access provisions should not apply to therapy dogs in training, however, since such animals are primarily pets and are not generally permitted to go on any assignments prior to certification.

[100] *Id*.

[101] Kan. Stat. Ann. § 39-1111(b) (2008).

[102] Kan. Stat. Ann. § 39-1112 (2008).

[103] N.Y. Agric. & Mkts. Law § 108 (26) (2009). In the interest of full disclosure, the authors of this article have been involved in drafting legislation in New York state which would allow limited access for therapy dogs while going to or from or on assignments.

[104] Or. Rev. Stat. § 167.352(3) (b) (2007).

I. Access Rights of Trainers and Handlers

Before highly trained guide dogs are given to blind or partially blind individuals, they must undergo rigorous training. Trainers must teach the dogs how to handle the environments in which they will live and work. Most states, therefore, provide access rights to trainers, though many states insist that trainers be employees of recognized training dog schools. Trainers must, under many codes, be prepared to produce documentation on their connection with a recognized training school, and that the dog is being trained to be a service animal.[105] The frequent references

[105] See Alabama (ALA. CODE § 21-7-4 (2009) (trainers of guide dogs)); Arizona (ARIZ. REV. STAT. ANN. § 11-1024.E (2009) (anti-discrimination law includes trainer of service animal who is with an animal being trained)); California (CAL. CIVIL CODE § 54.1(7)(C) (2009) (trainers of guide, signal, and service dogs may take them into public places) But cf. Proffer v. Columbia Tower, 1999 WL 33798637 (SD Cal. 1999) (landlord who permitted paraplegic tenant to maintain service dog did not have to accept other dogs the tenant hoped to train for other individuals with disabilities)); Colorado (COLO. REV. STAT. § 24-34-803(2) 2009); COLO. REV. STAT. § 24-34-803(7)(g) (2009) (trainer of an assistance dog is "a person who is qualified to train dogs to serve as assistance dogs")); Connecticut (CONN. GEN. STAT. § 46a-44(a)-(b), (d) (2009) (a guide or assistance dog trainer is "a person who is employed by and authorized to engage in designated training activities by a guide dog organization or assistance dog organization that complies with the criteria for membership in a professional association of guide dog or assistance dog schools and who carries photographic identification indicating such employment and authorization, or a person who volunteers for a guide dog organization or assistance dog organization that authorizes such volunteers to raise dogs to become guide dogs or assistance dogs and causes the identification of such dog with (1) identification tags, (2) ear tattoos, (3) identifying bandanas on puppies, (4) identifying coats on adult dogs, or (5) leashes and collars.")); Florida (FLA. STAT. § 413.08(4), (8) (2009) (trainer in the process of training a service animal has same access rights to public facilities as an owner, and is also liable for damages done by the animal)); Georgia (GA. CODE ANN. § 30-4-2(b)(2)-(3) (2009) (trainer of a guide or service dog has the same access rights as a user of such dogs, "so long as such trainer is identified as an agent or employee of a school for seeing eye, service, or guide dogs," provided: "(A) Such dog is being held on a leash and is under the control of the person raising such dog for an accredited school for seeing eye, hearing, service, or guide dogs; (B) Such person has on his or her person and available for inspection credentials from the accredited school for which the dog is being raised; and (C) Such dog is wearing a collar, leash, or other appropriate apparel or device that identifies such dog with the accredited school for which such dog is being raise")); Idaho (IDAHO CODE ANN. § 18-5812B (2009) (access is not to be denied by a common carrier, hotel, restaurant, or other public place because an individual is accompanied by a "dog-in-training," though "may be temporarily denied if the dog is poorly groomed so as to create a health hazard or the person accompanying the dog cannot maintain control of the dog.")): Illinois (775 ILL. COMP. STAT. 30/3 (2009) (trainers of support dogs, guide dogs, seizure-alert dogs, seizure-response dogs, and hearing dogs have right of access to public accommodations equivalent to the rights of the physically disabled)): Indiana (IND. CODE § 16-32-3-2(d) (2009) (access rights of blind, deaf, and physically disabled apply to guide dog trainer while engaged in process of training a guide dog)): Iowa (IOWA CODE § 216C.11 (2008)); Kansas (KAN. STAT. ANN. §§ 39-1109, 1111 (2008) (professional trainer from a recognized training center, while engaged in training a dog, has the right to be accompanied by it into place of public accommodation. If a question arises as to a trainer's right to bring an assistance dog into a place of public accommodation, as with owners of assistance dogs, the trainer is to produce an identification card provided by the recognized training center with the following information: (1) Legal name of the trainer; (2) Name of the training center; (3) Address and telephone number of the training center; (4) Types of functions for which dogs are trained by the center; and (5) A picture or digital photographic likeness of the trainer)); Kentucky (KY. REV. STAT. ANN. § 258.500(7) (2009) (trainers of assistance dogs are to have in their personal possession identification verifying that they are trainers of such dogs)); Louisiana (LA. REV. STAT. ANN. § 46:1955 (2009) (during training, a trainer or puppy raiser of an assistance dog has the same access rights to public facilities as physically disabled persons with assistance dogs have)); Maine (ME. REV. STAT. ANN. 17.47, § 17.1312 (4) (2009); ME. REV. STAT. ANN. 26.19 § 1420-A (4) (2009); Maryland (MD. CODE ANN., HUMAN SERV. § 7-701(f); MD. CODE ANN., HUMAN SERV. § 7-705 (a)(4), (c)); Massachusetts (MASS. GEN. LAWS. CH. 129 §§ 39D, F); Minnesota (MINN. STAT. § 256C.02 (2009) ("The service dog must be capable of being properly identified as from a recognized school for seeing eye, hearing ear, service, or guide dogs.")); Mississippi (MISS. CODE ANN. § 43-6-155 (2009)); Missouri (MO. REV. STAT. § 209.152 (2009) (trainer must be from a recognized training center to have same access right as a disabled individual)); Montana (MONT. CODE ANN. § 49-4-214(3), (4) (2009) (a dog in training to be a service animal "shall wear a leash, collar, cape, harness, or backpack that identifies in writing that the dog is a service animal in training. The written identification for service animals in training must be visible from a distance of at least 20 feet.")); Nevada (NEV. REV. STAT. § 651.075 (2009)); New Hampshire (N.H. REV. STAT. §§ 167-D:4, 167-D:1 (VII) (2009) (guide dog trainer is "any person who is employed by an organization generally recognized by agencies involved in the rehabilitation of blind and visually impaired as reputable and competent to provide dogs with training, and who is actually involved in the training process.")); New Jersey (N.J. REV. STAT. § 10:5-29.3 (2009); N.J. REV. STAT. § 10:5-5 (t) (guide or service dog trainer is a person "employed by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide dogs with training, and who is actually involved in the training process.")); New Mexico (N.M. STAT. ANN. § 28-11-2 (2009)); New York (N.Y. CIV. RIGHTS LAW § 47-b (3) (2009); N.Y. AGRIC. & MKTS. LAW § 121-b (1)(d) (2009) (a formal training program or certified trainer is "an institution, group, or individual who has documentation and community recognition as a provider of service animals.")); North Carolina (N.C. GEN. STAT. § 168-4.2(b) (2009) (access with a trainer allowed "when the animal is accompanied by a person who is training the service animal and the animal wears a collar and leash, harness, or cape that identifies the animal as a service animal in training.")); North Dakota (N.D. CENT. CODE § 25-13-02.1 (2009) (trainer with an assistance dog in training may enter any place of public accommodation, common carrier, facility of a health care provider without being required to pay an extra charge for the dog provided (a.) the trainer notifies an onsite manager that an assistance dog in training is being brought onto the premises; (b.) the trainer wears a photo identification card issued by a nationally recognized dog training program; and (c.) the trainer is liable for any damage done to the premises or facility by the assistance dog in training)); Ohio (OHIO REV. CODE ANN. § 955.43(A)(3) (2009)); Oklahoma (OKLA. STAT. TIT. 7, § 19.1 (A), (B) (2009) (dog trainer must be from a recognized training center)); Oregon (OR. REV. STAT. § 346.650 (2007); OR. REV. STAT. § 346.685 (2007)); South Carolina (S.C. CODE ANN. § 43-33-10 (2008)); Tennessee (TENN. CODE ANN. § 62-7-112(a)(1)(B) (2009) (the "dog guide trainer shall first have presented for inspection credentials issued by an accredited school for training dog guides;" a dogs in training include "dogs being raised for an accredited school for training dog guides; provided, however, that a dog being raised for such purpose is: (a) Being held on a leash and is under the control of its raiser or trainer who shall have available for inspection credentials from the accredited school for which the dog is being raised; and (b) Wearing a collar, leash, or other appropriate apparel or device that identifies such dog with the accredited school for which it is being raised.")); Texas (TEX. HUM. RES. CODE ANN. § 121.003(i) (2009)); Utah (UTAH CODE ANN. § 62A-5b-104(2) (2009)); Virginia (VA. CODE ANN. § 51.5-44 (2009) (dog must be at least six months old and "(i) in harness, provided such person is an experienced trainer of guide dogs; (ii) on a blaze orange leash, provided such person is an experienced trainer of hearing dogs; (iii) in a harness or backpack, provided such person is an experienced trainer of service dogs; or (iv) wearing a jacket identifying the recognized guide, hearing or service dog organization, provided such person is an

to recognized or accredited schools, centers, or organizations in the state codes indicate that many state legislatures anticipated that state governmental agencies (whether responsible for dog registration and licensing, agricultural regulation, or otherwise) would maintain lists of, or somehow know about, reputable service dog training facilities.[106]

The Department of Justice, in the preamble to the previously discussed proposed rules issued in June 2008, said that commenters had recommended training standards as a means of differentiating untrained pets and service animals. The preamble emphasizes the DOJ's insistence that "service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process."[107]

> Because of the variety of individual training that a service animal can receive--from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures--the Department is not inclined to establish a standard that all service animals must meet. While the Department does not plan to change the current policy of no formal training or certification requirements, some of the behavioral standards that it has proposed actually relate to suitability for public access, such as being housebroken and under the control of its handler.[108]

This fails to take into consideration the increasing reliance of the industry on testing and certification, something commenters had brought up by noting that "without training standards the public has no way to differentiate between untrained pets and service animals."[109] It also fails to take into consideration the fact that if no standard training or certification can be relied upon, businesses dealing with access issues, and courts dealing with disputes, are often left to make decisions that should more properly be left to those more familiar with industry standards. As noted in the above discussion regarding therapy dogs, the underlying tests of many organizations show considerable uniformity in what is required for an animal to be designated as qualified for a service or therapy responsibility.

experienced trainer of the organization identified on the jacket.")); and Wisconsin (WIS. STAT. ANN. § 106.52 (2009) (trainer can be required to produce certification or other credential issued by a school for training service animals that the animal is being trained to be a service animal)).

[106] See the references to Connecticut, Georgia, Kansas, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, and Wisconsin in the preceding footnote.

[107] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34516 (June 17, 2008).

[108] *Id*. at 34524.

[109] *Id*.

III. Verifying Service Animal Status

Another area of considerable confusion concerns how a trained animal's status may be verified by a place of public accommodation. Given the proliferation of functions that service animals, and particularly service dogs, perform, it is not surprising that business owners find it difficult to distinguish service animals from household pets. It is also not surprising that some pet owners take advantage of this confusion to assert that their pets are service animals. They may even think this, given what they see on news reports. Unfortunately, some training schools and internet sites that purport to train or certify service dogs also take advantage of the confusion.[110] One website allows an individual to get a "personalized service dog certificate," a vest saying the dog is a service dog, and other paraphernalia, by doing no more than checking a box to indicate that the user's dog satisfies most of the items on a 10-point checklist. That is Step 1 on the website. Step 2 is to select a payment option to transfer $249 to the organization issuing the certificates.[111]

It should be emphasized again that any trained animal, even a guide dog, may be excluded from a place of public accommodation if it is out of control and the handler cannot get it under control, is not housebroken, is disruptive in a way that fundamentally alters the service the public accommodation provides (e.g., barking during a musical performance), or if the animal poses a threat to the health or safety of others.[112]

[110] Although reputable service dog organizations follow up on placement of service dogs, the authors have been advised that others do not, and that the rapid increase in service dog placements for autistic children may be leading to situations where dogs are being abused because some children are not capable of being handlers, at least without proper adult supervision. Reputable organizations will have contact with all, or at least most, parties related to the care and education of an autistic child after the placement of a service dog, and will generally retain the right to reclaim the dog should it appear that the dog's welfare is being endangered. An organization that does not want to remain involved in a service dog placement should, in the opinion of the authors, be regarded as suspect.

[111] A disclaimer on the website states that the "purchaser understands and agrees that the only involvement by servicedogsamerica.org is to supply the represented information and equipment." Also, "servicedogsamerica.org is not responsible for any actions legal or otherwise caused by the use of the equipment or printed material supplied." The website does note that "[y]ou can train your Service Dog to meet the specific needs of your disability."

[112] See, e.g., 28 C.F.R. § 36 (2009), Appendix B (noting that 28 C.F.R. § 36.302 (2009) "acknowledges that in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods, services, facilities, privileges, or accommodations offered or provided, or the safe operation of the public accommodation would be jeopardized"); see also proposed 28 C.F.R. § 35.136(b) (proposed June 17, 2008); 73 Fed. Reg. 34465, 34504 (June 17, 2008); ALASKA STAT. § 11.76.133(c)(2); FLA. STAT. § 413.08(3)(e); and NEV. REV. STAT. § 651.075.2.

A. Verification under Department of Justice Rules

A public accommodation, according to the proposed rules of the Department of Justice, may inquire about the qualifications of a service animal:

> A public accommodation shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public accommodation may ask if the animal is required because of a disability; and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.[113]

Verification involves not only a determination that the animal is qualified, but, at least indirectly, also a determination that the individual served is disabled. The prohibition on requiring documentation deserves further consideration.[114] Since states register and license dogs and provide tags (often through political subdivisions), providing proof of certification could easily be part of the registration process. Animals that qualify as guide, hearing, or service status in many states receive identifiable tags or leashes. This could, at least at the state level, be a means of distinguishing service animals for the non-visibly disabled

[113] 28 C.F.R. § 36.302(c)(6) (proposed June 17, 2008), 73 Fed. Reg. 34504, 34553 (June 17, 2008). See DiLorenzo v. Costco Wholesale Corp.,515 F. Supp.2d 1187, 1193-194 (WD Wash. 2007) ("task or function" inquiry of shopper with dog, despite her production of a letter from her psychologist describing her disabilities and attesting to her suitability for use of a service animal, because (1) shopper claimed service animal status for her dog when it was a clearly untrained 12-week old puppy, (2) shopper's husband brought dog into the store on another occasion without the shopper and claimed the dog was a comfort animal for him, (3) the shopper carried the dog in her arms, (4) dog could not alert shopper of panic attacks without prompting from shopper's husband, so court found it "safe to say" the store's employees could not witness the dog performing any task to assist the shopper with her disability. Although inquiry was appropriate: "Clearly an inquiry would cease to be legitimate if it was used to harass or discourage people with disabilities from availing themselves of public accommodation. In this way, unduly repetitive questioning, after an adequate answer has been given, could suggest a pretext for discrimination, constituting an illegitimate inquiry. However, a similar course of action to what Defendant took here has been recognized as legitimate in the housing context." The opinion states that the dog did in time become able to recognize panic attacks of its master and alert her, but shopper did not establish her claim under the Americans with Disabilities Act).

[114] A letter signed by Deval Patrick, Assistant Attorney General of the Civil Rights Division of the Department of Justice, written July 26, 1996, and co-signed by Scott Harshbarger, President of the National Association of Attorneys General (posted on the ADA website at www.ada.gov/archive/animal.htm), contained an attachment of "Commonly Asked Questions about Service Animals in Places of Business." One such question was, "How can I tell if an animal is really a service animal and not just a pet?" To this the attachment replied: "Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers." Thus, it would appear that a state or local government-issued license specifying service animal status, or a certification, may be used, at least in the opinion of some Justice Department officials, to establish service animal status, though the document also cautions that "such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal."

from house pets, arguably with less stress on the service dog user than an inquiry about what tasks a service animal can perform.

B. Verification under Department of Transportation Rules

Except for emotional support animals, the evidence of an animal's status as a service animal under Department of Transportation rules is very loose: "As evidence that an animal is a service animal, you *must* accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal."[115]

In a guide published for the airline industry in 2005,[116] the Department of Transportation said the following concerning service animal status:

> Under particular circumstances, you may see a need to verify whether an animal accompanying a passenger with a disability qualifies as a service animal under the law. You must accept the following as evidence that the animal is indeed a service animal:
>
> (1) The credible verbal assurances of a passenger with a disability using the animal,
> (2) The presence of harnesses or markings on harnesses,
> (3) Tags, or
> (4) Identification cards or other written documentation….[117]
>
> Keep in mind that passengers accompanied by service animals may not have identification or written documentation regarding their service animals…
>
> Carriers may require that passengers traveling with emotional support animals present current documentation (i.e., dated within a year of the date of travel) from a mental-health professional stating that:
>
> (1) The passenger has a mental health-related disability;
> (2) The passenger needs the animal for the mental-health condition; and
> (3) The provider of the letter is a licensed mental-health professional (or a medical doctor) and the passenger is under the individual's professional care.
>
> Even if you receive sufficient verification that an animal accompanying a passenger is indeed a service animal, if the service animal's behavior in

[115] 14 C.F.R. § 382.117(d) (2009) (emphasis added).

[116] Nondiscrimination on the Basis of Disability; Technical Assistance Manual; Final Rule, 70 Fed. Reg. 41481, 41482 (July 19, 2005).

[117] *See also* 14 C.F.R. § 382.117(d) (2009). Assistance Dogs International has posted an Assistance Dog Model State Law on its website (www.assistancedogsinternational.org/modellaw.php) using the same language.

a public setting is inappropriate or disruptive to other passengers or carrier personnel, you may refuse to permit the animal on the flight and offer the passenger alternative accommodations in accordance with [14 C.F.R. § 382] and your carrier's policy (e.g., accept the animal for carriage in the cargo hold).

Example 1: A passenger arrives at the gate accompanied by a pot-bellied pig. She claims that the pot-bellied pig is her service animal. What should you do?

While, generally speaking, you must permit a passenger with a disability to be accompanied by a service animal, if you have a reasonable basis for questioning whether the animal is a service animal, you may ask for some verification. Usually no written verification is required.

You may begin by asking questions about the service animal, e.g., "What tasks or functions does your animal perform for you?" or "What has its training been?" If you are not satisfied with the credibility of the answers to these questions or if the service animal is an emotional support animal, you may request further verification.

You should also call a CRO [Compliance Resolution Official] if there is any further doubt in your mind as to whether the pot-bellied pig is the passenger's service animal.

Finally, if you determine that the pot-bellied pig is a service animal, you must permit the service animal to accompany the passenger to her seat as long as the animal doesn't obstruct the aisle or present any safety issues and the animal is behaving appropriately in a public setting.

Example 2: A deaf passenger is planning to board the plane with his service animal. The service animal is a hearing dog and is small enough to sit on the deaf passenger's lap. While waiting to board the flight, the hearing dog jumps off the passenger's lap and begins barking and nipping at other passengers in the waiting area. What should you do?

Since you have already made the determination that the hearing dog is a service animal and may accompany the deaf passenger on the flight, you may reconsider the decision if the dog is behaving in a manner that seems disruptive and infringes on the safety of other passengers. You should carefully observe the hearing dog's behavior and explain it in detail to a CRO (if the CRO is on the telephone). If, after careful consideration of all the facts presented, the CRO decides not to treat the dog as a service animal, you should explain your carrier's policy regarding traveling with animals that are not being allowed in the passenger cabin as service animals.

If an airline declines to accept an animal as a service animal, it "must explain the reason for your decision to the passenger and document it in writing. A copy of the explanation must be provided to the passenger either at the airport, or within 10 calendar days of the incident."[118]

Commenters to the proposed rules that preceded the final rules adopted by the Department of Transportation had argued against requiring carriers to accept

[118] 14 C.F.R. § 382.117(g) (2009).

service animals based on "credible verbal assurances," and that airlines should be able to insist on evidence of certification. To this, the Department responded:

> Under U.S. law (the ADA as well as the ACAA), it is generally not permissible to insist on written credentials for an animal as a condition for treating it as a service animal. It would be inconsistent with the ACAA to permit a foreign carrier, for example, to deny passage to a U.S. resident's service animal because the animal had not been certified by an organization that the foreign carrier recognized. When flying to or from the United States, foreign carriers are subject to requirements of U.S. nondiscrimination law, though carriers may avail themselves of the conflict of laws waiver and equivalent alternative provisions of this Part. We acknowledge that some foreign carriers may be unused to making the kinds of judgment calls concerning the credibility of a passenger's verbal assurances that the Department's service animal guidance describes, and which U.S. carriers have made for over 17 years. However, the comments do not provide any persuasive evidence that foreign carriers are incapable of doing so or that making such judgment calls will in any important way interfere with the operation of their flights.[119]

The DOT precludes foreign carriers, absent a conflict of laws waiver, from imposing "certification or documentation requirements for dogs beyond those permitted . . . U.S. carriers."[120]

C. Federal Fair Housing Act Disputes on Service Animal Status

A case arising in West Virginia under the Federal Fair Housing Act and state law concerned a couple with dogs residing in a cooperative housing project. The case demonstrates the difficulties that may arise without a certification system for establishing a dog's status as a service animal.[121] The housing project originally permitted pets, but in 1996 the stockholders voted to phase out animals. As a result, tenants could not replace dogs and other pets that died, though an exception was made for seeing-eye, hearing-aide, and dogs trained and certified for a particular disability. A stockholder had to obtain a certificate or authorization request from a licensed physician specializing in the field of the specified disability. Two tenants, the Jessups, purchased two dogs and presented a physician's statement that "it is a medical necessity for [the Jessups] with their present health ailments to be able to keep their pets to suppress both the physical and mental need for companionship as well as the confinement due to the various illnesses." The board rejected the request of the Jessups to keep the two dogs. The trial court found for the board, noting:

[119] Nondiscrimination on the Basis of Disability in Air Travel; Final Rule, 73 Fed. Reg. 27613, 27635 (May 13, 2008).

[120] Id. at 27,636.

[121] In re Kenna Homes Cooperative Corporation, Civil Action 99-C-2745, No. 29644 (Oct. 23, 2001).

> None of the [Jessups'] physician statements correlate dogs, generally, or the Jessups' two dogs, specifically, to the claimed disabilities. Nor has there been any link by expert affidavit or other offering that these two dogs are a necessary reasonable accommodation. The "necessity" for these dogs as indicated by the physicians is not related to any specific disability and is not related to the Jessups' ability to stay or live at Kenna Homes. In other words, even if one accepts the physician's statements as true, the Jessups can live and function at Kenna Homes without their dogs.

The Jessups appealed. The appellate court reviewed statutes under the Americans with Disabilities Act, West Virginia fair housing statutes, and relevant cases.[122] Although the court found that a dog might not have to be professionally trained, it must be individually trained, since "a dog cannot acquire discernable skills as a service dog without some type of training." Further, "federal case law holds that an animal does not have to have professional credentials in order to be a service animal under the FFHA. This is because there appear to be no uniform standards or credentialing criteria applied to all service animals or animal trainers."[123] There is no federal or West Virginia certification process. The court found, however, that under the Federal Fair Housing Act and the West Virginia Fair Housing Act,[124] a landlord may require a tenant seeking to keep a service animal—

[122] Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995) (skill level of supposed hearing dog was "hotly contested, with some testimony casting doubt on the dog had been certified by a training center, but jury instructions mixed local, state, and federal law and may have led jury to erroneously infer that without school training a dog cannot be a reasonable accommodation); Green v. Housing Authority of Clackamas County, 994 F.Supp. 1253 (D. Or. 1998) ("[T]here is no federal or Oregon certification process or requirement for hearing dogs, guide dogs, companion animals, or any type of service animal. There is no federal or Oregon certification of hearing dog trainers or any other type of service animal. The only requirements to be classified as a service animal under federal regulations are that the animal be (1) individually trained, and (2) work for the benefit of a disabled individual. There is no requirement as to the amount or type of training a service animal must undergo. Further, there is no requirement as to the amount or type of work a service animal must provide for the benefit of the disabled person. 28 C.F.R. § 36.104 (2009). The regulations establish minimum requirements for service animals. The dog in Green, according to its owners, "alerted them to several sounds, including knocks at the door, the sounding of a smoke detector, the telephone ringing, and cars coming in the driveway. The landlord's "requirement that an assistance animal be trained by a certified trainer of assistance animals, or at least by a highly skilled individual, has no basis in law or fact. There is no requirement in any statute that an assistance animal be trained by a certified trainer."); Janush v. Charities Housing Development Corp., 169 F. Supp.2d 1133 (ND Cal. 2000) (denying defendant's motion to dismiss on grounds plaintiff's two birds and two cats could not be service dogs, noting that 28 C.F.R. § 36.104 (2009) defines a service animal as a guide dog, signal dog, "or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability….").

[123] It is not clear that this statement is correct. Although precise uniformity would be impossible, most service dog training involves rather standard socialization and behavior requirements in addition to the specific tasks related to the individual's disability.

[124] *See* Fulciniti v. Village of Shadyside Condominium Ass'n, Civ. No. 9601825, 1998 U.S. Dist. Lexis 23450 (W.D.Pa.1998) (condominium violated FHA in refusing to allow plaintiff to keep service animal that had received 1½ years of training, where doctors provided supporting letters, and association had presented no evidence dog created a disturbance or threat to any other residents in the association).

> to demonstrate that he or she made a bona fide effort to locate a certifying authority and, if such authority is located, to subject the service animal to the specialized training necessary for such certification. If the tenant fails to locate a certifying authority, it is reasonable for the landlord or person similarly situated to attempt to locate a certifying authority and, if one is located, to require certification of the service animal. If neither the tenant nor the landlord or person similarly situated can locate a certifying authority after reasonable attempts to do so, it is reasonable for the landlord or person similarly situated to require that a recognized training facility or person certify that the service animal has that degree of training and temperament which would enable the service animal to ameliorate the effects of its owners disability and to live in its owner's household without disturbing the peace of mind of a person of ordinary sensibilities regarding animals.

The court, therefore, accepted that something very similar to certification was needed despite the absence of a legal certification requirement. Further:

> In order to show that the disabled person needs the assistance of a service animal to ameliorate the effects of his or her specific disability, it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service dog can ameliorate the effects of the disability….
>
> [W]here a tenant suffers from a disability which is not apparent to a person untrained in medical matters, it is reasonable for a landlord or person similarly situated to require a second concurring opinion from a qualified physician selected by the landlord or person similarly situated to substantiate the tenant's need for a service animal.

The court affirmed the lower court's decision that the housing project could require the Jessups to get additional verification of the skills of their dogs and their need to have them.

As discussed above, HUD has amended regulations governing requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities. Prior to the October 2008 amendment to Part 5, a tenant had to certify that he or a member of his family was a person with a disability, the animal had been trained to assist persons with that specific disability, and the animal actually assisted with that disability. This requirement was eliminated, and HUD now requires "an identifiable relationship, or nexus, between the requested accommodation and the person's disability." Further, as noted above:

> Housing providers are entitled to verify the existence of the disability, and the need for the accommodation--if either is not readily apparent. Accordingly, persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from

a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.[125]

It is not clear if the documentation provided by the individuals in the lawsuit just discussed would be regarded as adequate by HUD.[126]

D. State Verification Requirements

As with the federal government, many states have provisions regarding procedures that are appropriate for places of public accommodation that may question an animal's status as a service animal. States themselves and their political subdivisions may also verify service animal status for: (1) waivers or reductions of license and registration fees, (2) special tagging or gear requirements, and (3) validation that trainers are working for qualified training schools.[127]

1. Verification by Public Accommodations under State Law

Only nine states statutorily specify that access is to be allowed if the dog is wearing specially colored gear or a distinctive tag, though given local administration of tagging, this approach likely applies in more areas.[128] Some states provide that

[125] 73 Fed. Reg. 63835 (Oct. 27, 2008).

[126] *See also* John Ensminger and Frances Breitkopf, Service and Support Animals in Housing Law, 26(5) GP/Solo Magazine 54 (July/Aug. 2009).

[127] Although most state statutes refer to the dog having been trained for its purpose (or "especially trained," "individually trained," etc.), some states specify, that the training must have been done at a certified or accredited school, particularly if a charge of discrimination or criminal interference is to be lodged. In Alabama, a penalty can be imposed for denial of access to a blind person being led by a guide dog wearing a harness when "the blind person presents for inspection credentials issued by an accredited school for training guide dogs…." Ala Code § 3-1-7 (2009). *See also* Alaska Stat. § 11.76.130(c)(1) (interference with the rights of a physically or mentally challenged person when accompanied by a certified service animal, which has been "certified by a school or training facility for service animals as having completed such training."); Iowa Code § 216C.11.1 (assistive animal is one trained by "recognized training facility"); Mich. Comp. Laws § 750.502c (misdemeanor denial of access may apply when, among other things, "the person with disabilities being led or accompanied has in his or her possession a pictured identification card certifying that the dog was trained by a qualified organization or trainer…."); Ohio Rev. Code Ann. § 955.011(B) (defining guide, hearing, or service dog as having been "trained by a nonprofit special agency"); Tenn. Code Ann. § 62-7-112(a) (disabled person may not be excluded with dog guide provided "such blind or deaf or hard of hearing person or physically disabled person shall first have presented for inspection credentials issued by an accredited school for training dog guides."); Tex. Code Ann. § 121.002(1) (assistance animal "has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide animals with training of this type.").

[128] Conn. Gen. Stat. §§ 46a-44(a), (b), 46a-64(a) (access allowed provided dog is wearing a harness or an orange-colored leash and collar); Miss. Code Ann. § 43-6-7 (blind or deaf person has a right to access with trained guide or hearing dog on blaze orange leash); N.H. Rev. Stat. Ann. § 12.167-D:5 (disabled person's dog to have leash and harness colored international orange; blind person to have

access is to be allowed if the handler presents a credential for inspection that has been issued by a training school.[129] Kansas allows training facilities to issue identification cards or letters with specified information to persons using dogs they have trained, but individuals who have trained their own dogs can obtain identification cards by applying to the state.[130] Utah encourages persons accompanied by service animals to display the animal's identification card, a service vest, or other form of identification.[131] Handlers of professional therapy dogs, as well as trainers of assistance dogs, are also to carry identification cards in Kansas.

Some states indicate the dog's status as a guide, signal, or service dog on its license, but do not specify whether such identification is to be used to assure access, though this can probably be assumed.[132] Colorado, Michigan, and South Dakota specify that a charge of criminal interference with a service dog can only be lodged if the dog is wearing distinctive gear.[133] Florida allows a business to which a disabled person is seeking access to ask what special tasks the dog can perform.[134]

leash and harness designed for guide dogs; service dogs to have leashes colored blue and yellow); N.C. Gen. Stat. § 168-4.2(a) (disabled person to show tag stamped "North Carolina Service Animal Permanent Registration"); N.C. Gen. Stat. § 168-4.2(b) (service animal in training to wear a collar and leash, harness, or cape identifying animal as service animal in training); Ohio Rev. Code Ann. § 955.011(A) (assistance dogs receive certificates and tags stamped "Ohio Guide-Dog Permanent Registration;" same for hearing and service dogs); Okla. Stat. Ann. § 7.19.1.C (dog used by a deaf person to wear orange identifying collar); R.I. Gen. Laws § 39-2-13 (guide, hearing-ear, or personal assistance animal wearing a yellow harness and trained by a recognized training agency or school may enter public facility); VA. Code Ann. § 51.5-44 (blind dog to have harness; hearing dog to have blaze orange leash; service dog to have harness or backpack); and Wis. Stat. § 106.52(am)2 (service animal in training to wear a harness or a leash and special cape; service animal trainer can be required to produce a certification or credential issued by a school for training service animals).

[129] Ill. Comp. Stat. § 3/143-4(6) (access not to be denied if a guide, leader, seizure-alert, or seizure-response dog is wearing a harness and the handler presents credential for inspection issued by a training school for the type of dog); Mont. Code Ann. § 363A.19 (access for service dog depends on user being able to properly identified as from a recognized school for seeing eye, hearing ear, service, or guide dogs); Tenn. Code Ann. § 62-7-112(a) (access to be allowed if dog guide is wearing a harness and blind or deaf or hard of hearing person first presents for inspection credentials issued by an accredited school for training dog guides; also for trainers); and Tenn Code Ann. § 62-7-112(a)(2)(A) (in lieu of credentials from an accredited school, a deaf or hard of hearing person may apply to Tennessee Council for the Dear and Hard of Hearing for credentials).

[130] Kan. Stat. Ann. § 39-1111.

[131] Utah Code Ann. § 62A-5b-104(4).

[132] Haw. Rev. Stat. 3-143-4(6) (guide, signal, and service dogs to be designated as such on licenses); and N.Y. [Agric.] Law § 110.3 (licenses to be conspicuously marked with words "Guide Dog," "Hearing Dog," "Service Dog," "Working Search Dog," or "Therapy Dog"); N.Y. [Agric.] Law § 112.7 (special tags for guide, hearing, service, and detection dogs).

[133] Colo. Rev. Stat. § 18-13-107(3) (criminal interference applies if dog is wearing harness normally used for dogs accompanying or leading persons with disabilities); Mich. Comp. Law § 750.502c (criminal interference if a guide, dog is wearing a harness or a service dog is wearing a blaze orange leash and collar, hearing dog cape, or service dog backpack, and person using the dog has a pictured identification card certifying the dog was trained by a qualified organization or trainer); and S.D. Codified Laws § 40-1-38 (criminal interference occurs if service animal is wearing a harness or other control device normally used by service animals).

[134] Fla. Stat. § 413.08(3)(a).

More specific and sometimes stringent identification requirements are required in some states for trainers than for the disabled who ultimately use the dogs.[135] West Virginia does not permit demands for proof of an animal's service status.[136] In Arizona, discrimination includes "[r]equiring provision of identification for the service animal." In Nevada, it is unlawful for a place of public accommodation to require proof that an animal is a service animal or service animal in training.[137] However, the place of public accommodation may:

> *a.* Ask a person accompanied by an animal:
> (1) If the animal is a service animal or service animal in training; and
> (2) What tasks the animal is trained to perform or is being trained to perform.
>
> *b.* Ask a person to remove a service animal or service animal in training if the animal:
> (1) Is out of control and the person accompanying the animal fails to take effective action to control it; or
> (2) Poses a direct threat to the health or safety of others.[138]

Thus, states vary considerably in how their registration and licensing systems provide evidence of a dog's special status.[139] To the extent the special status is indicated by gear and tagging, disputes as to the status of a service animal are reduced. This is particularly the case where a service dog is accompanying an individual with a non-visible condition.

2. Verification by State and Local Governments

Many states do not charge owners of service dogs any licensing fee, and the owner will have to provide a document from a training school stating what the dog has been trained to be or do.[140] Some states indicate the dog's status as a service dog on

[135] Ga Code Ann. § 30-4-2(b)(1) (guide or service dog must be identified as having been trained by a school for such dogs; dog with person raising or training to be a service dog must wear "appropriate apparel or device that identifies such dog with the accredited school"); Ky. Rev. Stat. Ann. § 258.500(7) (trainers of assistance dogs to have in their possess identification verifying that they train assistance dogs); Md Code Ann. § 11-502 (dog guides issued licenses stating dog's status; guide dogs to be issued orange license tags); Mont. Code Ann. § 49-4-214(4) (service animals in training to wear a leash, collar, cape, harness, or backpack identifying it as a service animal in training); and N.C. Gen. Stat. § 25-13-02.1 (for access to public accommodations, trainers are to wear photo ID issued by a nationally recognized dog training program).

[136] W. Va. Code § 5-15-4(e) (service animal not required to be licensed or certified by a state or local government and no requirement for specific signage or labeling).

[137] Ariz. Rev. Stat. Ann. § 11-1024.J.2(a)-(e)

[138] Nev. Rev. Stat. § 651.075(f)

[139] Nev. Rev. Stat. § 651.075.2.

[140] Colorado (Colo. Rev. Stat. § 24-34-803(5)); Connecticut (Conn. Gen. Stat. § 22-345); Delaware (Del. Code Ann. § 7-1702(j): license fee waived for "a seeing eye, lead or guide dog or as a dog which has previously served in a branch of the United States armed forces"); Hawaii (Haw. Rev. Stat. § 3-143-4(6)); Kentucky (KY. Rev. Stat. Ann. § 258.500(9)); Louisiana (La. Rev. Stat. Ann. § 46.1958); Maine (ME. Rev. Stat. Ann. § 9.3923-A); Maryland (Md. Code Ann. § 11-502: "dog guides" exempt); Massachusetts (Mass. Gen. Laws. Ch. § 20.140.139); Michigan (Mich. Comp. Laws. § 287.291: for blind, deaf, and physically limited persons); Nebraska (Neb. Rev. Stat. § 54-603: no license tax is to be charged "upon a showing that the dog is a graduate of a recognized training school for dog guides, hearing aid dogs, or service dogs." If the dog retires from service, the owner becomes responsible for the license tax); New Hampshire (N.H. Rev. Stat. § 45.466:8: no fee is to be required for registration and licensing of a guide dog, hearing ear dog, or service dog, provided the person applying for the license provides "a proper identification card from a recognized guide dog, hearing ear dog, or service dog training agency or school"); New Jersey (N.J. Stat. Ann. § 4:19-15.3); New Mexico (N.M. Stat. § 77-1-15.1.C: for the blind, hearing impaired, and mobility impaired); New York (N.Y. [Agric.] Law § 110.3: no fee for any license for any guide dog, hearing dog, service dog, war dog, working search dog, detection dog, police work dog or therapy dog); North Carolina (N.C. Gen. Stat. § 168-4.3); North Dakota (N.D. Cent. Code. § 40-05-02(22)); Ohio (Ohio Rev. Code Ann. § 955.011(A)); Oregon (OR. Rev. Stat. § 609.105); Pennsylvania (3 PA. Cons. Stat. § 459-201(a): fees are reduced but not waived); Virginia (VA. Code Ann. § 3.2-6528); Washington (Wash. Rev. Code § 49.60.380); and Wisconsin (Wis. Stat. Ann. § 174.055). This list does not include waivers by political subdivisions within states.

tags issued to such animals, or mandate or recommend that owners of such dogs use specifically colored gear.[141] Ohio has a very complicated assistance dog registration law:

> When an application is made for registration of an assistance dog and the owner can show proof by certificate or other means that the dog is an assistance dog, the owner of the dog shall be exempt from any fee for the registration. Registration for an assistance dog shall be permanent and not subject to annual renewal so long as the dog is an assistance dog. Certificates and tags stamped "Ohio Assistance Dog-Permanent Registration," with registration number, shall be issued upon registration of such a dog…. Duplicate certificates and tags for a dog registered in accordance with this section, upon proper proof of loss, shall be issued and no fee required. Each duplicate certificate and tag that is issued shall be stamped "Ohio Assistance Dog-Permanent Registration."[142]

Tennessee law specifically conditions access to places of public accommodation on the disabled person or trainer first having "presented for inspection credentials issued by an accredited school for training dog guides."[143] As noted above, trainers

[141] See references in the preceding footnote for California, Hawaii, Maryland (license to state "dog guide" in red ink), New Hampshire (individuals with signal dogs to fit dogs with leash and harness colored "international orange;" individuals with guide dogs to use leash and harnesses designed for such dogs; mobility impaired individuals to use blue and yellow leashes), New York (applicants for guide, service, hearing dogs may obtain special tag for the dog), Ohio (tabs to indicate assistance dog registration), Oklahoma (hearing dogs to be fitted with orange collars), Tennessee (Tennessee Council for the Deaf and Hard of Hearing issues special credentials for signal dogs), and Utah (identifying gear recommended).

[142] Ohio Rev. Code Ann. § 955.011(A).

[143] Tenn. Code Ann. § 62-7-112.

of guide dogs must often be able to verify to places of public accommodation that they are training an animal at a recognized training school.

IV. Recommendations

Uniformity of enforcement, and fairness to both governments and businesses, requires several changes that would involve changing the laws of most states and federal recognition of those laws in verification procedures. The authors, therefore, make four specific recommendations:

(1) State licensing authorities should verify that an individual with an animal he or she claims to be a service animal has a physical or mental disability. For visible conditions, the government agent may observe the condition and note that this requirement is satisfied on the appropriate registration form. For conditions where the service provided by the animal is not apparent, such as with a mobility impaired individual who uses the animal for balance, the government agent may ask the applicant the nature of the service provided by the animal. For non-visible and psychiatric conditions, the government agent may request a letter from a physician, psychiatrist, social worker, or other medical professional stating that the applicant suffers from a physical or mental condition that is alleviated by the tasks that the dog performs or by the companionship of the dog.

Inquiries and questions regarding an animal's status, even if legitimate, can be embarrassing and can result in an individual limiting her choice of stores to those where the employees have previously acknowledged the qualification of a service dog. Requiring that employees of public accommodations ask what the animal does, without asking what the individual suffers from, are naïve. The individual will often have to explain what she suffers from in order to explain what the dog does for her. Thus, all states should take the approach of HUD, recognizing that an individual with diagnosed psychiatric conditions may appropriately gain access with her animals if there is a nexus between the individual's condition and the presence of the animal and that nexus can be verified by a letter from a medical professional.

The authors believe that it is better for the individuals served, as well as for public environments, if dogs are trained at least at some minimal level—not to be aggressive, to be housebroken, etc. A training requirement, however, cannot apply equally to all service animals in that some service animals, such a seizure-alert dogs, may develop the skill with minimal or no training, though their continued recognition of oncoming seizures will often be rewarded and, in that sense, reinforced and trained.

The authors have experienced, and all dog owners know, that the reaction of an owner or employee of a restaurant or store may often depend on factors that have nothing to do with the qualifications of the dog, such as whether other customers are complaining, the dog is wet from rain and shaking itself, the owner does not like dogs, and so forth. Taking a service dog into a store may be fine one day when one store manager is on duty, but may cause a problem the next day when another store manager is working. The better approach is to make the state licensing authorities into society's primary gatekeepers. To do this successfully, states should provide officials registering and licensing dogs with sufficient training to recognize when an individual has a disability that can be alleviated by the tasks or presence of a specially trained animal.

(2) State licensing authorities should verify if the applicant's service animal has been trained to perform tasks related for the applicant's condition, unless, as with psychiatric service dogs, a sufficient nexus is established by the letter of a medical professional. Verification of service dog status may be made by reviewing a certificate of training of the service animal issued by a training school or organization that the state recognizes as training dogs for the disability of the applicant. If the dog has been trained by the applicant, the government agent may conduct an appropriate test to verify the dog's skills in performing tasks related to the individual's disability. Alternatively, the government agent may require the applicant to have the animal tested by a recognized training school or organization before proceeding with the application.

The reluctance of the federal agencies, and of many state codes, to accept a certification system makes recognition of service dogs helping individuals with non-visible conditions more difficult. In the June 2008 proposed rules, the Department of Justice provided that a "public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal."[144] The Department's objection to establishing a standard for "all service animals" to meet because of the "variety of individual training that a service animal can receive," certainly acknowledges the complexity of a licensing system that would look to the qualifications of different types of service animals, but many service animals receive high levels of training (service dogs for autistic children, seizure-response dogs), or provide unique services (seizure-alert dogs), that could be verified by the training institution or an appropriate medical authority. As noted previously, many states allow trainers of service dogs access to public accommodations when those trainers are affiliated with recognized training institutions. This presumes that states, at least to varying degrees, have officials with knowledge of the more established institutions in the state. This knowledge could be shared with licensing authorities. Also, many states do not charge licensing or registration fees for owners of service dogs, and presumably rely on produced training or certification

[144] 28 C.F.R. § 36.302(c)(6) (proposed June 17, 2008).

documentation to approve such waivers. If no system for recognizing training and testing organizations is in place, such a system should be instituted. The burden of this process can be reduced if states uniformly acknowledge the testing and certification procedures of the national and more reputable local organizations. Admittedly, some states may have to investigate the legitimacy of some local training organizations. This information could be kept in a shared federal/interstate database to which local agencies would have access.

(3) State licensing authorities should issue a license to an applicant with a guide, signal, or service animal stating that the animal qualifies under state law as a service animal. State licensing authorities should provide specially colored tags that can be prominently displayed on the animal's collar, leash or harness.

A number of states already provide for specially identifiable or colored tags, and this approach should be adopted by all states. It might also be appropriate that licenses issued contain digitalized pictures of the owner and the service animal. In any case, individuals serviced should obtain an identification document from the organization that has trained or certified a service dog, preferably with a picture of both the dog and the user. State officials might also encourage owners of service and other trained dogs to use collars and/or leashes of specific colors, even if no law requires such gear.[145] A separate tagging and color system could be provided to therapy dogs and search and rescue dogs to make public accommodation access easier when they are traveling to and from assignments. As noted above, the Department of Transportation allows identification of a service animal by the "presence of harnesses, *tags*, or the credible verbal assurances of a qualified individual with a disability using the animal."[146] Other federal agencies should adopt the same procedure.

Licensing and tagging service and support animals in a way to make them distinguishable from household pets would admittedly not resolve all disputes. Some individuals only begin to think about the services their animals perform after an event such as a landlord's adoption of a no-pets policy, but the number of disputes would be reduced and the ultimate comfort of service dog users would be increased.

(4) States should provide special licenses and tags to animals qualifying for limited temporal access. These types of animals include therapy dogs (providing emotional benefits to various populations to which the handler takes the animal for visitations), and search and rescue dogs. Such dogs should be licensed for admission to places of public accommodation, including restaurants, while being transported to and from assignments, or while on assignments.

[145] The blue and yellow leash for service dogs in New Hampshire is only specifically mentioned for dogs serving the mobility impaired.

[146] 14 C.F.R. § 382.117(d) (2009) (emphasis added).

Thus, therapy dogs should have limited access privileges as search and rescue dogs already do in Connecticut and New Hampshire. In addition to the special licenses and tags, it would also be desirable to require therapy dog handlers to follow procedures similar to those required in Kansas for handlers of professional therapy dogs, so that the handler should carry a photo identification card with a picture of the handler and the dog, the name and address of the handler, and a statement of the state-recognized training facility that the dog has been trained.

The law should recognize that with the increasing number of functions that dogs provide in the service and therapeutic spheres, there will be instances, as there already are in some states, where access rights should be recognized with limits of space or time. Search and rescue dogs in two states have access rights when going to and from assignments. Such limited-access rights might also someday be needed for cancer-sniffing and other disease-detection dogs that accompany health care workers in remote areas.

V. Final Observations

The model for exceptions to no-pets policies has been complete access for guide, signal, and service dogs for the mobility impaired or, more often, physically disabled. Increasingly, service dogs for individuals with mental disabilities, often called psychiatric service dogs, are allowed full access to public accommodations. Emotional support animals are generally to be admitted under Department of Transportation and Department of Housing and Urban Development rules. Trainers of guide, signal, and service dogs have access rights in most states, and handlers of search and rescue dogs have limited access rights in at least two states. Therapy dogs have access rights if they are used full-time by institutions in only one state.

The model for verification of service animal qualification has been, taking a general perspective, verification by function under Department of Justice rules, verification by nexus between the dog's function and the individual's condition under Department of Housing rules, and verification by identification cards, other written documentation, and use of harnesses, tags, or even credible verbal assurances under Department of Transportation rules. State laws sometimes follow the Department of Justice reluctance to ask about the individual's condition, but sometimes allow for investigation that might not be acceptable under federal rules. Some states provide special licenses and unique tags to individuals served by service animals, and assistance dog training facilities often provide such items, with or without actual legal significance. Unfortunately, there has arisen an internet trade of providing certification cards and service dog paraphernalia with only self-verification by persons willing to pay hundreds of dollars to give themselves the trappings of owning a service dog.

Providing access to service animals and their trainers is generally based on the civil rights of those benefiting from the animals. Even where the individual seeking the access is not himself disabled, such as with a trainer for service animals, or a handler of a professional therapy dog in Kansas, the ultimate justification for the exception to a no-pets policy concerns the beneficiary of the animal's training.

That is, the animal must be able to learn to respond to the disadvantaged individual or population it serves in environments that individual or population will use or live. In the case of a search and rescue dog traveling to a disaster site, the animal must be able to reach the location where it is to perform its function as a trained dog. Although some uniformity in access rules is provided by federal rules, licensing and tagging procedures remain matters of state and local law, and uniformity in these procedures would probably require a greatly increased degree of cooperation among the states.

Formal recognition of the value of dogs to individuals who are disabled is less than a century old, and more medical and therapeutic functions are being given to dogs all the time, meaning unfortunately that the present confusion of laws and procedures is likely to increase. The legal system should be flexible enough to adapt to new services that dogs can perform, but this flexibility should be accompanied by uniformity that, at the moment, seems to be wishful thinking.

A Case Study of African Elephants' Journey from Swaziland to US Zoos in 2003: A Question of Commerce and a Tale of Brinkmanship

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[1] *Born Free USA. v. Norton*, 278 F. Supp.2d 5 (D.D.C. 2003).

I. Background—Elephants: Population status, Biology and Threats to their Survival

Since the origin of elephants about 60 million years ago, at least 160 elephant species have existed in an extraordinary array of forms.[2] The African and Asian elephants living today are the sole remnants of that spectacular radiation, and they too may be close to the end of their time on Earth. Elephants, our world's largest land mammal, have inspired awe in humans for centuries.[3] Sadly, the elephant's majesty has also made it a target of humans seeking to profit by the slaughter of these animals and the sale of their parts and products made from them. While an estimated five to ten million African elephants once roamed across the African continent from the Mediterranean to the Cape of Good Hope, humans have destroyed vast numbers of these animals in the last few centuries.[4]

Today, although estimates vary, the World Conservation Union Species Survival Commission's (IUCN) African Elephant Specialist Group estimates that, "Between 400,000 and 660,000 elephants are currently thought to roam in African forests and savannas."[5] Approximately 1,000 African elephants are maintained in captivity, most of them in American and European zoos.[6]

Across the entirety of their range, both African and Asian elephants are subjected to a variety of threats. Poaching of elephants for their ivory tusks is one of the best-known threats. The trade in elephant ivory is immense, global, dangerous, ongoing, and, for the most part, illegal.[7] Elephants are slaughtered for human consumption, one of a large number of wild species who are killed

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[2] Joyce Poole, et al. Preamble, "The Elephant Charter," http://theelephantcharter.info/index.php?option=com_content&task=view&id=3&Itemid=8, (last visited January 21, 2010).

[3] Elephants are herbivores, moving almost ceaselessly through huge home ranges seeking food, water, minerals, family, and friends each day. They live in complex yet stable societies. Female elephants form life-long bonds; all elephants exhibit extraordinary sociality, physical vigor and cognitive powers. J.H. Poole and P.K. Granli, (2009) Mind and Movement: Meeting the Interests of Elephants in An Elephant in the Room: The Science and Well Being of Elephants in Captivity (D.L. Forthman, L.F. Kane, D. Hancocks and P.F. Waldau eds) North Grafton MA: Tufts University Cummings School of Veterinary Medicine's Center for Animals and Public Policy.

[4] 5 Ronald Orstein, An Elephant Update: November 1996, in Elephants, The Deciding Decade 12 (Ronald Orenstein, ed., 1991).

[5] Elephant Status Report 2007, IUCN World Conservation Union Press Release, available at http://iucn.org/afesg/.

[6] Raman Sukumar, The Living Elephants: Evolutionary Ecology, Behavior, and Conservation 396 (2003). Asian elephants, on the other hand, have a population size estimated at about ten percent of the African elephant population, with roughly one-third of them in captivity—including many in the Asian elephant's native habitat—referred to as their "range states." *Id*.

[7] Esmond Martin and Daniel Stiles, The Ivory Markets of East Asia, Save the Elephants, Nairobi: Kenya (2003). *See also* 2002 report on the global ivory trade, A Global Problem, published by the Born Free Foundation for the 2002 CITES meeting: http://www.bornfree.org.uk/elefriends/images/ivorytrade.pdf.

specifically to be eaten, as "bushmeat."[8] Humans continue to demand elephant hides as well.[9] Elephants are also slaughtered after conflicts with humans, especially over the destruction of agricultural crops. Elephant numbers are adversely affected by increases in local human populations and the resulting decrease in available elephant habitat.[10]

Additionally, live elephant trade is a significant issue threatening the species' conservation and welfare.[11] Elephants are sent to zoos and circuses around the world where they, and their offspring, are displayed as a popular attraction to human visitors. [12] The American Zoo Association (hereafter AZA), a trade group representing the oldest and most significant zoos and aquaria in the United States, justifies its members' interest in procuring and exhibiting elephants by characterizing "[e]lephants, as a flagship species," and claiming that they "provide unique opportunities for zoos' conservation education efforts."[13] There is no evidence, however, that these education efforts of zoos bear fruit among the millions of their visitors to zoos. At the same time, zoos have been largely unsuccessful in maintaining and successfully breeding elephants in captivity. Not surprisingly the number of captive elephants in the United States is decreasing. It follows that elephants already in captivity cannot be relied on to maintain the species' long-term viability in captivity.[14] This state of affairs strongly suggests to this author that US zoos' unabated desire to display elephants, together with the industry's poor breeding record, may compel the zoo industry to resort to global trade in elephants to stock its elephant exhibits.

[8] "Will Central Africa's Wildlife Be Eaten into Extinction?" Scientific American, Sept. 15, 2008 accessed November 13, 2008 at: http://www.sciam.com/article.cfm?id=central-africa-forest-wild-life-eaten-into-extinction

[9] Edmund Kagire, Africa: Continent's Rare Species of Flora and Fauna Face Extinction as Poaching Intensifies, The New York Times (Kilgali), Oct. 8, 2008 accessed Nov. 13 at http://allafrica.com/stories/200810090301.html

[10] Sukumar, *supra* note 6, at 363-379; Sukumar, *supra* note 6, at 303. "Raiding by elephants is not confined to standing crops in fields. They also attempt to feed on harvested plants stacked in the field for drying (prior to threshing) or even raid stores by knocking over mud or thatched house walls. There are even amusing anecdotes of elephants raiding locally brewed liquor stores in villages or even the imported, connoisseur's varieties kept in army camps near the jungle."

[11] D.S. Favre, Elephants, Ivory and International Law, 10 (3) RECIEL 277-286 (2001).

[12] Sukumar, *supra* 400. Former Chair of the World Conservation Union Asian Elephant Specialist Group, he claims, "[t]he birth of an elephant calf in a Western zoo increases visitor numbers and revenue as few other animals do."

[13] African Elephant Species Survival Plan, AZA, AZA, Annual Report On Conservation and Science 1999-2000/ Volume I: Conservation Programs Reports 81 (2001).

[14] *Id*. at 82. "The [number of elephants in] North American [] is declining and not self-sustaining. A large portion of the female[s] [are] passing through the prime breeding age for this species. At the current rate of reproduction, in 15 years there will be only one female under 25 years of age. The last successful live birth with the calf surviving over a year of age was in 1985. Since 1985, only seven calves have been born. Three are currently under one year of age. None of the other four born since 1985 survived to a year of age."

This article focuses on the most recent importation of elephants by US zoos and the legal challenge mounted by the animal protection community to stop it, *Born Free USA v. Norton*, 278 F.Supp.2d 5 (D.C. 2003), vacated by 2004 U.S.App. Lexis 936 (D.C. Cir. Jan.21, 2004). The District Court affirmed a decision by the United States Fish and Wildlife Service to issue importation permits under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereafter CITES) to San Diego Zoo and Lowry Park Zoo to import 11 young wild-caught elephants from the Kingdom of Swaziland.[15]

This case deserves attention because it points to issues and arguments that may well inspire future challenges by the animal protection community to elephant importations by the zoo industry. In particular, this case offers a springboard to a deeper examination of whether zoos' display of elephants is, at heart, a non-commercial activity under CITES. This is significant because elephants, designated as Appendix-I animals, may not be lawfully imported under CITES for commercial purposes. This article explores the argument of whether the import has a commercial purpose turns on the importing party's actions rather than its status as a charitable or educational institution. Secondly, this case demonstrates how a US federal court's case management and decision process can be deeply influenced by political actions of the exporting nation. Swaziland's exporting authorities sought a quick and favorable US court decision by threatening to kill the animals and feed them to the local Swaziland citizens unless the district court approved the zoos' permit applications. Swaziland's threat, appearing both in press reports and court documents, drove the court's timetable for considering and addressing the important and difficult issues the case raised. One consequence of this pressure was the court's truncated treatment of a host of issues, including whether exhibiting elephants to paying zoo guests is a commercial activity or not within the meaning of CITES. Accordingly, this article focuses on the court's analysis of the zoos' claim to a non-commercial purpose in importing the Swaziland. This article also details the deep influence of Swaziland officials' brinkmanship on the District Court's judgment.

II. The Global Trade in Live Elephants

Since 1973, the US zoo industry's demand for elephants from the wild has been regulated by CITES and a host of ancillary national laws adopted to enforce CITES. This section describes the regulatory framework in general terms.

A. International Regulation of Wildlife Trade

CITES was enacted to help protect wildlife by regulating international trade in animals and plants of conservation concern because, for example, they may be threatened with extinction. CITES obliges its member Parties like the United States

[15] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 6 1973, 27 U.S.T. 1087, 993 U.N.T.S.243 [hereafter CITES].

to control wildlife imports and exports by taking "appropriate measures" to enforce the Convention.

International trade in wildlife is regulated under CITES by the listing of species on one of three Appendices. Species included on Appendix I, like the Giant Panda, Grey Whale, gorilla, certain chimpanzee species, and Asian elephants, are afforded the strictest trade protections because they are "species threatened with extinction which are or may be affected by trade."[16] An Appendix I animal may not be exported without a determination by the exporting country's Scientific Authority that the export will not be detrimental to the survival of the species; that the Management Authority has determined that the specimen was not acquired illegally; and that the Management Authority is satisfied that a living individual will be "prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment."[17] Further, an Appendix I animal may not be imported without "the prior grant and presentation of an import permit" from the country to which the animal will be taken and a valid export permit issued by the country from which the animal will be exported, among other considerations and requirements.[18] Of particular importance for Appendix I species, the importing country's Management Authority must be satisfied "that the specimen is not to be used for primarily commercial purposes."[19]

An Appendix II specimen, like African gray parrot, and certain bison, tortoises, turtles, frogs and owls, may be traded internationally for commercial purposes. Only an export permit reflecting that export will not be detrimental to the survival of the species in the wild is required. The permit must also state that the specimen was not illegally obtained, and that the specimen will be prepared and shipped humanely.[20]

The African elephant was originally listed under Appendix II, but was transferred from Appendix II to Appendix I in 1989, a decision that took effect in January 1990.[21] The previous system involving a regulated trade in elephant ivory under Appendix II had been a failure and a complete international ban was enacted. Willem Wijnstekers, an authority on the Convention and the current Secretary-General of CITES, noted in 1992, "CITES and the mechanisms it provides for the control of trade in Appendix II species have proven to be insufficient to stop the vast illegal trade in ivory."[22]

The decision to end the international commercial trade in elephant ivory

[16] CITES, Art. II.
[17] CITES, Art. III, para. 2.
[18] CITES, Art. III, para. 3.
[19] *Id.*
[20] CITES, Art. IV, para. 2.
[21] Willem Wijnstekers, The Evolution of CITES: A Reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, published by CITES Secretariat, Geneva: Switzerland (1992) at 209. "However, in adopting the transfer to Appendix I in 1989, the Conference of the Parties also adopted a special mechanism for the transfer of African elephant populations from Appendix I to Appendix II."
[22] *Id.* at 208.

came after a global public campaign to protect elephants more vigorously from the trade in their ivory. The 1989 ban is often highlighted as one of the most important reasons why the elephant population in Africa, which had declined dramatically in the previous decade, began to stabilize across some of the key range states in the 1990s.[23]

1. The Non-Commercial Purpose Requirement

CITES prohibits the import of Appendix I species for "commercial purposes" unless the animal was specifically "bred in captivity for commercial purposes."[24] Article III of the Convention mandates that an import permit can only be granted for an Appendix I species (such as elephants in Swaziland) by the importing country's Management Authority when (as mentioned above), among other conditions, it is satisfied that the specimen is not to be used for "primarily commercial purposes."[25]

In 1985 at the Buenos Aires CITES Conference of the Parties, Resolution Conf. 5.10 clarified to a limited extent the definition of the phrase "primarily commercial purposes" through a series of general guiding principles and examples. For instance, principles suggesting a purpose that is primarily commercial include a use that is "to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit."[26]

> Further, the term 'commercial purposes' should be defined by the country of import as broadly as possible so that any transaction which is not wholly 'non-commercial' will be regarded as 'commercial'. In transposing this principle to the term 'primarily commercial purposes', it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of specimens of Appendix-I species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens.[27]

[23] However, in the years following the listing, a minority of African elephant range states petitioned CITES to renew some form of trade in elephant parts and products. The most vocal of these were Botswana, Namibia, South Africa, Zambia, and Zimbabwe. Their requests have taken a number of forms including permission to allow trade in stockpiled ivory only (in a "one off" sale), trade in non-ivory products (such as hides and hair), and at its most extreme, the return to an annual ivory quota. The general perception that elephants and their products may once more be the subjects of trade, albeit in a limited way, may explain a renewed interest in live trade. These "downlisting" proposals also included specific reference to the trade in live elephants to "appropriate and acceptable destinations," though a clear definition for this phrase did not initially exist.
[24] CITES, Art. III and Art. VII.
[25] CITES, Article III, para. (3)(c).
[26] CITES Resolution Conference 5.10, Definition of "Primarily Commercial Purposes," Buenos Aires, Argentina (1985) General Principle 2, available at: http://www.cites.org/eng/resols/5/5_10.shtml.
[27] *Id.* Principle 3.

Importations aimed at obtaining economic benefit through resale or exchange, whether in cash or in kind, are considered commercial.[28] Importation by the biomedical industry is initially considered commercial in nature because the purpose is viewed as promoting public health through the sale of biomedical products:

"The latter aspect in this case would usually be considered to be predominant and as a result, imports of this type will mot often not be acceptable."[29] A non-commercial purpose includes the donation or exchange of the specimen between scientists or scientific institutions.[30]

2. The Not Detrimental To the Survival of the Species in the Wild Finding

CITES also prohibits the importation of Appendix I species when the purpose of the import is detrimental to the survival of the species, or when the recipient is not suitably equipped to house and care for the animal. CITES, Art. III, ¶3. According to the Secretary-General of CITES, the Scientific Authority's "advice that the export will not be detrimental to the survival of the species" is essential for achieving the aims of the Convention. Such advice requires: (1) sufficient knowledge of the conservation status of the species; and (2) that positive advice should not be given in the absence thereof.[31]

In order to ensure that trade in Appendix I species does not have a detrimental impact on the survival of the species, the exporting Party's Scientific Authority must determine that export will not be detrimental to the survival of the species.[32] Similarly, the importing Party's Scientific Authority must be satisfied that the purposes of the import will not be detrimental to the survival of the species.[33] This is a fundamental and vital safeguard with respect to international trade in endangered species.[34]

[28] *Id.* Principle 2.
[29] *Id.* Annex Example (b) Scientific Purpose.
[30] *Id.*
[31] Wijnstekers, *supra* note 22, at 26.
[32] CITES, Article III, para. (2)(a).
[33] *Id.* Article III, para. (3)(a).
[34] For a number of years, not all CITES Parties undertook a rigorous assessment concerning whether trade in a specific CITES-listed specimen, whether Appendix I or II, would result in a detriment to the species. CITES Parties recognized this at their twelfth Conference of the Parties in Santiago, Chile in 2002 when they expressed specific concern over the lack of appropriate non-detriment findings for Appendix II species: "that some States permitting export of Appendix-II species are not effectively implementing Article IV paragraphs 2 (a), 3 and 6 (a) of the Convention, and that, in such cases, measures necessary to ensure that the export of an Appendix-II species takes place at a level that will not be detrimental to the survival of that species, such as population assessments and monitoring programmes, are not being undertaken, and that information on the biological status of many species is frequently not available."

B. US Regulation of Wildlife Trade Under CITES

To import an African elephant into the United States, in addition to complying with the requirements of CITES, Art. IV, ¶1, zoos must also meet both the general requirements applicable to all FWS permits, 50 C.F.R. Part 13, as well as the permit requirements that apply to the import of animals listed on Appendix I of CITES, 50 C.F.R. Part 23. 50 C.F.R. § 17.40(e).

1. The Endangered Species Act (ESA)

The Endangered Species Act (ESA) is the United States national government's implementing legislation for CITES and makes the violation of CITES illegal under federal law.[35] The ESA was adopted in the early 1970's in response to the concern of Congress that species of fish, wildlife, and plants "have been so depleted in numbers that they are in danger of or threatened with extinction."[36] The statute pledges the United States "as a sovereign state in the international community to conserve to the extent practicable the various species of fish and wildlife and plants facing extinction;" it also provides that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]." [37] The Act is administered by the FWS, an agency within the Department of the Interior.

The ESA prohibits the "tak[ing]" of listed species, defined under the Act to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[38] It also prohibits the importation of such listed species.[39]

The African elephant is listed as "threatened"[40] under the Endangered Species Act[41] and the Asian elephant is listed as "endangered."[42] Threatened species are those species that are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[43]

[35] 16 U.S.C. §§ 1537(a) and 1538(c)(1).
[36] 16 U.S.C. § 1531(a).
[37] 16 U.S.C. § 1531(c).
[38] 16 U.S.C. § 1532.
[39] 16 U.S.C. § 1538.
[40] US Fish and Wildlife Service. Species Profile, African Elephant, available at: https://ecos.fws.gov/species_profile/SpeciesProfile?spcode=A07U#status.
[41] 16 U.S.C. §§ 1531-1544.
[42] US Fish and Wildlife Service. Species Profile, Asian Elephant, available at: https://ecos.fws.gov/species_profile/SpeciesProfile?spcode=A059#status.
[43] See supra note 37, § 1532(6)

When a species is a "threatened" species under the ESA, the FWS can promulgate what is known as a "4(d)" or "special rule" for the species that designates certain activities as not resulting in a taking of the species.[44] Such a rule exists for the African elephant, which has the effect of the FWS not requiring an ESA permit for trade in this species.[45]

2. The National Environmental Policy Act (NEPA)

NEPA is this nation's basic charter for the protection of the environment. NEPA makes it national policy to "use all practicable means and measures . . .to foster and promote the general welfare [and] to create and maintain conditions under which [humans] and nature can exist in productive harmony." [46]

To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a "detailed statement" regarding all "major federal actions significantly affecting the quality of the human environment."[47] This statement is commonly referred to as an Environmental Impact Statement (EIS).

An EIS must describe: (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) alternatives to the proposed action, (4) "the relationship between local short-term uses of [the] environment and the maintenance and enhancement of long-term productivity," and (5) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented."[48]

The Council on Environmental Quality ("CEQ") promulgated regulations implementing NEPA that are binding on all agencies, including the FWS.[49] The CEQ regulations provide that, where the agency has not determined whether an EIS is required, it must generally prepare an "Environmental Assessment" ("EA") to determine whether the environmental effects of its proposed action are "significant" and thereby require the preparation of an EIS.[50] In determining whether an action is "significant," the agency must consider among other factors, "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial;" "[t]he degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration;" the degree to which the action "may adversely affect an endangered or threatened species;" and whether "the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment." [51]

[44] 16 U.S.C. § 1533 (d).
[45] 50 C.F.R. § 17.40 (e).
[46] 42 U.S.C. § 4331 (a).
[47] 42 U.S.C. § 4331(a).
[48] 42 U.S.C. § 4332.
[49] See 40 C.F.R. §§ 1500-1508.
[50] 40 C.F.R. § 1501.4(b).
[51] 40 C.F.R. § 1508.27(b).

Both an EA or EIS requires a discussion of effects, alternatives, and mitigation measures so that decision makers can rest their determinations based on facts of the impacts of the proposed project as well as viable alternatives.[52] Nevertheless, NEPA does not require a particular environmental outcome.

The EA and EIS differ in important respects as well. An EA is a concise report providing sufficient evidence and analysis to permit a Finding of No Significant Impact (FONSI) on the human environment.[53] An EIS is prepared when proposed actions may have a significant impact on the quality of the human environment.[54]

III. US Zoos Seek Permits to Import Elephants from Swaziland in 2003: A Case Study of *Born Free v. Gale Norton*

A. Factual and Procedural History

Elephants were thought to have been extirpated from the Kingdom of Swaziland roughly 60 years ago,[55] but, in the late 1980s, the Chief Executive of the Kingdom of Swaziland's Big Game Parks (BGP), Terence "Ted" Reilly, began importing elephants into Swaziland from South Africa, first by receiving 18 elephants in 1987 and then another 19 elephants in 1994.[56] Mr. Reilly was chief executive of Big Game Parks, Swaziland's sole implementing authority for CITES. In that capacity, Mr. Reilly claimed throughout the controversy that he functioned as Swaziland's Management Authority and Scientific Authority. [57]

By 2003 Swaziland's African elephant population numbered between 30 and 40 animals, confined in two protected areas: the Hlane Royal National Park and the Mkhaya Nature Reserve.[58] Mr. Reilly alleged that "there [wa]s severe competition for space for alternative land use in Swaziland" including "growing human pressure on our Parks."[59] Mr. Reilly claimed that increasing competition for land use in the protected areas within Swaziland was growing between elephants and humans as

[52] 40 C.F.R. § 1500.1
[53] 40 C.F.R. § 1508.9; 40 C.F.R. sec. 1508.13.
[54] 40 C.F.R. § 1508.11.
[55] Intervenor-Defendants' Memorandum of Points and Authorities In Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, *Born Free USA, et al., v. Gale Norton, et. al.*, and the Zoological Society of San Diego, et al., 278 F. Supp2d 5 (D.D.C. July 24, 2003)(Civ. No. A:03CV01497 JDB) (on file with author).
[56] *Id.* at 6.
[57] *See*, e.g., Intervenor- Defs.'Ex.1, Decl. of Terrence (Ted) Reilly at 2, Born Free, 278 F. Supp2d 5, (D.D.C. July 24, 2003) (No. Civ.A.03-1497 JDB).
[58] Blanc, J. J., Barnes, R. F. W, Craig, G. C., Dublin, H. T., Thouless, C. R., Douglas-Hamilton, I. and Hart, J. A., IUCN Species Survival Commission , African Elephant Status Report 2002: An Update from the African Elephant Database, (2003) at 165-66 available at http://www.african-elephant.org/aed/aesr2002.html (last visited Oct. 31, 2009).
The report described a definite population of 39 individuals. Hlane National Park reportedly was approximately 142 sq. km while Mkhaya Nature Reserve reportedly was approximately 65 sq. km. The confined areas for elephants, however, were much smaller.
[59] T.E. Reilly, The Elephant Controversy: Background Information (undated) (on file with the author).

well as between elephants and other species such as rhinos.[60] In addition, Mr. Reilly claimed that the elephants, all of whom came from South Africa as orphans of cullings in Kruger National Park in South Africa in the 1980s,[61] were rapidly degrading their existing habitat, including destruction of trees.[62] As a result, Mr. Reilly determined that removal of some elephants was necessary. As early as 2001, Mr. Reilly stated that absent relocation of some elephants from Swaziland, they would have to be culled.[63] Mr. Reilly was initially contacted in May of that same year by an international animal capture and translocation company seeking elephants for the Zoological Society of San Diego, California, (hereinafter, "San Diego Zoo").[64] The same company subsequently approached Mr. Reilly later on behalf of Lowry Park Zoological Garden, Florida, (hereinafter, "Lowry Park Zoo").[65] This joint effort of San Diego Zoo and Lowry Park Zoo ("the Zoos") marked a resumption of trade that had been suspended by AZA zoos for a decade.[66] Thereafter, the process of identifying, capturing, and corralling the eleven elephants identified for export began. The arrangement between Mr. Reilly and the Zoos called for a payment of one million Rand (approximately $132,000 US dollars) by the Zoos to Mr. Reilly for eleven elephants.[67]

Once the agreement was reached, the San Diego and Lowry Park Zoos applied for permits to import the Swaziland elephants.[68] Applications were submitted to the Fish and Wildlife Service (FWS)—the U.S. agency charged with administering CITES and the ESA—in June and July of 2002 by the Zoos.[69] Amended permits were sought by the zoos in August 2002 and granted by FWS in September 2002.[70]

In March 2003, a coalition[71] of individuals and groups (hereafter the Coalition) opposed to the resumption of international trade of live African elephants

[60] Letter from T.E. Reilly, Director of the CITES Management Authority for Swaziland, to Dr. Michael Kreger, Division of Scientific Authority, US Fish and Wildlife Service at 3 (May 31, 2003) (on file with author). Reilly claims that "4 bulls [elephants] were destroyed at Mkhaya for Rhinocide."

[61] *Id.* at 4.

[62] *Id.* at 2. Mr. Reilly claimed that habitat disturbances in Hlane National Park and Mkhaya Game Reserve were similar "although the emphasis of the habitat modification is obviously directed at different plant species due to varying habitats between the two parks."

[63] Decl. of Ted Reilly, at 20, para.57,Born Free USA, et a., v. Gale Norton, et al., and The Zoological Society of San Diego, et al., 278 F. Supp2d 5 (D.D.C. July 24, 2003) (No. Civ.A.03-1497 JDB).

[64] *Id.* at 18, para.53.

[65] *Id.* at 19, para. 54.

[66] E-mail from Mike Keele to Michael Kreger, US Fish and Wildlife Service ("[T]here have been no African elephants imported by AZA facilities during the last 10 years.") (May 5, 2003) (on file with author).

[67] Decl. of Ted Reilly, supra note 66 at 26, para. 71

[68] Memorandum in Support of Plaintiffs' Motion. for Preliminary Injunction at 12-15, *Born Free*, 278 F. Supp2d 5, 5 (D.D.C. July 24, 2003) (No. Civ.A.03-1497 JDB).

[69] *Id.*

[70] *Id.* at 15-17.

[71] Born Free USA, Born Free Foundation, The Elephant Alliance, The Elephant Sanctuary, People for the Ethical Treatment of Animals, In Defense of Animals, Animal Protection Institute, Animal Welfare Institute, and two individuals.

wrote to the FWS informing the agency that its decision to issue the permits violated CITES, the Endangered Species Act, and the National Environmental Policy Act, and to the Zoos, informing them both of violations of regulations implementing the ESA and CITES with respect to the proposed import.[72]

The Coalition had learned that some of the elephants rounded up on March 10, 2003 for export were from Hlane Royal National Park, a location not included in the Zoos' amended permit applications that provided the basis for the FWS's decision to grant the Zoos' permits in 2002. Thus, the Zoos did not adhere to the specifications of the amended permit applications, which stated that the elephants were coming exclusively from Mkhaya.

This is noteworthy beyond the specifics of the permit process because one of the primary justifications for the import was that the elephants in the smaller Mkhaya Royal Park had allegedly outgrown their available habitat and the game reserve was allegedly at carrying capacity. The larger Hlane National Park was not suffering from these allegedly dire conditions. Both Zoos were also informed that alternative wildlife reserves had been identified within Africa willing to receive these elephants, thereby removing the alleged imperative for their export to the United States.

On April 2, 2003 the FWS sent letters to the Zoos asking them to clarify their permit applications. FWS specifically advised the Zoos that the eleven elephants that were captured for importation to the U.S. were not the elephants specifically identified in the permit applications based on independent corroboration that the FWS received regarding the capture.

In the meantime, the Coalition, having received no substantive response to their March letters to FWS or the Zoos, filed suit against the FWS on April 9, 2003, to halt the import. The suit was dismissed by joint stipulation and the Zoos "retendered" their permits to the FWS, submitting applications for "renewal" or "reissuance" of their permits, citing purposes of captive breeding, research, conservation or exhibition.[73]

The Coalition objected, arguing in part to the FWS that new permits should not be issued for importation of the captured elephants in Swaziland since the applicant Zoos "misrepresented and withheld information in their permit applications that is clearly material to the proposed importation."[74]

[72] *See* Endangered Species Act, 16 U.S.C. §1540(g)(2)(A)(i)(2006).The citizen suit provision of the ESA requires sixty-day notice be given before certain claims can be brought under the Act—for instance, the potential claims against the Zoos.

[73] At the time, Lowry Park Zoo was constructing a barn and two-acre exhibit space for the elephants while San Diego Zoo indicated it would provide the seven elephants marked for relocation to California an existing two-acre outdoor space and barn at its northern San Diego County facility.

[74] Correspondence to Timothy J. Van Norman, Chief of Branch of Permits-International, Division of Management Authority, US Department of Interior, Fish & Wildlife Service, from counsel for the Coalition, May 2, 2003 (on file with author).

In the midst of the controversy over the Zoos' permit applications, the US Fish and Wildlife Service on June 5, 2003 issued a draft EA pursuant to NEPA analyzing the impact of the proposed elephant importation.[75] Importantly, the assessment found that the import of the elephants would not be detrimental to the survival of the species in Swaziland and that the transaction was not primarily commercial in its purpose.[76] On June 26, 2003, FWS issued a set of findings with respect to each zoo.[77] With respect to the purpose of the import, FWS found that the animals slated for importation would participate in a captive breeding program.[78] FWS found on June 7, 2003 that, "It is the zoo's expectation, supported by the AZA's SSP,[79] that importing these elephants into the United States could increase awareness of African elephant's [sic] status in their native land and increase funding and support for conservation activities. "The majority of Americans do not have access to elephants in Africa and therefore exposure to them within well-designed and signed enclosures could be beneficial."[80] On July 9, 2003, FWS issued import permits for the elephants from Swaziland.

B. The Coalition seeks Declaratory and Injunctive Relief to Halt the Importation

On July 10, 2003, the Coalition filed suit in the United States District Court for the District of Columbia against Secretary of Interior Gale Norton and Director of the Fish and Wildlife Service Steven Williams for declaratory and injunctive relief.[81] The Coalition argued that the FWS authorized the importation of eleven elephants from Swaziland in violation of the ESA and the ESA's regulations implementing CITES,[82] in violation of the National Environmental Policy Act,[83] and in violation of the Administrative Procedure Act.[84] The Coalition contended in part that: (1) the Zoos misrepresented critical information regarding the identity and location of the elephants; (2) the Zoos' purpose for seeking the import of the elephants was primarily commercial; (3) the proposed importation was detrimental to the survival of the species in the wild; (4) the Zoos were not 'suitably equipped

[75] *Born Free*, 278 F. Supp.2d 5 at 17.
[76] *Id.* at 12-14.
[77] *Id.* at 12.
[78] *Id.* at 13.
[79] *See* Association of Zoos and Aquariums Homepage, Animal Care and Management, www.aza.org/AnMgt/Documents/PLH_SSPs.pdf (last visited Oct. 31, 2009).The AZA defines its Species Survival Program as a cooperative management and conservation program aimed at population management of selected species in captivity and enhancement of species survival in the wild.
[80] Issuance Criteria Review For Permits under 50 CFR 13.21 issued by Fish and Wildlife Service, July 7, 2003. Please see note in text.
[81] Born Free, 278 F. Supp.2d 5 at 8.
[82] *Id.* at 9.
[83] *Id.*
[84] *Id.*

to house' these wild animals;[85] and (5) the Zoos failed to show that the elephants were 'lawfully acquired' as required by CITES.[86]

The Coalition sought a preliminary and permanent injunction enjoining defendants from issuing any permits under the ESA or CITES to the Zoos for importation of elephants from Swaziland.[87] One week later, a motion for preliminary injunction was filed to halt the import.

Subsequently, the District Court granted the Zoos' motion to intervene in the action. They defended FWS's decision to issue the operative permits, asserting FWS properly concluded that the importation of the elephants would "spare their death, enhance the African elephant breeding program in the United States, and serve other scientific and conservation purposes."[88]

The district court issued a memorandum decision on August 8, 2003, denying the Coalition's motion for preliminary injunction. The Coalition appealed. Along with the notice of appeal, the Coalition filed an emergency motion for injunctive relief in the United States Court of Appeals for the District of Columbia. The emergency motion was denied on August 15, 2003. Within days of the order, the Zoos airlifted the elephants to their new locations in the United States. The Court of Appeals subsequently dismissed the Coalition's appeal in January 2004 on the ground it was moot.[89]

C. The District Court's Opinion

The only court-authored discussion of issues in dispute in the controversy appears in a District Court's memorandum decision issued August 8, 2003, denying the Coalition's motion for injunctive relief. This article challenges the District Court's conclusion that the FWS, acting in its capacity as the importing State's Management authority, properly decided that the Zoos' purpose in importing the elephants for captive breeding and propagation was not a primarily commercial purpose under CITES Art. III (3). This issue deserves extended consideration because it is highly probable that other similarly situated non-profit US zoos will wish to import elephants for the purpose of display and captive propagation in the future as the industry responds to a declining census of African elephants in North America.

This article also addresses the unique impact of Mr. Reilly's threat to kill the eleven elephants selected for importation unless the import permits were approved and the translocation of the elephants to zoos in the US went forward by no later than mid-August 2003. As will be discussed below, Mr. Reilly's threat appears to

[85] The Coalition abandoned this ground in Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, *Born Free USA, et al, v. Gale Norton, et al.*, and The Zoological Society of San Diego, et al., 278 F. Supp2d 5 (D.D.C. July 24, 2003) (No. Civ.A.03-1497 JDB).
[86] The Coalition subsequently abandoned this ground, too.
[87] *Id.* at 8.
[88] Intervenor-Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. for a Prelim. Inj. *supra* note 57 at 2.
[89] *Born Free USA v. Norton*, 278 F. Supp2d 5 (D.D.C. July 24, 2003) (No. Civ.A.03-1497 JDB) (D.D.C. July 24, 2003), vacated as moot, 2004 WL 180263 (2004).

have deeply influenced the FWS's and the District Court's respective decisions. Of almost equal importance, Mr. Reilly's threat shortened the time available to the parties to marshal their arguments and for the District Court to consider them.

1. Non-Commercial Purpose— the Parties Respective Positions

The record before the court presented starkly differing versions of the facts related to the issue of whether the importation was primarily non-commercial in purpose. The court's opinion pointed to FWS's June 11, 2003, report, finding that "the primary purpose of the import is to improve the breeding capability of captive elephants within the United States and to provide conservation education to visitors."[90] The court relied on FWS's finding that "[a]lthough the zoo may collect additional gate receipts, gift shop sales, and donations due to the import of these elephants, the money is going back into the zoo, the elephant breeding program, and/or in situ conservation programs in which the zoo participates."[91] The court further drew attention to FWS's conclusion that because the Zoos were "non profit institution[s] and that any profits made from obtaining the elephants from Swaziland will be used for in-situ and ex-situ conservation work carried out at the zoo[s] … the import of these specimens is not for primarily commercial purposes."[92]

The court's opinion then turned to the contrasting facts and inferences offered by the Plaintiffs. They argued, "that because the elephants will be exhibited for paying guests, and indeed, because elephants are a species that tends to increase gate admissions at zoos, the importation of the elephants must be for a primarily commercial purpose."[93] The court noted the plaintiff's argument that display and captive breeding were essentially commercial endeavors calculated to bring paying customers to San Diego Zoo and Lowry Park Zoo.[94] Finally, the court acknowledged the plaintiffs' contention that FWS "should not have relied upon 'conservation education' as a purpose because the zoos did not rely on this purpose in their applications."[95]

[90] *Id.* at 14.
[91] *Id.*
[92] *Id.*
[93] *Id*.
[94] *Id.*
[95] *Id.*; To the extent that the zoo industry continues to claim a conservation education mission, its own research suggests it is failing. In 2007, AZA issued a report funded by the National Science Foundation that found visiting a zoo or aquarium did not result in a statistically significant change in visitors' overall knowledge. Instead, the report found that visits to zoos reinforced and supported the visitors' pre-existing attitudes and values. Falk, JH, Reinhard EM, Vernon CL, Bronnenkant, K, Heimlich JE, Deans N. 2007 Silver Spring, MD: AZA. It seems, therefore, that the zoo industry's claim that is members are important centers of conservation education is little more than a unproven, though cherished, industry claim.

FWS's findings reflected the conservation and education claims made by the zoos. The District Court's opinion adopted FWS's findings concerning the Zoos' mission and intentions with respect to the proposed importation[96] without comment on the paucity of evidence in the record to support them.

2. Non-Commercial Purpose— District Court's Analysis

The District Court began its analysis by determining that the terms "commercial purpose" or "primarily commercial purpose" within CITES were ambiguous.[97] This initial decision was taken without the District Court first explaining why the long-standing rule that courts must abide by the plain language of a treaty, "unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"[98]

Had the District Court relied on a traditional approach to constructing the terms of the treaty, it would have first employed the ordinary meaning of the word commercial as, for example, "occupied with or engaged in commerce," and the ordinary meaning of primarily as "first of all," or "principally." See *Webster's Third New International Dictionary* (1993). In any event, the District Court instead consulted the Conference of the Parties' Resolution Conference 5.10 for clarification.[99] The District Court found that the Resolution clarified that a "commercial purpose" examination concerns only "'the intended use of the specimen … in the country of importation, not the nature of the transaction between the owner of the specimen in the country of export and the recipient in the country of import.'"[100] Relying on this language, the District Court focused on the intentions of the Zoos to determine if the importation was primarily commercial, reasoning, in part, that, "as an initial matter, the fact that Swaziland may have profited from the sale of the elephants—and likewise the fact that Swaziland intends to reinvest the funds for the benefit of the remaining elephants—is irrelevant."[101]

The District Court then turned to language in Resolution Conference 5.10 defining an activity as commercial if "'its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed towards the resale, exchange, provision of a service or other form of economic use or benefit.'"[102] The District Court recognized that the Management Authority of the country of import was obligated by Resolution Conference 5.10 to find "'all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature.'"[103]

[96] *Born Free*, 278 F. Supp.2d 5 at 16.
[97] *Id.* at 15.
[98] *Iceland S.S. Co. v. U.S. Dep't. of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000).
[99] *Born Free,* 278 F. Supp.2d 5 at 15.
[100] *Born Free*, 278 F. Supp.2d 5 at 14, (*quoting* CITES Resolution Conference 5.10, *supra* note 27).
[101] *Id.* at 14-15.
[102] *Born Free*, 278 F. Supp.2d 5 at 15, (*quoting* CITES Resolution Conference 5.10, *supra* note 27).
[103] *Id.*

The District Court first determined that of the several non-exhaustive examples stated in the Annex to Resolution 5.10 describing certain recurring fact situations relevant to a determination of commercial purpose, the example set out in Example (e)[104] appeared to be most relevant.[105] Example (e), the subsection that FWS argued supported its decision to issue import permits to the Zoos, addresses "captive breeding programmes." However, upon closer examination of the example, the District Court concluded that the examples of permissible non-commercial purpose of "captive breeding programmes" were directly linked to the larger effort "aimed at recovery of a species."[106] The District Court noted that, "although ultimately successful breeding by zoos may eliminate or decrease future need for importation, it is not entirely clear that 'long term protection' and 'recovery' of African elephants is a 'priority' or 'aim' of the importation. Thus, example (e) is not particularly instructive."[107] Accordingly, the District Court determined that FWS's reliance on Example (e) to issue the permits to the Zoos to import elephants from Swaziland for captive breeding was erroneous to the extent that FWS sought to argue that Example (e) offered "direct support for importing animals from the wild for use in the type of captive breeding program at issue here."[108]

Importantly, however, the District Court nevertheless affirmed the FWS's decision to issue import permits to the Zoos. The District Court's memorandum opinion achieved this end by employing a reformulation of FWS's rationale under Example (e). The Memorandum Decision reasoned that if FWS' rationale were characterized as an attempt to "abstract from the example a more general observation that where profit is derived from an imported animal but the income is funneled back into a program that benefits the Appendix I species, rather than being allocated to the economic benefit of a private individual or shareholder, there is not

[104] *See* CITES, Resolution Conf. 5.10 Definition of "Primarily Commercial Purposes" (1985), available at http://www.cites.org/eng/res/05/05-10.shtml. Example (e) addresses captive-breeding programmes: "Importation of specimens of Appendix-I species for captive-breeding purposes raises special problems. Any importation of such specimens for captive-breeding purposes must be aimed as a priority at the long term protection of the affected species as required in Resolution Conf. 2.12. Some captive-breeding operations sell surplus specimens to underwrite the cost of the captive-breeding programme. Importations under these circumstances could be allowed if any profit made would not inure to the personal economic benefit of a private individual or share-holder. Rather, any profit gained would be used to support the continuation of the captive-breeding programme to the benefit of the Appendix-I species. It should not, therefore, be assumed that importation under such circumstances is inappropriate. … In connection with captive-breeding purposes, it should be noted that as a general rule importations must be part of general programmes aimed at the recovery of species and be undertaken with the help of the Parties in whose territory the species originate. The profit gained that might result should be used to support the continuation of the programme aimed at the recovery of the Appendix-I species."

[105] *Born Free*, 278 F. Supp.2d 5 at 15-16.

[106] *Id.* at 15.

[107] *Id.*; African elephants have never been re-introduced to the wild after being bred in captivity in United States' zoos.

[108] *Born Free*, 278 F. Supp.2d 5, at 15.

necessarily a commercial purpose."[109] The District Court returned to FWS's finding that money earned from gate receipts attributable to the elephants will go "back into the zoo, the elephant breeding program, and/or in sit[u] conservation programs in which the zoo participates."[110] The District Court adopted FWS findings of fact on this issue and together with its own reformulation of FWS's legal basis for granting the permit, concluded that FWS properly determined that the Swaziland elephants would not be used for primarily commercial purposes.[111]

The District Court's memorandum decision took a second significant step. Although the Zoos identified captive breeding as the primary purpose of the importation, the District Court, like FWS, found that the Zoos' conservation education mission would be furthered by the importation.[112] District Court expressly found that the Zoos' purpose to breed and "not merely" display the animals and the Zoos' mission to educate the public about conservation provided FWS with a reasonable basis upon which to issue the permits.[113] The opinion cites the Zoos' mission statements and Lowry Park Zoo's promise to erect "[e]ducational signage regarding elephants' ecological role and the conservation needs of the species … at the perimeter of the exhibit."[114]

Of importance to its decision on the issue of whether the Zoos' purpose in importing these animals was primarily commercial, the District Court seemingly relied on the Zoos' status as non-profit institutions whose activities would presumably not benefit any individual or shareholder.[115] The District Court reasoned that in light of the Zoos' status as non-profit institutions, "it is reasonable for FWS to conclude that this is not a setting in which commercial aspects of the zoos' purposes predominate over non-commercial aspects."[116] This statement, although somewhat obscure in meaning, suggests that the Zoos' purpose in exhibiting the elephants "to gain economic benefit" was nevertheless non-commercial within the meaning of CITES because the Zoos themselves were non-profit institutions. In this regard, the District Court conflated the Zoos' purpose to exhibit these elephants for profit with their status as non-profit entities under US tax laws. However, the relevant language in Resolution 5.10 requires the Management authority to focus on "all uses" or "the intended use of" specimens of Appendix-I species" by the party, including a non-profit institution, seeking the animal's importation.

This is particularly relevant since the District Court's analysis on this point ignored case law recognizing that non-profit institutions are fully capable of engaging in activity with commercial purpose, for example, non-profit institutions engaged in conduct with commercial purposes that may run afoul of the Sherman

[109] *Id.*

[110] *Id.* at 15-16.

[111] *Id.*

[112] *Id.* at 16.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

Anti-Trust Act.[117] The Coalition referred to cases under the Sherman Act involving non-profit entities in their briefs. Nevertheless, the District Court failed to mention them at all. A quick review of these cases suggests they provide a promising analytic approach that might be useful to unpacking the conundrum of non-profit organizations engaged in commercial activity rather than, as the District Court did here, simply appear to surrender to the Zoos' vision of their own motives. [see further discussion in *Section III. C. 2.]*

In any event, at the end of its discussion of the "primarily commercial purpose" principle, the District Court pointedly rejected the Coalition's argument that the Zoos' purpose in acquiring the elephants was primarily commercial,[118] an argument resting on three principle assertions put forth by the Coalition: (1) the Zoos expressed no intention of returning these animals or their offspring to the wild, (2) the sole purpose of improving the breeding success of African elephants in the United States is to produce more elephants for display; and (3) such display of elephants attracts the public who in turn provide income to the Zoos through gate receipts, snack and gift shop receipts and other sales.[119]

The District Court did not explain which part of the Coalition's syllogism failed. Instead, the District Court disclosed its discomfort with the potential consequences of a decision in favor of the Coalition, observing that the District Court's acceptance of the syllogism "would essentially preclude all importation of Appendix I species by zoos that would display the animals and charge a fee for general admission."[120] The District Court concluded: "Neither the language of CITES nor the Resolution indicates that the Treaty goes that far."[121]

While it may be open to debate whether "the Treaty goes that far," what is not open to debate is how far this District Court went to uphold FWS's decision. The memorandum opinion adopted a key agency finding, that the Zoos' purpose in importing the elephants was conservation education, when that ground was absent from the Zoos' permit applications.[122] The District Court rejected the agency's legal basis for issuing the permits and then substituted its own legal theory, which it found sufficient as a basis upon which to affirm FWS's action.[123] Both the District Court's fact-finding and its affirmation of the agency's action on a legal basis not articulated by the agency appear to violate bedrock principles governing judicial review of executive agency action.[124]

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117 *See US v. Brown University*, 5 F. 3rd. 658, 665-668 (3rd Cir. 1993*); Goldfarb v.Virginia State Bar*, 421 US 773, 787 (1975); *American Society of Mechanical Engineers, Inc. v. Hydrolevel, Corp.*, 456 US 556, 576 (1982).

118 *Born Free, supra* note 2, at 16.

119 *Id.* at 14.

120 *Id.* at 16.

121 *Id.*

122 *Id.*

123 *Id.*

124 Judicial review of agency action taken under the Endangered Species Act including review of the permitting process under Section 10 of the Act and CITES is governed by the Administrative Procedure Act, 5 U.S.C. sec. 706(2)(A). This section requires the court to set aside agency actions that it determines to be arbitrary, capricious, an abuse of discretion, or otherwise unlawful after conducting a "searching and careful" inquiry into the facts and justification for the agency's action. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 US 402, 416 (1971). While the standard does not envision a court's rubber stamping of the agency's decision, neither does it allow the reviewing court to substitute its judgment for that of the agency. *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). With regard to an agency's legal conclusions, the court will uphold the agency's interpretation if it is reasonable or permissible. *Chevron, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44. A reviewing court is not empowered, however, to affirm an agency's conclusion of law on a legal basis not articulated by the agency itself. *State Farm*, 463 US at 50, citing *SEC v. Chenery Corp.*, 332 US 194, 196 (1947).

125 *Goldfarb v. Virginia State Bar*, 421 US 773, 787 (1975).

126 *United States. v. Brown Univ.*, 5 F3d. 658, 665 (3rd Cir. 1993).

127 *Id* at 665-66.

128 *Id.* At 666.

3. *Non-Commercial Purpose— Omissions from the District Court's Analysis*

As is not infrequently the situation in highly charged cases, issues sidestepped by the court and legal arguments left unexamined are often more interesting than those tackled. In this case, the District Court failed to discuss potentially promising lines of cases where, in other contexts, federal courts have grappled with the complex issue of non-profit organizations engaged in commercial activity. In addition, the District Court concluded that the Zoos' purpose was non-commercial under the Treaty and Resolution 5.10 without considering cautionary presumptions against importation stated in the Annex to Resolution 5.10, even where a purpose initially meets the non-commercial standard. Discussion of both omissions follows.

a. When Non-Profit Organizations Engage in Commercial Activities

Non-profit organizations seeking sanctuary from the Sherman Anti-Trust Act may not hide behind the nature of their occupation, mission, or charitable purpose.[125] Like CITES, the Sherman Anti-Trust Act regulates transactions that are commercial in nature. Also like the broad language of CITES, the Sherman Anti-Trust Act was intended to embrace the widest possible array of commercial conduct. Like CITES, the Sherman Anti-Trust Act's sweeping language carved no exception for non-profit organizations. "Non-profit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers."[126] Similarly, CITES sweeping language on "primarily commercial purpose" suggests an equivalent recognition that the "absence of profit is no guarantee that an entity will act" in a manner consistent with recognized categories of not "for primarily commercial purposes" as spelled out in the Annex materials attached to Resolution 5.10.

Brown University[127] held that although immunity under the Sherman Anti-Trust Act is narrowly circumscribed, immunity does extend to transactions with a public-service aspect.[128] Transactions are assessed as commercial or non-

commercial based on the nature of the conduct in light of the totality of the circumstances.[129] However, the court in *Brown University* emphatically recognized that, "the exchange of money for services, even by a non-profit organization, is a quintessential commercial transaction."[130]

In *Brown University*, the court grappled with whether providing financial assistance solely to needy students was a selective reduction of full tuition or a charitable gift.[131] The court concluded that the financial assistance was not a charitable gift since the student was not free to take it and apply it elsewhere.[132] Even though the universities involved in the case were not obliged to provide financial assistance, the court concluded that the absence of obligation did not transform the financial aid into charity.[133] The court reasoned that discounting the price of educational services for needy students is not charity when the university receives tangible benefits in exchange, regardless of whether the university's motivation is altruism or self-enhancement or a combination of both.[134] The court found that the provision of financial aid helped universities to attract better students. The court observed that increased quality of the student body in turn brought enhanced prestige to the university. Such enhanced prestige is itself a significant financial benefit to the university: "The Supreme Court has recognized that nonprofit organizations derive significant benefit from increased prestige and influence."[135] The court explained in *Brown University* that participation in the tuition assistance program, called Overlap, afforded universities the benefit of overrepresentation of high-caliber students and resulting institutional prestige by immunizing the universities participating in Overlap from competing for students.[136]

The similarity of focus in both sets of legal principles is plain. Both the Sherman Anti-Trust Act and those portions of CITES addressing "primarily commercial purpose" focus on the actions and not the status of the parties before them. Where an organization is involved in an exchange of money for services, the service is "a quintessential commercial transaction," the nature of which is not transformed by the identity of the organization involved in the transaction.

In the case at hand, the Zoos' purpose for importing the elephants was to breed and exhibit them.[137] Where exhibition of the specimens was a central purpose, and where such exhibition occurred in these zoos open only to a paying public, it would appear that the use of the elephants by the Zoos was primarily commercial. The commercial purpose is not diluted by the Zoos' claim that the public's viewing of elephants in their exhibits offered the public an educational experience. The

[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 666-67.
[135] *Id.* at 667 (*citing Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.* 456 U.S. 556, 576 (1982).
[136] *Id.* at 667.
[137] *Born Free*, *supra* note 2, at 14.

claimed educational benefit cannot be presumed, especially since the Zoo industry has yet to provide empirical evidence that viewing animals in exhibits results in any measurable gain in the public's understanding of the animal, or its conservation plight, or results in zoo guests taking any action aimed at conserving the species.[138]

The record contained evidence that the Zoos believed, and FWS found, that exhibiting these elephants would increase traffic at their gates and ancillary sales within their institutions.[139] It is common wisdom in the zoo community that nothing boosts attendance quite like the birth and display of a baby elephant.[140] This is consistent with industry expectations as a whole concerning elephants. Elephants have long been recognized in the industry as perhaps the most quintessential "charismatic megafauna" that most zoos are anxious to exhibit.[141] The presence of these charismatic megafauna enhances the prestige of the zoos exhibiting them.[142] In that regard, exhibiting and breeding elephants enhances a zoo's status and influence and underscores the economic role of exhibition. As noted in *Brown University*, the non-profit organization's motive or mission is irrelevant. If the non-profit zoo nevertheless benefits from the exhibition of elephants, then the transaction is commercial in nature.[143] Even were it assumed that some conservation education is transmitted, it is of such minimal value that, viewed reasonably, it could not transform the essentially commercial nature of exhibition into one of significant public service. Like the student aid package offered to students by MIT, it could be strongly argued that the conservation education offered by the zoo to the public by exhibiting elephants is not a charitable gift, but rather, is directly connected to, and offered in exchange for, the public's paid admission to view the elephants on exhibit, (and the zoo's fully justified expectation of additional substantial income derived from the sale of snacks, drinks, parking space, and souvenirs attributable to such visits.

b. Presumptions against Importation in Annex to Resolution 5.10

The Memorandum Decision failed to consider the statement of cautionary principles set forth at the conclusion of Resolution 5.10. This statement provides

[138] L.F. Kane (2009) Contemporary Zoo Elephant Management: Captive to a 19th Century Vision in An Elephant in the Room: The Science and Well Being of Elephants in Captivity. (D.L. Forthman, L.F. Kane, D. Hancocks and P.F. Waldau eds) North Grafton MA: Tufts University Cummings School of Veterinary Medicine's Center for Animals and Public Policy.
[139] *Born Free, supra* note 2, at 14.
[140] The Oregonian, reporting on August 17, 2008 about the impending birth of an Asian elephant calf at Oregon Zoo, stated: "If all goes well, an adorably wobbly, floppy eared calf could draw tens of thousands of extra visitors and prompt a wave of positive publicity at an opportune time: Metro, which owns the zoo, will ask voters in November to approve a $117 million bond measure to upgrade exhibits and, perhaps, buy more land for the elephants." http://www.oregonlive.com/living/oregonian/index.ssf?/base/living/1218860707223020.xml&coll=7.
[141] Elizabeth Hanson, Animal Attractions 44-45 (2002).
[142] Id.
[143] American Society of Mechanical Engineers, supra note 107, at 576.

that in those cases where the importation of an Appendix I species removed from the wild meets the "non-commercial purpose" standard, importation "should, as a general rule, not be allowed unless the importer has first demonstrated that: (a) he has been unable to obtain suitable captive-bred specimens of the same species; (b) another species not listed in Appendix I could not be utilized for the proposed purpose; and (c) the proposed purpose could not be achieved through alternative means." This provision, structured as a rebuttable presumption, appears to provide that meeting the non-commercial purpose test is not enough. The importer must still demonstrate the non-availability of captive-bred animals or inability to achieve the proposed purpose through alternative means.

Since only Examples (a) and (c)[144] are relevant to this case, this discussion is limited to them. In this case, the Zoos admitted that it was their very failure to successfully breed African elephants in captivity that prevented them from locating suitable captive-bred specimens of the same species.[145] Ironically, this disclosure made plain that the Zoos' need to import more elephants was a direct result of the industry's failure to breed second-generation elephants successfully. The District Court's enthusiasm for allowing the importation was not dampened by this admission. Instead, the District Court, like FWS, focused on the Zoos' belief that it will in the future be able to breed African elephants successfully in captivity.[146]

Example (c) is a catchall provision. Its broad language suggests a concomitantly broad burden on the permit applicant to show that African elephants already present in the US were not available for the zoos' purpose. The Coalition submitted evidence suggesting that up to 35 female African elephants in the US might have been available for relocation to the Zoos.[147] This evidence did not make its way into FWS's decision, and played no part in the District Court's decision. If, however, the provision were successfully pressed in future litigation, it would compel the importer to explore the acquisition of alternative animals and to explain why they were not appropriate or available. At a minimum, such a requirement would increase the transaction costs borne by zoos seeking an Appendix I species import permit and elevate the profile of Appendix-I animals already in the US. Both of these outcomes would meet the overarching goal of Resolution 5.10 to reiterate that importation of Appendix I species to "strict regulation" and authorizing it "only in exceptional circumstances."

Finally, it is interesting to observe that while the statement of cautionary principles at the end of Resolution 5.10 arguably provides an additional basis for scrutiny of the importing entity, it provides no basis for additional scrutiny of the

144 Subsection (b) is not relevant to this case since this import involved only Appendix-I animals.

145 Kristin L. Vehrs (AZA Deputy Director) letter to Tim Van Norman (US Fish and Wildlife Service) (25 June 2003) (on file with the author).

146 Born Free, supra note 2, at 26.

147 Comments of Defenders of Wildlife on the Draft Environmental Assessment for permit applications PRT-06008 and PRT-06006: import of wild-caught African elephants (loxodonta africana) from Swaziland, to Fish & Wildlife's Management Authority, Brank of Permits, dated July 1, 2003 (copy on file with author).

exporting entity. In other words, its current terms place no burden on the exporting State to demonstrate that "the purported purpose could not be achieved through alternative means." This explains, in part, the Coalition's failure to prevent the importation on the ground that preferable alternative locations were available to the exporting State. The record shows that upon learning that Swaziland intended to export or cull 11 elephants, the Coalition pursued a number of alternative placements for the Swaziland elephants that would have kept them on the African continent in preserves or other protected areas.[148] Despite these efforts, some of which appeared to mature to viable options, FWS and the District Court concluded they lacked the power to compel Swaziland to act on these alternatives or discover additional alternatives on it own.[149] The perceived absence of this superintending authority infused Mr. Reilly's threat to cull the elephants if the importation was not approved with chilling potency.[150]

D. The Influence of Brinkmanship by Swaziland's Management and Scientific Authority on the District Court's Case Management and Opinion

Mr. Reilly led a campaign to pressure US authorities from FWS to the District Court and Court of Appeals for the District of Columbia to allow the importation of eleven elephants from Swaziland. Mr. Reilly's made a threat to cull the eleven elephants at the beginning of the importation process in 2001.[151] His threat was repeated by the FWS when it initially assessed the Zoos' initial, though flawed, permits in 2002.[152] FWS's Division of Scientific Authority specifically determined that the proposed imports would not be detrimental to the survival of the species or cause other adverse effects since absent the proposed importation to the US, the elephants would be killed.[153]

Mr. Reilly continued making a number of strong statements throughout the process. He declared that the captured elephants would not be returned to the wild in Swaziland nor relocated to other wild or semi-wild locations within southern Africa.[154]

148 Born Free, supra note 2, at 23-24.

149 Id.

150 Id. at 25-26.

151 Intervenor-Defendants' Exhibit 1,Declaration of Ted Reilly, at 20, para 57, Born Free, 278 F. Supp.2d 5 (D.D.C. July 24, 2003)(Civ. No. A:03CV01497 JDB) (on file with author).

152 Record of Advice on Permit Application, Division of Scientific Authority, Fish and Wildlife Service, August 30, 2002 (copy on file with author).

153 Intra-Service Section 7 Biological Evaluation Form Division of Scientific Authority, Michael Kreger, 3 September 2002 (copy on file with author).

154 Intervenor-Defendants' Exhibit 1,Declaration of Ted Reilly, at 25, para 69, Born Free, 278 F. Supp.2d 5 (D.D.C. July 24, 2003)(Civ. No. A:03CV01497 JDB) (copy on file with author). : "The elephants have been removed from the herds and this will not be reversed—all that now remains is what their fate will be. As much as we want to avoid it, if the elephants are not ready for export, with all necessary U.S. permits, by that date [middle of August], they will, unfortunately, be killed" (copy on file with author).

In a statement issued in April 2003, Mr. Reilly stated that these elephants must be translocated or killed: "The alternative to live translocation of these animals would be the careful culling of this population in as humane way as possible. We however regard this as the last resort and we will do everything in our power to avoid this situation as it would obviously impact negatively on the remaining animals."[155] Appearing increasingly frustrated with the inability to complete the sale and shipment of the elephants to the zoos expeditiously, Mr. Reilly declared in May 2003: "While standing quarantine the elephants are locking up resources and manpower we can ill afford…. We cannot release them back into the wild for reasons already spelt out and I have provisionally reserved refrigeration space in case we must cull them….Furthermore, these animals are so beautiful and relaxed in quarantine, that the dead elephant option would be very distasteful to execute…."[156]

The Zoos submitted "DECLARATION OF TERENCE (TED) E. REILLY" made on July 24, 2003, to the District Court in support of FWS's decision to issue importation permits.[157] Mr. Reilly's statement warned the court that the culling of the eleven elephants was inevitable unless they were exported to the Zoos by mid-August: "We cannot hold these elephants beyond the middle of this August. As I stated often and clearly, most recently on June 18, 2003, if the permits are not issued by this time, these elephants will be culled." [158]

Although the District Court never admitted that Mr. Reilly's threat to kill the elephants affected its decision, there is strong indirect evidence that it did. The District Court's memorandum decision contains no fewer than 15 references to Mr. Reilly's promise to cull the elephants unless they were exported to the Zoos. Reference to Mr. Reilly's threat opens the court's memorandum decision addressing the merits of the Coalition's motion for injunctive relief, appears in the body of the decision, and is referenced again at its close. It is reasonable to conclude that the threat, coupled with Mr. Reilly's authority to make good on his threat, affected the outcome of the case.

The first paragraph of the Memorandum Decision opens with an explanation of the haste with which of the District Court acted: "Although the expedited briefing on plaintiffs' motion was completed only on August 6, 2003, the parties require a decision on the motion for a preliminary injunction by today, August 8, because the zoos, who have intervened as defendants, represent that it is imperative that the process to import the elephants commence immediately…. This case raises novel issues and evokes considerable emotion—in part because the record supports the conclusion that if the elephants are not exported to these zoos promptly, they will be killed."[159]

[155] T.E. Reilly statement, faxed to US Fish and Wildlife Service (April 18, 2003) (copy on file with the author).

[156] T.E. Reilly letter to Mike Kreger (US Fish and Wildlife Service) (27 May 2003) (copy on file with author).

[157] INTERVENOR-DEFENDANTS' EXHIBIT 1, Born Free, 278 F. Supp2d 5 (D.D.C. July 24, 2003)(Civ. No. A:03CV01497 JDB) (copy on file with author).

[158] *Id.* at 25 para. 68.

[159] *Born Free, supra* note 2, at 8.

In summarizing the key facts of the case, the court again referred to Mr. Reilly's threat to kill the elephants if the deal with the Zoos was stopped: "Mr. Reilly, on behalf of Swaziland, has determined that the removal of eleven elephants is required in order to maintain a biologically diverse ecosystem within the reserves. Mr. Reilly has further stated unequivocally that if he is unable to export these elephants now, he will cull them—i.e., kill them."[160]

The District Court repeated its acknowledgment that the pace of the disposition of the case was driven in large part by Mr. Reilly's threats to cull the elephants: "Mr. Reilly has submitted an affidavit that states that he 'cannot hold these elephants beyond the middle of this August' and 'if the permits are not issued by this time, these elephants will be culled.'"[161] Although the Coalition argued strenuously that Mr. Reilly would not, for a variety of reasons, make good on his threat, the District Court was unwilling to take the risk that Mr. Reilly's threat was an empty one: "Although plaintiffs challenge Mr. Reilly's representation … plaintiffs have little to undercut Mr. Reilly's representation, and, in any event, it must be given credence." [162]

The District Court noted that the finding of non-detriment in FWS's Environmental Assessment rested in part on Mr. Reilly's assessment "that if the elephants cannot be exported or translocated, they will be culled." The Court also concluded as a matter of law that neither it nor FWS were capable of exercising jurisdiction over Swaziland's domestic elephant population strategy, including any plan to cull these elephants unless they were exported to US zoos. The Court observed, therefore, that FWS was fully justified in "determining whether, given Swaziland's conclusion that it will either export or cull the elephants, issuance of import permits is appropriate."[163]

The District Court's affirmed FWS's Environmental Assessment even though it had not taken into account a number of alternative placements for the elephants in Africa. Again, the District Court acknowledged Mr. Reilly's power over the fate of the elephants, reiterating that, "Mr. Reilly had made abundantly clear that the only alternative he would consider would be culling the elephants—not translocating them elsewhere in Africa."[164]

The final section of the Memorandum Decision explores the balance of harms among the parties depending upon the outcome of the Coalition's request for a preliminary injunction halting the issuance of the import permits. The entire section focuses on Mr. Reilly's decision to cull the elephants if they are not exported. The District Court revisited the long string of statements detailing Mr. Reilly's thinking on the matter and the steps he had taken to act on this threatened decision going back to 2001. Again, the District Court rejected arguments from the Coalition, arguments ultimately characterized as a request to the Court "to take a

[160] *Id.*

[161] *Id.* at 10.

[162] *Id.*

[163] *Id.* at 18.

[164] *Id.* at 23.

leap of faith that, despite Mr. Reilly's statements in his affidavit that he will cull the elephants, in fact he will not do so. [footnote omitted]."[165]

The Court's refused the Coalition's invitation, stating, "The Court cannot take such a leap." The Court noted that Mr. Reilly's statement of intent to cull were "unequivocal" and "clear,"[166] and the District Court reminded the parties that "Mr. Reilly makes clear in his affidavit that he does not intend to pursue any alternatives other than immediate culling."[167] The Court also accepted at face value the Zoos' assertions that they were powerless to exercise any control over Mr. Reilly or his disposition of the elephants.[168]

Based on the record submitted, the District Court concluded its opinion with the simple but chilling syllogism that "if an injunction is granted the elephants will be culled." [169]

It seems that Mr. Reilly's brinkmanship, although decried by the District Court,[170] was shrewdly effective. It both drove the decision in a favorable direction to the parties seeking the importation of the elephants and rushed the decisional process due to the seriousness with which the District Court took Mr. Reilly's threat. The District Court was unwilling to set the legal machinery in motion that would have ended in the violent death and butchering of the eleven Swaziland elephants.

IV. Conclusion

Zoos maintain a privileged cultural status in our society that our courts appear reluctant to examine closely. It may be that this reluctance arises in part on our courts' rarely being called upon to explore and apply concepts in CITES, like "primarily non-commercial purpose" to zoos. A court's familiarity with a body of law breeds confidence. Our courts have been called upon to explore and define the meaning and scope of the Sherman Anti-Trust Act for decades. So it is interesting to note that a concept of commercial purpose under the Sherman Anti-Trust Act, a concept strikingly similar to non-commercial purpose concept in CITES, is applied with rigor to other categories of privileged cultural institutions, like universities. Accordingly, future court challenges to zoos' applications for importation permits will require careful, thorough and thoughtful argument to build the requisite confidence in the courts so that they may treat zoos' claims of non-commercial purpose under CITES with dispassionate rigor.

[165] *Id.* at 25.
[166] *Id.*
[167] *Id.*
[168] The contract between Mr. Reilly and the Zoos was not made part of the record, despite the Coalition's efforts to seek its admission.
[169] *Id.* at 26.
[170] *Id.* at 25. "Granted, the Court does not appreciate brinkmanship. But the statements in Mr. Reilly's affidavit are unequivocal."

Although Mr. Reilly's approach worked to the benefit of the parties seeking the import deal, a similar approach by the zoo industry and elephant home-range nations may not work a second time. Courts typically resist bullying tactics by parties, especially if the court discerns that the tactics are aimed in substantial part at the court's exercise of authority. Mr. Reilly's tactics worked, in part, due to their audacity and the District Court's opinion that his threat was not occasioned by the case being filed. The court was quick to point out that Mr. Reilly had reached a decision to cull these animals unless they were exported "independent of this litigation."[171]

Given the facts of this case, asserting a similar threat in a future importation deal may look more like an obvious attempt to bully a court into affirming the issuance of permits. If a court were to sense such motivation on the part of the exporting party, it might be more willing to take both a harder and a longer look at the representations of the parties seeking importation of Appendix-I animals like elephants. If US courts are not willing to take a hard look in the future, then zoos or others in the US seeking to import an Appendix-I species could partner with an Exporting State willing to say it would cull the animals if they were not exported. Such a tactic would, in effect, usurp the administrative discretion of FWS and the supervisory role of the US Courts. Neither of these outcomes is desirable.

As a practical matter, the court challenge mounted by the Coalition in *Born Free USA v. Norton* appears to have dampened enthusiasm of US zoos to pursue importations of elephants from Africa or elsewhere. Although the number of African elephants held captive in AZA accredited North American Zoos has continued to decline overall, there have been no efforts to import elephants from Africa since the lawsuit. It would seem the Coalition's legal challenge had a chilling effect on the Zoo industry's resort to importation. To that extent, the lawsuit was successful in making the legal and public relations costs associated with the importation uncomfortably high for the industry. It is only a matter of time, however, before the dwindling numbers of elephants available for exhibit and breeding once again motivate members of the zoo community to test the legal waters by seeking another importation permit from FWS.

[171] *Id.* While the death of these elephants would have been tragic, their death at Mr. Reilly's hands would have had no bearing on whether the purposes of the zoos' import of them was primarily non-commercial or not detrimental to the survival of the species.

Brazilian Animal Law Overview: Balancing Human and Non-Human Interests

Tagore Trajano de Almeida Silva*

I. Introduction

In this essay, I will explore the state of Animal Law in the Brazilian system. Until recently, Brazilian scholars have excessively focused on the philosophical debate. These scholars have written books, given lectures, and held conferences without ever discussing a significant point: How should the Brazilian judiciary respond to the animal rights debate? Such a question is of principal importance, as are a number of other social problems in Brazil relating to animal welfare, providing one more issue for the judges, Justices, and theoretical activists to ponder. I will clarify where Brazilian theory is in the current debate in the courts, universities, and legislative branches. In conclusion, I will suggest a frame of reference from which other scholars can work to develop this important area of law.

II. Brazilian Footsteps: the legislature beginning of the animal welfare laws

Brazil, as most South American countries, has adopted the Civil Law tradition.[1] Since its beginning, this system has denied that judges "make" law and that judicial decisions can be a source of law.[2] There was a dependency on legislation and a reliance on a system which considered the judge a "machine" that made decisions solely according to statute. Beyond this legal tradition, the Brazilian legal culture has based

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[1] The tradition of civil law is characterized by a particular interaction among Roman Law, Germanic Law and local customs, and canon law. *See generally*, Mary Ann Glendon et. al. Comparative Legal traditions, Thomson and West. 3rd edition, 17 (2008).

[2] *Id*. at 56.

on a rural paternalism whereby a segment of society wielded its disproportionate economic and political power to influence decisions in the legislative and executive branches. This legal power structure influenced even the appointment of Justices to Court.[3] Historically, in Brazil farm owners and agricultural businesses controlled the power in governmental decision making because of their economic power. The animal debate has been controlled for years by those in Congress interested in agricultural legislation. In the later nineteenth century, an animal welfare movement bloomed. The movement acknowledged widespread cruelty toward animals. It took steps to educate the public, and established the means to prevent animal abuse. The movement started in England in 1824.[4]

This animal welfare debate in Brazil began with the founding of the International Union for the Protection of Animals (U.I.P.A.)the first Brazilian organization to lobby for the prevention of cruelty to animals. The U.I.P.A was created on May 30th, 1895, after Henri Ruegger, a Swiss citizen residing in São Paulo, observed horses being mistreated and published articles on the abuse of animals in São Paulo, Brazil.[5] Ruegger wrote for newspapers such as *Jornal do Comércio, A Opinião*, and *Diário Popular*. He focused upon the need to establish an organization such as the Society for the Prevention of Cruelty to Animals in London. Ruegger understood that mere words were insufficient; to further his cause, he solicited the help of British Brazilian Senator Ignácio Wallace Gama Cochrane. Cochrane was dedicated to the establishment of the Association and was later unanimously appointed as the U.I.P.A.'s first president.[6]

[3] *See, e.g.,* Sérgio Buarque de Holanda, Raizes Do Brasil: Edição Comemorativa 70 Anos. (2ª reimressao, ed. rev. 2006); David J. Hess & Roberto da Matta, The Brazilian Puzzle: Culture on the Borderlands of the Western World (1995); Roberto DaMatta. Carnivals, Rouges, and Heroes: An Interpretation of the Brazilian Dilemma. (John Drury trans.) (1991); Geert A. Bank, *Roberto DaMatta and the Anthropology of Brazil* 8 *Social Anthropology* 209, 209-11 (2000); Gilberto Freyre, *A Consideration of the Problem of Brazilian Culture*, 4 Phil. and Phenomenological Res.,171, 171-75 (1943).

[4] It was a world movement that started in England with The Society for the Prevention of Cruelty to Animals of London (1824), and expand to other countries such as *Der Deutsche Thierschutz – Verein* - The German Animal Protection Association (1841), *La Société Protectrice des Animaux of Paris* – The Society for the Protection for Animals of Paris (1860), American Society for the Prevention of Cruelty to Animals (1866), *La Société Génévoise pour la Protection des Animaux* – The Genève Society for the Prevention for Animals (1868), *La Sociedad Madrilena Protectora de los Animales y de las Plantas* – The Society for the Protection for the Animals and the Plants (1874), *Sociedade Protectora dos Animaes* - The Society for the Protection for Animals of Lisboa (1875), and *La Sociedad Argentina Protectora de los Animals* (1881), *La Sociedad Venezuela Protectora de los Animals* - The Venezuelan Society for the Protection for Animals (1894). *See* Ignacio Wallace da Gama Cochrane, Presentation Read in the First General Assembly of União Internacional Protectora Dos Animales (May 30, 1895).

[5] Vanice Orlandi. FUNDAÇÃO DA U.I.P.A. *available at* http://www.uipa.org.br/portal/modules/mastop_publish/?tac=Fundacao.

[6] Edna Cardozo Dias, *Experimentos com animais na legislação brasileira*, *Fórum de Direito Urbano e Ambiental*, Nov.-Dec. 2005 at 2909, 2909-26.

In the United States, John P. Haines, president of the American Society for the Prevention of Cruelty to Animals, asserted that the animal rights movement had become worldwide. The number of local societies incorporated in the United States by 1904 was 233, with 21 societies in other American nations, including the *Sociedade Protetora dos Animais* of Rio de Janeiro (1903), which was established and incorporated in 1866, making a total of 254. According to Haines, the establishment of these organizations represented an increased interest in humane work, which had found a practical expression in the legislation of nearly every nation state. Nevertheless, Haines knew that the primary aim and practical work of those organizations was to fight for the possession of police power. The Societies needed the full power to arrest and prosecute offenders against the laws relating to animals.[7]

This movement began, thus, placing a focus on "welfare concerns". Evidence of their success came in the form of the first Brazilian law on animal cruelty, dated October 6, 1886, passed by the city of São Paulo: "*Coachmen are forbidden to mistreat animals and barbaric excessive punishments shall be fined.*"[8]

The impact of the U.I.P.A on the legal world began in 1924, when Decree[9] 16.560/1924 was promulgated. This law prohibited the carrying out of any behavior or recreation that caused suffering to animals.[10] In 1934, Decree 24.645 was enacted to establish legal protection for animals. It also allowed animals to be assisted in courts by representatives of the Public Ministry (Brazilian Prosecutor Branch) or attorneys of the animal protection organizations in damage and criminal cases.[11]

This decree defined cruelty to animals in Article 3 concerning issues such as housing, abandonment, and hunting. The accompanying debate served to advance Brazilian awareness regarding animal cruelty. Subsequently, a second decree, the Criminal Misdemeanor Act, number 3,688 of October 2nd, 1941, expanded animal cruelty.

> *Article 64* – Every person who shall exercise cruelty to animals or submit them to excessive work shall be punished by imprisonment of 10 (ten) days, but not to exceed one (1) month, or fined.

[7] John P. Haines. The American Society for the Prevention of Cruelty to Animals. Thirty-eighth annual report for the year ending December 31, 1903. New York (1904). P. 151-154. *See generally* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 Det. C.L. Rev. 1 (1993).

[8] Laerte Fernando Levai, Direito Dos Animais 27-28 (1998).

[9] Decree is an order made by a head of state or government and having the force of law.

[10] Heron José Santana. Os crimes contra a fauna e a filosofia jurídica ambiental. In: Benjamin, Antônio Herman V. (org.). *Anais do 6.º Congresso Internacional de Direito Ambiental, de 03 a 06.06.2002: 10 anos da ECO-92: O direito e o desenvolvimento sustentável*. São Paulo: Imesp, 2002. p. 409-410.

[11] Antônio Herman de Vasconcellos e Benjamin, *A natureza no direito brasileiro: coisa, sujeito ou nada disso*. *Caderno jurídico*. Escola Superior do Ministério Público, nº. 2, julho de 2001, at 155.

Paragraph 1 – Penalties will be exacted for administering pain and suffering, even in the name of science and research, where there are alternative resources available.
Paragraph 2 – Penalties shall be increased by 50%, if the animal is subjected to excessive labor or mistreated public entertainment.

Following these decrees the legislature enacted several laws about animal's issues, but the primary focus was on wild animals: Fishing Code (1967); Protection Fauna Act (1967); Vivisection Act (1979); Zoo Act (1983); and Brazilian Environmental Politics Act (1981).[12]

The current momentum for Brazilian animal law began with the promulgation of the new Brazilian Constitution (1988). The Constitution obligates the government to prevent cruelty to animals:

Article 225 – All people have the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.
Paragraph 1 – In order to ensure the effectiveness of this right, the Government shall:
VII – protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of a species, or subject an animal to cruelty.

This contemporary Constitution and several subsequent code revisions differ in several important respects from the earlier classical codifications and laws regarding fundamental rights. After 1988, the environmental law addressed a specified treatment of fundamental rights: that is, these rights had immediate applicability according to fundamental guarantees and rights of this Constitution.[13]

This understanding makes the Brazilian Constitution unique among other foreign constitutions such as Germany and Austria. The concern for animal welfare

[12] Luciano Rocha Santana; Marcone Rodrigues Marques. Maus-tratos e crueldade contra animais nos Centos de Controle de Zoonoses: aspectos jurídicos e legitimidade ativa do Ministério Público para propor Ação Civil Pública. In: Benjamin, Antônio Herman V. (org.). *Anais do 6.º Congresso Internacional de Direito Ambiental, de 03 a 06.06.2002: 10 anos da ECO-92: O direito e o desenvolvimento sustentável*. São Paulo: Imesp, 2002;) Edna Cardozo Dias, *A tutela jurídica dos animais*. 155 (2000).

[13] 1988 Constitution states: Article 5. Paragraph 1º: *There is immediate applicability of constitutional laws so as to define rights and guarantees*. *See e.g.*, Gilmar Mendes. Judicial Fundamental Rights in the Brazilian Constitution. http://www.stf.jus.br/arquivo/cms/noticiaArtigoDiscurso/anexo/DiscEgito.pdf; *See also* Sônia T. Felipe, *Dos direitos morais aos direitos constitucionais: Para além do especismo elitista e eletivo,* 2 Brazilian Animal Rights Review 182, 182-84 (2007).

in Article 225 has been used by judges in courts to decide animal law issues. This constitutional provision has actually had a positive impact on curbing animal cruelty as will be shown in the next section.

All of the acts ratified before the new Constitution that were contrary to the new fundamental rights and guarantees were revoked. The scope of these rights covered humans and non-humans.[14] Moreover, new acts began to be enacted by the legislative branch; for instance, Environmental Criminal Law (Act 9,605/1998), and Laboratory Animals Act (Act 11,794/2008); both regulate questions about cruelty to animals.[15]

The Environmental Criminal Act (1998) is a federal law which defines environmental felonies and misdemeanors. Although not a broad anticruelty regulation, the law focuses on various environmental debates as well as cruelty law.[16]

Ten years after the new Constitution, the Environmental Criminal Law Act was enacted, the central article of which addressed the animal welfare debate.[17]

Article 32 – Every person who shall abuse, mistreat, maim or injure wild animals, domestic or domesticated, native or exotic… shall be punished by imprisonment of 3 (three) months not to exceed one (1) year and fined.
Paragraph 1 – Shall be punished with the same penalties as those who exact pain or cruelty to living animals, even for educational or scientific purposes, where there are alternative resources.
Paragraph 2 – Penalties shall be increased by 1/6 (one sixth) to 1/3 (one third), if death occurs in animals.

[14] *Supra*. Article 225. Paragraph 1º, VII.

[15] *See, e.g.*, Tagore Trajano de Almeida Silva, *Antivivisseccionismo e direito animal: em direção a uma nova ética na pesquisa científica*, 53 Environmental Law Review, 239 (2009); Tagore Trajano, *Direito dos Animais*, *Pensata Animal,* v. 11, at 11, (2008); Tagore Trajano, *A Lei Arouca: ainda continuamos a realizar pesquisas com animais*, *Pensata Animal - Revista de Direitos dos Animais*, v. 17, at 01-06, (2008) *available at* http://www.pensataanimal.net/index.php?option=com_content&view=article&id=203&Itemid=1; Tagore Trajano. Vivissecção e direito animal. *Revista do Programa de Pós-graduação em Direito da Universidade Federal da Bahia*, v. 16, p. 357-373, 2008. *See also* Tagore Trajano, *Direito animal e os paradigmas de Thomas Kuhn: Reforma ou revolução científica na teoria do direito?*, 3 Brazilian Animal Rights Review 239 (2008).

[16] *See, e.g.*, Antônio Herman Benjamin. Introduction to Brazilian Environmental Law. 14 *Environmental Review*. São Paulo: RT, April/June. (1999). Luís Paulo Sirvinskas. Tutela penal do meio ambiente: breves considerações atinentes à Lei 9.605 de 12.02.1998. 2. ed. São Paulo: Saraiva, 2002. p. 130. *See also* Danielle Tetü Rodrigues. O Direito & Os Animais: uma abordagem ética, filosófica e normativa. Curitiba: Juruá, 2006. p. 72; Luciana Caetano da Silva; Gilciane Allen Baretta. Algumas considerações sobre a crueldade contra os animais na Lei 9.605/1998. In: PRADO, Luiz Régis. (coord.). Direito Penal Comtemporaneo: estudos em homenagem ao Prof. Cerezo Mir. São Paulo: Ed. RT, 2007. p. 320; Luciano Rocha Santana; Thiago Pires Oliveira. Guarda responsável e dignidade dos animais. 1 Brazilian Animal Rights Review 11. Salvador: Instituto de Abolicionismo Animal, jan.-dez. (2006); Helita Barreira Custódio. Crueldade contra animais e a proteção destes como relevante questão jurídico-ambiental e constitucional. 7 Environmental Law Review 60, São Paulo: Ed. RT, jul.-set. (1997).

[17] *Id*. *See also,* Antônio Herman Benjamin. Constitucionalização do ambiente e ecologização da Constituição brasileira. In: Canotilho, José Joaquim Gomes; Leite, José Rubens Morato. Direito constitucional ambiental brasileiro. São Paulo: Saraiva, 109 2007.

However, topics not covered by this federal law include veterinary care of animals, their use in K-12 education, hunting, trapping, slaughtering, animals in agriculture production, retail pet stores, injuries by animals or inflicted upon animals, theft of pet dogs and cats for sale to research and testing facilities, zoo exhibitions, animal fighting (dogs and cocks primarily), and animals used for transportation purposes.

Professor Joseph Vining argues that there is difficulty in quantifying suffering, but when we do, the degree and the amount of suffering of these animals are truly staggering. According to Vining, any kind of suffering must be set against the background of laws. Humane treatment of an animal should be a value in itself.[18] Therefore, when civil law judges decide animal lawsuits, they must presuppose a reasonable and justified interpretation that requires the judge to balance the interest of animals *vs.* human use of the animal.[19]Indeed, the judges' decisions need to consider suffering, pain, mistreatment, abuse, cruelty, and injury to animals because in cases of excessive and unjustified suffering, they have to consider these facts (suffering, pain, mistreatment…) a misdemeanor.[20]

Animals in research labs, which were not protected in the Environmental Crimes Act,[21] have since been protected under the Laboratory Animals Act – LAA (2008),[22]legislation which set the rules about animal testing and research and revoked the Vivisection Act (1979). The LAA created the National Animal Experimentation Counsel (CONCEA), responsible for creating new rules about animal experimentation in Brazil.

Beginning in the 1970s, the LAA's bill was discussed among scientific organizations and societies for the prevention of cruelty to animals. Legislative member Sérgio Arouca introduced a progressive form of the bill to Congress, but the Brazilian Society for the Progress of Science and other associations advocated for a draft that did not punish researchers using animals in laboratory research.[23]

The critical event that supported the approval of the new law was that both cities of Rio de Janeiro and Florianópolis enacted anti-cruelty ordinances to prohibit testing and experimentation based on the Environmental Criminal Act.[24] After their

[18] Joseph Vining, Commentary, *Animal, Cruelty Laws and Factory Farming*, 106 Mich. L. Review First Impressions 123, 123-24 (2008).

[19] *See e.g.*, Humberto Ávila, Theory of Legal Princiles (2007); Robert Alexy, A Theory of Constitutional Rights, (Julian Rivers trans.) (2002).

[20] The role of the Judiciary is to show to society the best interpretation and review of the laws, because the 1988 Constitution had serious problems in form and substance. *See* Keith S. Rosenn, *Brazil's New Constitution: an Exercise in Transient Constitutionalism for a Transitional Society*, 38 Am. J. Comp. L. 773, 801 (1990).

[21] A parallel with the American system can be found in David S. Favre, Animal Law: Welfare, Interests, and Rights, 363 (2008). In Brazil, Edna Cardozo Dias.Experimentos com animais na legislação brasileira. Fórum de Direito Urbano e Ambiental – FDUA 24-4/2909-2926, Belo Horizonte, nov.-dez. 2005.

[22] *See generally,* David Favre, *Laboratory Animal Act: A Legislative Proposal*, 3 Pace Envtl. L. Rev. 242 (1979).

[23] For more on this debate *see e.g.* Sônia T. Felipe, Ėtica e Experimentação Animal: fundamentos abolicionistas, Florianópolis: EUFSC (2007).

[24] Girardi Giovana. Florianópolis proíbe estudo com cobaias. *Folha de São Paulo*, Cad. Ciência e Saúde, 10.12.2007.

enactment, the Federal government hurried and enacted a new law about the use of animals in laboratories that would supersede the local law.

Currently, a similar situation is occurring with animals in circuses. Some cities and states have enacted ordinances and statutes that disallow animal use in circuses. The federal law proposal nº 7,291/2006 is still in Congress awaiting a vote. The pressure for a legal response increased after the national news showed cruelty to animals in several Brazilian circuses.[25] Moreover, some societies for animal rights have moved forward to prohibit the use of animals for public entertainment,[26] and the courts have started to decide pro-animal welfare cases as will be seen in the next section.

III. Animal Law Cases: Decisions of Brazilian Courts

Like the United States courts, Brazilian courts have been reluctant to allow lawsuits concerning animal abuse or welfare. The Brazilian courts in general have followed the rules in Civil and Criminal Procedure Codes. However, plaintiff standing issues, which had previously been limited to the Codes, are now required to coincide with the interpretation of the Constitution by the Supreme Court.[27]

> *As required by the Brazilian Constitution:*
> (1) The law may not exclude the consideration by the Judiciary branch regarding injury or threat to fundamental rights;
> (2) Nobody will be prosecuted or sentenced except by the competent authority;
> (3) Nobody will be deprived of liberty or property without due process;

In making a systematic interpretation of the Brazilian Constitution, Civil Law and Civil Procedure codes, most scholars suppose that enforcement of a legal right requires "personhood". This interpretation is based on some statutes that require personhood in order to have standing.

The first article of the Civil Code states: "*Every person is capable of rights and duties in the civil law system*". The second article declares: "*The personhood in the civil law system begins with being born alive, but the law gives some rights to the unborn child as of conception*". The 7th article of the Civil Procedure adds: "*Every person is able to be in court to claim their rights*". Combining these three pieces of legislation, to date all Brazilian judges have made the interpretation that only human beings have standing to file suit in court.[28]

[25] *See e.g.* Renata de Freitas Martins. *O respeitável público não quer mais animais em circos*! 4 Brazilian Animal Rights Review (2008). For more information can be *available at* http://globoreporter.globo.com/Globoreporter/0,19125,VGC0-2703-18190-5-299216,00.html.

[26] Renata de Freitas Martins. *O respeitável público não quer mais animais em circos*! 4 Brazilian Animal Rights Review (2008).

[27] David S. Favre, Animal Law: Welfare, Interests, and Rights, 326 (2008).

[28] *See generally,* some Brazilian authors that advocate for this way: Clovis Bevilaqua. Código Civil

Indeed, early decisions under this "logic interpretation" prevailing in the Brazilian courts precluded any animal rights debate from arising in the judiciary branch. Rather, as common law, these courts make no assertions of the interests of animals, a position taken based on Greek Stoicism, Biblical ideas, and concepts of natural law.[29]According to Professor Steven Wise, the concept of animals as property helped people believe that the world was created for the benefit of humans at the top of the natural hierarchy, with other species of lesser consideration.[30]

Over the past century, the law has created a wall of obstacles to the granting of legal rights to animals. Professor Thomas Kelch asserts that "*the status of animals as property impacts the possibility that animals can be plaintiffs"*[31]. Kelch says since animals are property and have no rights, representatives of animals cannot appeal in the interest of animals.[32]

Kelch further states that after some years the U.S courts have come to recognize that some pets are something more than property, due to the fact that animals are living creatures with feelings, emotions, and affection; thus they are more than objects.[33] In the same direction, but with another interpretation, Professor David Favre argues that we do not need to change the status of animals to attribute rights to them. Favre states that animals are living sentient beings with "self-ownership", because some retain self-direction and self-control, which gives them self-ownership.[34]Thus, concepts of property law can be used to construct a new paradigm that gives animals the status of legal persons without entirely severing the concept of property ownership.[35]

What definition of personhood has the Brazilian system developed? As discussed supra, the logic of the Brazilian system embodies conservative attitudes. The Brazilian jurisprudence is highly legalistic; that is, the society places emphasis

dos Estados Unidos do Brasil. V. 01. 9.ed. Rio de Janeiro: Francisco Alves, 1951. Orlando Gomes. Introdução ao Direito Civil. Rio de Janeiro: Forense, 1998. Washington de Barros Monteiro. Curso de Direito Civil. v. 1. São Paulo: Saraiva, 1962. Fredie Didier Jr. Pressupostos processuais e condições da ação. São Paulo: Saraiva, 2005. Maria Helena Diniz. Compêndio de Introdução à Ciência do Direito São Paulo: Saraiva, 1993. Sílvio de Salvo Venosa. Direito Civil. v. 1. 3.ed. São Paulo: Atlas, 2003. Carlos Roberto Gonçalves. Teoria Geral do Direito Civil. v. 2. Rio de Janeiro: Lúmen Júris, 1999. Pablo Stolze Gagliano & Rodolfo Pamplona Filho. Novo Curso de Direito Civil . v. 1. 10.ed. São Paulo: Saraiva, 2008.

[29] Steven M. Wise, *Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 525-30 (1996). *See also* Gary Francione, *Animal as property,* 3 Brazilian Animal Rights Review, 13 (2007).

[30] Steven M. Wise, *Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 492-503 (1996).

[31] Thomas G. Kelch. *Toward a Non-Property Status for Animals*. 6 N.Y.U. Envtl. L.J. 537 (1998).

[32] *Id*.

[33] *Corso v. Crawford Dog and Cat Hosp., Inc*. 415 N.Y.S. 2d 182, (N.Y. Civ. Ct. 1979): *See also* Kelch. *at* 538.

[34] Self-ownership means the right to control, direct, or consume things. *See* David Favre, *Equitable self-ownership for animals*, 50 Duke. L.J. 477-480 (2000).

[35] *Id*. at 502.

upon seeing that all social relations are regulated by comprehensive legislation.[36] Historically, humans are the legal rights holders, and animals are seen as property to service them.

Therefore, judges and prosecutors have not yet given sufficient recognition to animal interests, even in the Supreme Court. Despite this, some changes are evident. The following section is a discussion of the initial changes in the Brazilian animal law system.

A. Habeas Corpus *for Animals*

The Brazilian court system generally has refused to hear suits with animals as plaintiffs. As declared by the courts, the plaintiff cannot be an animal, which is viewed as an object or property.[37]

In 1972, in case n. 50343,[38] the plaintiffs, the Society for the Protection of Animals and Mr. Fortunato Benchimol, filed a *habeas corpus* in favor of any Brazilian birds in cages or in captivity due to marketing, use, harassment, illegal hunting or gathering. The plaintiffs alleged as defendant every person or company unreasonably trying to deprive any birds of liberty.[39] The question presented was whether *habeas corpus* was the appropriate judicial mechanism to protect the liberty of birds and/or under what conditions animal protection societies and individual persons could represent animals in court.[40]

The district judge decided that it was not a case of *habeas corpus*. According to the Brazilian Constitution, *habeas corpus* ensured the freedom of man; that is, only human beings could use this action of filing suit.[41] The judge further indicated that it was necessary to state who the plaintiff was because a plaintiff could not be unidentified as in *any birds.*[42]

The plaintiffs appealed to a higher federal court, arguing that the lower court lacked jurisdiction and therefore was incompetent to hear the case,[43] and that Decree 24,645/1934 gave permission to animal protection societies to represent

[36] Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the formal legal system and its developmental implications*. 19 Am. J. Comp.L. 514 (1971).

[37] BRAZIL. Supreme Court of Brazil. RHC nº 50.343. Justice Djaci Falcão delivered the opinion of the Court.

[38] Habeas Corpus nº 50343, 1972 in Supreme Court of Brazil.

[39] BRAZIL. Supreme Court of Brazil. RHC nº 50.343. Justice Djaci Falcão delivered the opinion of the Court.

[40] BRAZIL. Supreme Court of Brazil. RHC nº 50.343. Justice Djaci Falcão delivered the opinion of the Court.

[41] In contrast Steven Wise teaches that legal personhood is central to the common law system. According to Wise, personhood determines who or what counts, and whether an entity's value is inherent, or merely instrumental. 'Things' exist for persons, while 'persons' exist for themselves. Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 *Golden Gate* U. *L. Rev.* 219, 221-228 (2007). In Brazil, *see e.g*. Heron José de Santana Gordilho. Abolicionismo animal. 36 *Environmental Law Review*. 85 out/dez,(2004).

[42] *Id*.

[43] *See* standing discussion *supra*.

animals through *habeas corpus*. The prosecutor[44] made an argument alleging that what the plaintiffs wanted was unreasonable because animals were lacking standing. According to the prosecutor, no appropriate judicial mechanisms were in place to handle animal protection because animals were not subjects of the law but are *things* or *goods*.[45]

After obtaining the prosecutor's petition, Justice Djaci Falcão delivered the unanimous decision of the Court. The Court ruled that only human beings could be protected by *habeas corpus.* It stated that this writ must not be used for animals, because animals are only objects of law, but never subjects of the law. Thus, it denied the request by declaring a lack of genuine issues,[46] and the judgment of the district court was affirmed.[47]

After the decision of the Brazilian Supreme Court, animals were not recognized as having personhood and all animal cases in the courts were denied for that reason. Moreover, during the 1970s and 1980s Brazil was governed under a dictatorship and most social movements were focused on rights and guarantees involving humans, not animals.

However, in 2006 another *habeas corpus* (nº 833085-3/2005/BA), pro-animal rights, was filed within the Brazilian law system. Professors, prosecutors, law students, and protection organizations brought action in a Bahia district court in favor of "Suiça" a female chimpanzee caged at Getúlio Vargas Zoo, in the city of Salvador. The plaintiffs alleged the conditions of Suiça's housing in a small coop as unsuitable for life. The housing condition was not adequate to promote the psychological well-being of Suiça, causing her physical and psychological problems. Further, the plaintiffs sought her transfer to the Great Ape Sanctuary in the city of Sorocaba, São Paulo.[48]

Judge Edmundo Lúcio da Cruz realized that to admit the case would incite debate among persons and entities of the Judiciary branch and law colleges. In contrast to other judges, Judge Da Cruz tried to show that the law must change and follow the current behavior and thoughts in society. He mentioned the earlier

[44] In the Brazilian Legal system the prosecutor must say if the judge is following the law according to constitution. The general prosecutor is in charge of supervising police work and directing the police in investigations.

[45] *Id*. *See generally* Gary L. Francione, Animals, Property and the Law, Philadelphia: Temple University Press, 1995; *See also* Gary L. Francione, *Personhood, Property and Legal Competence*. In Paola Cavalieri & Peter Singer (eds.), The Great Ape Project, New York: St. Martin's Griffin, 248-257 (1993). Gary L. Francione, Animals as Persons: Essays on the Abolition of Animal Exploitation, Columbia University Press (2008). For more on this debate in Brazil, *see e.g*. Mônica Aguiar, Direito à filiação e bioética. Rio de Janeiro, RJ:Forense (2005).

[46] This attitude is similar to the practice under Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(c).

[47] *Id*.

[48] In *Favor of* Suica, 9th Criminal Court, No 833085-3/2005 (Bahia, Brazil Sept. 26, 2005). English translation *available at* http://www.animallaw.info/topic_subcat/tsbrmaterials.htm. *See also* Heron José de Santana; Luciano Rocha Santana; Tagore Trajano. et all. Habeas Corpus impetrado em favor da chimpanzé Suíça na 9ª Vara Criminal de Salvador (BA). 1 Brazilian Animal Rights Review 268 jan/dez (2006). Salvador: Instituto de Abolicionismo Animal.

case, but affirmed that in 24 years in court he had never seen one case assigned to an animal. Judge Da Cruz understood that the theme was complex and required an in-depth examination of "pros and cons". Therefore, he accepted an extension of the deadline to allow the defendant to bring more information about the facts which appear in the petition. The judge felt the suit needed more attention because it was a question that had had little discussion in the judiciary branch. He stated that some conservative Brazilian jurists would probably not like this debate, but it was necessary as it was the main cause of admission of the argumentation.[49]

Suiça, the subject of the *habeas corpus,* died inside Salvador Zoo, and the defendant alleged that this sad event took place in spite of all efforts made and all care provided to Suiça. Judge Da Cruz, upon accepting the debate, caught the attention of jurists around the country about the matter. In his opinion, the Criminal Procedure Law must not be static but must accept some changes, and new decisions must adapt to new times. Despite Suiça's death, the debate must continue especially in law colleges as well as in the courts.[50] The death of Suiça had defeated the purpose of the case, thus rendering the case moot. Thereupon, Da Cruz dismissed the case. As stated previously, the main discussion in this case (*Salvador Zoo vs Suíça Chimpanzee*) was whether *Habeas corpus* was the appropriate judicial mechanism to protect the liberty of animals. However, this case tried to extend human rights to Great Apes. In the petition, the plaintiffs argued that liberty, life and integrity were rights due to great apes because of the genetic similarity between human beings and apes. The discussion extended to national and international debates on TV shows and newspapers around the world.

This case introduced into the Brazilian system what many call the *"extension of human rights for the great apes theory*." According to this theory, the legal system should recognize some rights for animals, starting with Great Apes because there is enough knowledge to say that the distance between humans and great apes is short. Genetic, sociological, and zoological studies affirm that humans are primates and have a closer relationship with each other. The law must recognize this fact.[51]

[49] In *Favor of* Suica, 9th Criminal Court, No 833085-3/2005 (Bahia, Brazil Sept. 26, 2005). English translation *available at* http://www.animallaw.info/topic_subcat/tsbrmaterials.htm. *See also* Heron José de Santana; Luciano Rocha Santana; Tagore Trajano. et all. Habeas Corpus impetrado em favor da chimpanzé Suíça na 9ª Vara Criminal de Salvador (BA). 1 Brazilian Animal Rights Review 268 jan/dez (2006). Salvador: Instituto de Abolicionismo Animal.

[50] *Id*.

[51] Professor Heron Santana Gordilho asserts that this analogy is possible when considering Brazilian history. In the nineteenth century, when there was slavery in Brazil, Luis Gama (slaves' son) filed suit in favor of slaves that had manumission, but still worked for their former masters. The goal was to guarantee the liberty of these individuals. According to the author, the fact that slaves did not have personhood was not an obstacle to assuring the slaves' rights. *See also* Luís Gama, Primeiras Trovas Burlescas e Outros Poemas (org. Lígia Ferreira). Sâo Paulo: Martins Fontes (2000); J. Romão Silva, Luiz Gama e Suas Poesias Satiricas. Rio de Janeiro: Ed. Casa do Estudante do Brasil; and Heron J. Santana Gordilho. Abolicionismo Animal, Salvador: Evolução (2009). *See* Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery*, Da Capo. (2006); *See also* Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 (2) Golden Gate U. L. Rev. 219 (Winter 2007).

Since 1993, scholars have started to demonstrate that the distance between Great Apes and humans is shorter than previously thought. This is based on research indicating that ape and human DNA may be close enough to say that Apes possess equal or similar thresholds for feeling.[52] Like the Brazilian authors, American authors like Steven Wise advocate for the possibility of animals having standing though *habeas corpus.*[53]

In 2008, another *Habeas Corpus* (nº 96.344/SP) case involving two chimpanzees: "Lili" and "Megh" faced the "Superior Tribunal de Justiça" in Brazil.[54] The plaintiffs, Brazilian animal rights lawyers, brought action in the district court of São Paulo to require the Brazilian Institute for Environmental and Renewable Natural Resources (IBAMA) to return the chimpanzees to their previous owner. The question presented was whether animals had personhood or were a thing or property. Notwithstanding, Justice Castro Meira argued that *habeas corpus* must only be used for human beings, that is, entities with personhood. He judged the case impaired and converted the matter into a writ of mandamus.[55]

The definition of animal law both in the context of animal welfare and animal rights is starting to develop in Brazil. In the legislative branch, some new law projects have appeared and have been discussed in the national and state congresses. Important cases are being addressed by the Brazilian Supreme Court: Brazilian cockfighting and bullfighting (Festival of the Oxen) have already been settled in the high Brazilian Court. Even if the personhood of animals has not made progress in the courts, these cases are nevertheless considered animal issues.

[52] Philosophers such as Peter Singer argue that animals other than humans feel pain, and the denial of the intensity of pain in animals is speciesists. According to Peter Singer, great apes would have the same capacity as infants and mentally challenged humans that have rights. In 1993 Peter Singer and Paola Cavalieri edited *The Great Ape Project,* a text that seeks to extend the scope of three basic moral principles to more than humans. These principles are set out in the Declaration on Great Apes and include the rights to life, the protection of individual liberty, and the prohibition of torture, all currently applicable only to humans. *See also* Paola Cavalieri & Peter Singer, *A Declaration on Great Apes, in* The Great Ape Project: Equality Beyond Humanity (Paola Cavalieri & Peter Singer eds., St. Martin's Press 1993); Peter Singer, Animal Liberation (The New York Review 1975). Encyclopedia of Animal Rights and Animal Welfare (Marc Bekoff & Carron A. Meaney eds., Greenwood Press 1998).

[53] Steven Wise argues that "(…) flexibility is part of common law's basic structure, that legal personhood is one of common law's basic values, that the structure of common law requires it to permit such a cause of action to go forward on its merits, and that the claim of chimpanzees to common law legal personhood should always be subject to common law re-evaluation". Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of* Habeas Corpus *and* De Homine Replegiando, 37 Golden Gate U. L. Rev. 219, 221-22 (2007).

[54] Superior Tribunal de Justiça is the Court that can decide appeals from the state Supreme Courts on matters unrelated to constitutional rights. The Superior Tribunal de Justiça can also be called as unconstitutional Supreme Court in Brazil.

[55] Brazil, Superior Court of Brazil. HC nº 96.344/SP – GB. Justice: Castro Meira. Accessible at: http://www.lfg.com.br/public_html/article.php?story=200809101024025.

B. Balancing of Interests: cultural manifestations vs. animal welfare

1. Festival of the Oxen 56

In 1997, a case involving a Brazilian cultural event arrived in the courts (RE nº 153.531-8/SC). The issue affirmed that the duty of the government was to guarantee everyone's cultural rights, encouraging local traditions, while not renouncing enforcement of constitutional law. Although, the Brazilian Constitution banned cruelty to animals, there existed a cultural practice called "*farra do boi*" (Festival of the Oxen).[57] The Festival of the Oxen originated as a Portuguese and Spanish festival where a bull is tied and then released to into the streets and then festival goers attempt to outrun the bull without being mauled.[58] The facts of this case, *Animal Defend League & et. al vs. Santa Catarina State*, may be briefly stated. In 1997, some societies for the protection of animals: Petropolis Friends Association (PFA) – property, protection of animals, ecology advocating, Animal Defend League (LDZ), Education Zoo Society (SOZED), and Protection for Animals Association (APA); filed suit to abolish the Festival of the Oxen. The organizations asserted that the event violated the Constitution and requested an end to the practice.[59]

The district judge dismissed the petitions as there was no legal grounds to abolish the practice. The plaintiffs appealed to the Santa Catarina Supreme Court, which agreed with the lower court decision. The plaintiffs again appealed this time to the Brazilian Supreme Court[60].

Even though the Public Ministry[61] had elected not to file a brief, the Justices reversed the lower court decision. Justice Francisco Rezek, who delivered the opinion of the Court, raised some questions about cruelty to animals. According to Justice Rezek, Article 225, paragraph 1, VII, had immediate applicability; that is, it could be invoked in decisions on cruelty to animals, and enforced without the

[56] *See generally* Farradoboi.org, What is Farra do Boi? (last visited October 20, 2009).

[57] Brazil, Supreme Court of Brazil. RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court. For information about this debate *see generally* Carolina Medeiros Bahia. O Caso Da Farra Do Boi Em Santa Catarina: colisão de direitos fundamentais. In: Ingo Wolfgang Sarlet; Tiago Fensterseifer; Carlos Alberto Molinaro; Fernanda Luiza Fontoura de Medeiros. (Org.). A Dignidade Da Vida E Os Direitos Fundamentais Para Alem Dos Humanos: uma discussão necessária.. Belos Horizonte: Editora Fórum (2008). Carolina Medeiros Bahia. A farra do boi à luz do princípio da proporcionalidade. In: Leite, José Rubens Morato; Bello Filho, Ney de Barros (Org.). Direito Ambiental Contemporâneo. Barueri: Manole, 2004, v., p. 75-98. Carolina Medeiros Bahia. Princípio da proporcionalidade nas manifestações culturais e na proteção da fauna. 1. ed. Curitiba - Pr: Juruá, 2006.

[58] *See* Farradoboi.org, What is Farra do Boi? (last visited October 20, 2009).

[59] Brazil, Supreme Court of Brazil. RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court.

[60] *Id*.

[61] The Public Ministry is the Brazilian institution for prosecution, one of which exists in each state. The public prosecutors can work at the federal and state levels. *See generally* Manoel Jorge e Silva Neto. Curso De Direito Constitucional, 2ª.ed. Rio de Janeiro: Lúmen Júris (2006).

necessity of legislative or executive action. Further, he expressly wrote that other judges failed when they thought that animal rights questions were of a secondary nature to courts busily dealing with varied social problems while attempting to insure fundamental guarantees and rights to the citizenry. This opinion states that judges cannot ridicule a lawsuit because it raises animal welfare issues. In a dispute, the kind of rights individuals choose to advocate is a *zone of privacy*.[62]

Moreover, Justice Rezek alleged that the critical question of "standing" would be simplified in the following question: Could the Supreme Court confer standing to Societies for the Prevention for Animals localized in another state? Do animal societies have an interest in the problem? The main question is: Is a mere "interest in a problem", no matter how longstanding the interest and no matter how qualified the organization in evaluating the problem, sufficient by itself to give a stake to the organization?[63] Justice Rezek concluded that in a federation country where there was a national constitution anyone could sue whenever a possible illegality arose. In this case, the goal of the associations was advocacy for animal welfare; thus, the judicial system was obligated to hear the case.[64]

The Festival of the Oxen is extremely cruel, often resulting in the death of the animals during the festivities. According to Justice Rezek's opinion, the supposition that the festival was not a cruel and violent practice, but a "cultural manifestation," was in contrast to the photographs and news reports. Therefore, the Court decided in favor of the animals. Furthermore, he pointed out, in other states there was the same practice but the communities used role players dressed as oxen or bulls rather than indulge in violence or cruelty to animals.[65] In other words, there was a less burdensome way to achieve the same end.

Hence, Justice Rezek advocated that this was a case that dealt with legitimate and fundamental questions for the betterment of Brazilian society. He disagreed with the Public Ministry, district court, and Santa Catarina Supreme Court and voted to ban the use of animals in such events.[66]

[62] Brazil, Supreme Court of Brazil, RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court. . Compare in US system with a case *Griswold v. Connecticut*, 381 U.S. 484 (1965), for a discussion of Constitutional rights and the "zone of privacy," and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 533-535 (1925).

[63] David S. Favre, Animal Law: Welfare, Interests, and Rights 332 (Aspen Publishers 2008).

[64] Brazil. Supreme Court of Brazil. RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court.

[65] *Id*.

[66] Brazil, Supreme Court of Brazil. RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court.

In contrast, Justice Maurício Corrêa dissented and said that the court could not prohibit the festival, which was also supported by the Constitution. According to Justice Corrêa, the Constitution ensured cultural rights in articles 215 and 216 and the Supreme Court must respect this rule[67].

> *As required by the Brazilian Constitution:*
> *Article 215* – The State shall guarantee to everyone the full exercise of cultural rights and access to sources of national culture and support and encourage the appreciation and dissemination of the culture.
> *Paragraph 1* – The State shall protect the expressions of popular, indigenous, African-Brazilian cultures, and other groups participating in the national civilization process.
> *Also,*
> *Article 216* – Material and immaterial property compose the Brazilian cultural heritage, individually or together…

In apparent agreement with Justice Corrêa, the State of Santa Catarina took no steps to prevent violent practices or ensure that animals would not be subjected to excess cruelty. The Judiciary role is to help the States in efforts to disallow practices of cruelty to animals. According to Justice Corrêa, there is no internal contradiction in the Constitution. Even though the Constitution prohibited cruelty to animals, it also guaranteed and protected cultural manifestations which were the immaterial property of Brazilian society.[68] Thus, Justice Corrêa concluded that the "Festival of the Oxen" was a cultural regional manifestation and must be protected by the State. Notwithstanding, whereas there was excessive infliction of pain and suffering, the State of Santa Catarina must use its police department to prevent these practices; or, if the State did not address, the matter, judiciary branch would decide based on the Constitution.[69]Justice Marco Aurélio disagreed with Justice Maurício Corrêa regarding the significance of this critical debate to the Brazilian society, as a whole, and concerning the greater or lesser relevance of this case compared to others on the docket. He distinguished cultural manifestation from cruelty to animals by saying that a foreign manifestation had originated on the Iberian Peninsula and that there was evidence of cruelty to living beings. According to Aurélio, the practices of cruelty to animals had become a problem, among various others, that were occurring in the State of Santa Catarina. He asserted that in this case intermediary decisions were not viable because the approval of practices of cruelty would have a negative effect on Brazilian society.[70]

[67] *Id;* Compare *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 541-46 (1993) (for a discussion of the tension between freedom of religion and animal welfare). *See also* David N. Cassuto, *Animal Sacrifice and the First Amendment: The Case of Lukumi Babalu Aye*, *in* Animal Law and the Courts 50 (Thompson West 2008).

[68] Brazil, Supreme Court of Brazil, RE nº 153.531-8/SC. Justice Francisco Rezek delivered the opinion of the Court.

[69] *Id*.

[70] *Id*.

"*The Festival of the Oxen – where men, women, and even children, pursue the ox until exhausting the animal – is not a cultural manifestation; it is merely violence*".[71] Based on the Constitution, according to Aurélio, it is impossible for the police department to stop only the practice of cruelty because all of the festival is based on the cruel treatment of the ox or bull.[72]

Aurélio concluded that nowadays the Festival of the Oxen is a practice that disallows the hallmarks of the Constitution while giving passion reign as people pursue defenseless animals. Therefore, he concurred with Justice Francisco Rezek in affirming the petitioner's right to a trial and court decision.[73]Finally, Justice Néri da Silveira summarized the main points of the discussion and decided that all cultures must help develop citizenship, freedom and justice in society as well as uphold human dignity. These values should not legitimize the practice of cruelty so that they become the principles and values of Brazilian society. Whereas these excesses point to the necessity to preserve the environment and animals, it is impossible to maintain the interests of those practices that go against the principles and values of the Constitution. Thereupon, the court accepted the case with the dissent of the Justice Maurício Corrêa, and judged according to Article 225, paragraph 1, VII of the Constitution, forbidding the practice called Festival of the Oxen.[74]

2. Cockfighting Laws

In 1957, Justice Candido Mota delivered the opinion of the court stating that cockfighting is not a sport or cultural manifestation and that the practice maltreats animals in the fights. According to Mota, cockfighting is a misdemeanor based on the Criminal Misdemeanor Act. Based on Article 64, the police officer must arrest anyone that practices cockfighting (HC 34.936/SP).[75]

The unanimous decision started a new interpretation of cockfighting in the Supreme Court of Brazil. Previously, cockfighting had been considered by the Justices to be a sport in which cocks are often drugged to be more aggressive.[76]The cocks are subjected to a variety of training regimens where trainers force their cocks to run to develop the birds' breast muscles and cardiovascular system to fight. The goal of the game is to "kill more quickly" and inflict wounds more cleanly than the birds' natural spurs.[77]As time passed, the judges came to feel that such practice was abuse and needed to cease. After the first decision, another two cases appeared in the Brazilian Supreme Court. In 1958, the Executive Branch of the State of São Paulo edited administrative rule nº 74, 1956, after guidelines from the U.I.P.A regarding cruelty to animals.

[71] Justice Marco Aurélio in BRAZIL. Supreme Court of Brazil. RE nº 153.531-8/SC.
[72] *Id*.
[73] *Id*.
[74] Justice Marco Aurélio in Brazil, Supreme Court of Brazil, RE nº 153.531-8/SC.
[75] Brazil, Supreme Court of Brazil, HC nº 34.936/SP.
[76] *See* Aaron Lake *1988 State Ballot Initiatives*, 5 Animal L. 90 (1999).
[77] Erin N. Jackson, *Dead Dog Running: The Cruelty of Greyhound Racing and the Basis for its Abolition in Massachusetts*, 7 Animal Law 195-96 (2001).

The administrative rule orders:
(1) The Public Security Secretary of State to use his or her statutory mandate in order to represent the U.I.P.A and:
(2) Whereas cockfights are cruel, setting up a typical violation of Article 64 of Criminal Misdemeanor Act (Decree-Law 3688 of October 2nd, 1941);
(3) Whereas the offense for gambling – that the police must combat (Criminal Misdemeanor Act, article 50, paragraph);
Resolved:
(4) Cockfighting is strictly forbidden in the whole of the State of São Paulo, the police authorities being competent to establish the misdemeanor process against every person helping, promoting or participating in this event.
(5) Post it and obey it.

The Supreme Court convened to decide the constitutionality of this law (HC 35.762/SP). Justice Afrânio Antônio da Costa, who delivered the opinion of the court, asserted that participating in, or watching cockfighting was illegal, according to the Criminal Misdemeanor Act. The unanimous opinion of the court, ruled that cockfighting was a practice of cruelty. Animals were mistreated for the passion and enjoyment of the players. Therefore, he denied the appeal and affirmed the law.[78]In the same year, the Supreme Court decided that "*cockfighting is a misdemeanor typified in Article 64 of the Criminal Misdemeanor Act.*"[79] (RE 39.152/SP). Justice Henrique D'Avila, who delivered the opinion of the court,[80] said that people have the duty of showing mercy toward animals and must avoid any cruel practice to them. In the court's opinion, only in this way will society progress. He continued that humans have a moral duty to protect animals, whatever the situation. According to D'Avila, if human beings hope for justice, they should take care of animals as exemplified in England.[81]Subsequently, the court unanimously concluded that based on Article 24,645/1934, a special decree about animal protection, and the Criminal Misdemeanor Act,[82] cockfighting was wholly forbidden in Brazilian territory for reason of cruelty to animals and shall be punished by imprisonment and fines.[83]

[78] Brazil, Supreme Court of Brazil, HC nº 35.762/SP, Justice Afranio Antonio da Costa delivered the opinion of the Court.
[79] Justice Henrique D'Avila in Brazil, Supreme Court of Brazil. RE nº 39.152/SP, Justice Henrique D'Avila delivered the opinion of the Court.
[80] He mentioned Thomas Aquinas and Roman Emperor Nero in his opinion for more *see*: Brazil, Supreme Court of Brazil, RE nº 39.152/SP, Justice Henrique D'Avila delivered the opinion of the Court.
[81] Brazil, Supreme Court of Brazil. RE nº 39.152/SP. Justice Henrique D'Avila delivered the opinion of the Court.
[82] Brazil, Supreme Court of Brazil, RE nº 39.152/SP, Justice Henrique D'Avila delivered the opinion of the Court.
[83] A parallel with the United States legal system can be found in the new law which makes cockfighting a felony. For instance in Arizona any person who engages in cockfighting can be punished.

After the Constitution of 1988, some cockfighting cases arrived in the Supreme Court. Three different states enacted laws about how cockfights could be lawfully organized in their states. The first case was in the State of Rio de Janeiro in 1998. Rio de Janeiro Statute nº 2,895[84] allowed and regulated cockfighting championships. However, the Supreme Court declared that statutes that regulate and permit cockfighting were unconstitutional based on article 225, paragraph 1, VII (Action of Unconstitutionality n. 1,856-6/RJ).

The facts may be briefly stated:[85] the General Public Ministry, plaintiff, filed the unconstitutional action against the Rio de Janeiro Statute n. 2,895 permitting cockfighting. The petition was written for Alex Amorim de Miranda, prosecutor of the republic district, and Ms. Geuza Leitão Barros, U.I.P.A president.[86]

The Court asked the defendants to supplement more information regarding the case. The assembly president of Rio de Janeiro, Mr. Sergio Cabral Filho, argued that insofar as cockfighting was regulated the public government could control and supervise sport cockfighting societies, including the social aspect, inasmuch as cockfighting "encouraged social integration while creating employment." According to the State legislative president, the statute did not offend the Constitution, which solely addressed the protection of fauna and the ecosystem – not the domestic, domesticated, captive, or private zoo animals. Rio de Janeiro Governor Marcello Alencar, answered that the statute was constitutional because it simply regulated a popular activity.[87]

Justice Carlos Velloso, who delivered the opinion of the Court, based his decision on the Brazilian Constitution which he interpreted as inclusive of the animals. In his opinion, the Constitution protected all animals against cruelty indiscriminate of the breed or category. Furthermore, cockfighting had constituted cruelty since Decree 24,645/34, which established rules to protect animals: *mistreatment includes organization and promotion of fighting among animals of the same and/or different species*[88].

Some statutes defined a cock as a "male chicken, including game fowl," and the act of cockfighting as knowingly: 1. Owing, possessing, keeping or training cocks with the purpose of holding a cock-fighting exhibition; 2. For amusement or gain allowing cocks to fight and/or cause injury to each other; or 3. Simply allowing any of these acts to occur on their premises. Ariz. Rev. Stat. Ann. § 13-2910.03(A)(1)-(3) (2009). *See also* VA ST § 3.2-6572. Like Brazil, cockfighting in the United States was considered according to cultural context, but in the summer of 2008 Louisiana became the last state to outlaw the practice of cockfighting, making it illegal in all of the United States (LSA-R.S. 14:90.6; LSA-R.S. 14:102.23, and LSA-R.S. 14:102.1) . In the Brazilian legal system, there is no statute indicating the punishment for cockfighting, "but *cockfighting* is understood as *animal cruelty* according to the Constitution." Article 32, Environmental Criminal Act, and Article 225, paragraph 1, VII of the 1988 Constitution.

[84] Rio de Janeiro Statute nº 2,895, March 3rd, 1998.

[85] Brazil, Supreme Court of Brazil, Action of Unconstitutionality nº 1.856-6/RJ, Justice Carlos Velloso delivered the opinion of the Court.

[86] Brazil, Supreme Court of Brazil, Action of Unconstitutionality nº 1.856-6/RJ, Justice Carlos Velloso delivered the opinion of the Court.

[87] *Id*.

[88] *Id*; *See generally* Helita Barreira Custódio, Crueldade contra animais e a proteção destes como relevantes questão jurídico-ambiental e constitucional. 7 *Environmental Law Review* 54. July/Sept (1997).

Historically, President Getúlio Vargas[89] in 1961 enacted Decree n. 50,620 prohibiting cockfighting, which was revoked in 1962. According to earlier decisions[90] cockfighting has been characterized as mistreatment based on Article 64 of the Criminal Misdemeanor Act.

The framework of the Velloso decisions was the case of the Festival of the Oxen. This case established that a cultural manifestation could not violate Constitutional law regarding cruelty to animals. According to Justice Velloso, engaging animals to fight each other was cruelty. Therefore, he decided that Rio de Janeiro Statute n. 2895 was unconstitutional and violated Article 225, paragraph 1, VII of the Constitution. Subsequently, the enforcement of the statute had to cease.[91]

Justices Mauricio Correa and Moreira Alves concurred with Velloso's judgment.[92] The judgment was unanimously affirmed.

After almost ten years, a similar case came to the Supreme Court. The State of Santa Catarina enacted Statute nº 11,366/2000 as follows:

> *Article 1* – It is permitted to hold, create and show cockfighting "Galus-galus", under this law.
> *Article 2* – Cockfighting is a sport and involves the preservation of cocks. The activity will be permitted in appropriate spaces called "cock spaces".
> *Article 3* – The authorization to compete shall be granted by a state agency through paying tax.
> *Article 4* – The places where the events will be made should be inspected annually by competent authorities to insure a working license for safety and security of visitors.
> *Article 5* – Before the competition, a veterinarian or/and a trained assistant shall certify the health of the animals.
> *Article 6* – It is forbidden to practice this activity close to churches, schools, and hospitals. A minimum distance of eighty yards to preserve the silence and public order should be respected.
> *Article 7* – Children under the age of sixteen (16) are not permitted to enter "cock spaces," unless accompanied by parents or guardians[93].

The General Public Ministry, plaintiff, supposed that the Santa Catarina statute was unconstitutional and violated the Constitution, opening the door once again to

[89] President Getúlio Vargas was the fourteenth and seventeenth Brazilian President.

[90] *See* discussion *supra.* (Rule 4.2 states that supra may be used to refer to legislative hearings, books, pamphlets, reports, unpublished materials, non-print resources, periodicals, services, treaties and international agreements, regulations, directives, and decisions of intergovernmental organizations, and internal cross references.

[91] *Id*.

[92] *Id*.

[93] Brazil, Supreme Court of Brazil, Action of unconstitutionality nº 2,514-7/SC, Justice Eros Grau delivered the opinion of the Court.

cockfighting and cruelty to animals. As an endorsement, the Legislature affirmed that cockfighting was a cultural and popular manifestation and that cocks exist just to fight, adding that this could be verified through genetic tests and because cocks were not good for eating. For the legislative members, cockfighting was more a sport, similar to horse racing.[94]

Justice Eros Grau, who delivered the opinion of the Court (Action of Unconstitutionality nº 2,514-7/SC), affirmed the earlier decision, and communicated to the State of Santa Catarina that it had ignored the meaning of the Constitution in Article 225, paragraph 1, VII which disallowed cruelty to animals, at the same time mentioning earlier decisions (ADI 1,856-6/RJ and RE n. 153,531). Hence, the statute was unanimously judged unconstitutional.[95]As if that were not enough, the State of Rio Grande do Norte had enacted a statute permitting cockfighting. The statute was similar to those of Santa Catarina and Rio de Janeiro. The plaintiff, once more the Public Ministry, reasoned in the same framework as the earlier cases. Justice Cezar Peluso, who delivered the opinion of the Court, affirmed that the Rio Grande do Norte statute was unconstitutional and cautioned that the decision of the Supreme Court repudiated any statute, ordinance, or law as well as any legislative or executive action that allowed cruel, violent, and atrocious practices with animals based on "cultural manifestation" or "genetic background knowledge" about certain animals. After these arguments, he cited other cases and unanimously declared the Rio Grande do Norte Statute nº 7,380/1998 in the ADI 3,776-5[96] unconstitutional.

All of these decisions have offered new substantive arguments in Brazilian animal welfare law. The current trend among Brazilian scholars and the modern legal debate are discussed below.

IV. The Participation of Brazilian Scholars in this Debate

The impact of the animal rights debate emerged in Brazil with the publication of *Animal Liberation* by Peter Singer,[97] and *Empty Cases* by Tom Regan.[98]

[94] In contrast to the legislative and executive branch position that cockfighting can be a sport or cultural manifestation, several decisions by U.S. courts (there should be a citation at the end of this sentence referring to some of these U.S. cases) held that statutes barring cockfighting were not unconstitutional and that cockfighting was mistreatment of animals – therefore, not an inalienable right. For example, a statute outlawing cockfighting was not unconstitutionally overbroad; the law unambiguously defined the specific conduct of cockfighting to subject individuals to prosecution while not criminalizing the enjoyment of birds in their natural habitat. For example, in *Edmondson v. Pearce*, 91 P.3d 605, 631 (Ok la. 2004), a statute outlawing… (please continue the sentence)*See also*, "there was no constitutional right to cause cockfighting for amusement or gain" (A.R.S. § 13±2910.03, subd. A, par. 2). In Brazil, this debate is still going on although the Supreme Court has already established its position on the subject.

[95] Brazil, Supreme Court of Brazil. Action of unconstitutionality nº 2,514-7/SC, Justice Eros Grau delivered the opinion of the Court.

[96] Brazil, Supreme Court of Brazil, Action of unconstitutionality nº 3,776-5/RN, Justice Cezar Peluso delivered the opinion of the Court.

[97] *See* Peter Singer, LIBERTAÇÃO ANIMAL, Porto Alegre: Lugano (2004).

[98] *See* Tom Regan, JAULAS VAZIAS: encarando o desafio dos direitos animais, Porto Alegre: Lugano (2006).

Thereafter, the philosophical claim for animal rights gained strong philosophical power. The ensuing philosophical debate created a desire and justification for social change.[99]

As in the United States, the broader social activity in the 1980s and 1990s had very little impact within the legal profession or Brazilian law schools.[100] There were no books about animal issues until 1998, outside of some articles and petitions. The first book about the animal rights debate published in Portuguese was written by Laerte Levai, a São Paulo prosecutor in some cases involving animal welfare issues.[101]In 2000, Edna Cardozo Dias wrote the first thesis about Brazilian animal law[102]which explained the evolutionary process of the animal law. In 2003, Danielle Tetü Rodrigues wrote "Rights and Animals: Ethics, Philosophy and Law".[103] In 2006, Heron Jose de Santana Gordilho wrote "Animal Abolitionism" in Brazil, which was published in 2008;[104] and in the same year, Daniel Braga Lourenço wrote "Animal Rights: Background and New Perspectives."[105]

These publications have contributed to the increased debate of animal rights within the entire society in Brazil. Several other books have been written on the animal rights movement in areas such as philosophy, biology, animal science, and ethics. Brazilian authors Sônia Felipe,[106] Diomar Ackel Filho,[107] Luciana Caetano da Silva,[108] Geuza Leitão,[109] Sérgio Greiff,[110] Thales Trez,[111] Marly Winckler,[112]

[99] David S. Favre, *The Gathering Momentum for Animal Rights*, 1 Brazilian Animal Rights Review 13, 15 (2006); Sônia T. Felipe Dos direitos morais aos direitos constitucionais: Para além do especismo elitista e eletivo, 2 Brazilian Animal Rights Review 182 Salvador: Evolução, jan/jun. (2007).

[100] Favre, *supra* note 64, at 447.

[101] Laerte Fernando Levai, Direito Dos Animais. O direito deles e o nosso direito sobre eles. Campos do Jordão: Editora Mantiqueira (1998).

[102] *See e.g*. Edna Cardozo Dias, A defesa dos animais e as conquistas legislativas do movimento de proteção animal no Brasil, 1 Brazilian Animal Rights Review 150 jun. (2007); Salvador: Instituto de Abolicionismo Animal, Edna Cardozo Dias, A Tutela Juridica Dos Animais, Belo Horizonte: Mandamentos (2000).

[103] Danielle Tetü Rodrigues, O Direito & Os Animais*: uma* abordagem ética, filosófica e normativa, 2a. Ed. (2008).

[104] Heron J. Santana Gordilho, Abolicionismo Animal, Salvador: Evolução (2009).

[105] Daniel Braga Lourenço, Direito Dos Animais: fundamentação e novas perspectivas, Sergio Antônio Fabris. Porto Alegre (2008).

[106] Sônia T. Felipe, Ética e Experimentação Animal: fundamentos abolicionistas, 1. ed. Florianópolis: Editora da UFSC - EDUFSC, 2007; Sônia T. Felipe, Por Uma Questão de Princípios: alcance e limites da ética de Peter Singer em defesa dos animais, 1. ed. Florianópolis: Fundação Boiteux (2003).

[107] Diomar Ackel Filho.Direito dos Animais, São Paulo: Themis (2001).

[108] Luciana Caetano da Silva; Gilciane Allen Baretta, Algumas considerações sobre a crueldade contra os animais na Lei 9.605/1998, In: Prado, Luiz Régis, (coord.), Direito Penal Contemporâneo: estudos em homenagem ao Prof. Cerezo Mir. São Paulo: Ed. RT (2007).

[109] Geuza Leitão, A Voz Dos Sem Voz: direito dos animais, Fortaleza: INESP (2002).

[110] Sérgio Greiff, Alternativas Ao Uso De Animais Vivos Na Educação – pela ciência responsável, São Paulo: Instituto Nina Rosa (2003).

[111] Sérgio Greiff & Thales Trez, A Verdadeira Face Da Experimentação Animal: a sua saúde em perigo. Rio de Janeiro: Sociedade Educacional Fala Bicho (2000).

[112] Marly Winckler, Fundamentos do Vegetarianismo - Marly Winckler - Rio de Janeiro: Expressão

Paula Brugger,[113] and Tamara Bauab[114] have published books that have increased the debate in the Brazilian law colleges.

In 2006, the first volume of the *Brazilian Animal Rights Review* was published. At approximately the same time, the Abolitionism Animal Institute[115] was founded. This Institute joined the lead in advancing knowledge about animal issues. All those advocating animal rights have worked together on both the legal and social aspects of the debate. As Professor Favre stated, "*The existence of journals on animal rights issues is essential for the development of ideas and theories within the legal community.*"[116]

In addition, in 2008, at the Federal University of Bahia, the first international conference was held for lawyers, animal protection associations, activists, professors, and students. This conference brought together international professors such as Steven Wise (USA), David Favre (MSU/USA), Peter Singer (Princeton/ Australia), Gary Francione (Rutgers/USA), Maria do Céu (Acores/Portugal), and Marti Keel (USA). Moreover, most Brazilian professors along with Justice Eliana Calmon participated in this meeting on this issue. In July of the same year, the first national conference took place in São Paulo. Both conferences discussed what the next steps were to further the animal rights debate in Brazil.

In the United States, at least seventy universities teach classes pertaining to animal law[117]. In comparison, there are only two universities that research animal welfare questions in Brazil: the Federal University of Bahia (UFBA) and the Federal University of Santa Catarina (UFSC). As of today there remains an absence of animal rights courses and professors specializing in the subject[118].

The Brazilian system has just begun the road toward change[119]. The first Brazilian review was printed to encourage other lawyers, prosecutors, and judges to participate in the debate; furthermore, animal issues have started to become topics considered in law schools. The society has begun a debate about animal suffering, and magazines such as *Brazilian Vegetarian Magazine* translate the animal rights debate to the public though such topics as animals as food and animals as entertainment, among others.

e Cultura (2004).

[113] Paula Cals Brügger, Amigo Animal - Reflexões interdisciplinares sobre educação e meio ambiente: animais, ética, dieta, saúde, paradigmas, 1. ed. Florianópolis: Letras Contemporâneas (2004).

[114] Tamara Bauab, Vítimas da Ciência: Limites Éticos da Experimentação Animal", Campos do Jordão: Editora Mantiqueira (2001).

[115] *Available at* www.abolicionismoanimal.org.br.

[116] David S. Favre, 1 Brazilian Animal Rights Review 15 (2006).

[117] *See e.g.* Peter Sankoff, Charting the Growth of Animal Law in Education, 4 *Journal of Animal Law* 105, 114 (2008).

[118] Judicial institutions such as the Brazilian Bar Association (Ordem dos Advogados do Brasil/OAB) have advocated against animal rights in the court. The president of the Environmental Commission of the OAB says that "human law only has to protect humans not animals, and that the court should not accept animal cases" *available at* http://g1.globo.com/Noticias/SaoPaulo/0,,MUL756839-5605,00.html.

[119] David S. Favre, 1 Brazilian Animal Rights Review 23 (2006).

Furthermore, international scholars have collaborated in the Brazilian debate and encouraged Brazilian students and professors to continue their research in this area. For example, Michigan State University has joined forces with the Federal University of Bahia/Brazil.

V. New Directions in Brazilian Animal Law

The movement from the traditional rural paternalism view of animals to one that recognizes the rights of animals is monumental,[120] not to say, laborious. As stated, recognizing the rights in animals in the system of law would involve a fundamental change in the way that Brazilians live and think.

The animal rights movement has helped to develop ambitious theories and challenge the Brazilian system. New authors have chosen this area to study and develop their research. This modest beginning has been helpful in furthering future debate.

In the judiciary branch, the struggle has just begun. This is an area in which justices and judges now need substantive theories to win judgments. As Martha Nussbaum says "*along the way we need good reports of science, good discussions of concrete cases, and sensible proposals for activism"* to improve this movement.[121]

In truth, this debate has a long way to go in the direction of civil rights. Indeed, economic and social problems are still barriers, but the movement has become less restricted or closed in philosophical debates. Perhaps that is a new indication that the animal debate will be considered by judges in their decisions.

Several states in Brazil have enacted animal welfare codes aimed at protecting animals. States such as Rio de Janeiro[122] and Santa Catarina[123] initiated the debate in the legislative branch. Finally, the State of São Paulo organized a model code concerning several issues about the animal rights debate. The São Paulo code[124] deals with themes such as fishing, hunting, zoo pathologies, animals used for transportation purposes, animals in agriculture production, slaughtering, animals as entertainment, and animals in research labs.

Brazilian social problems remain a barrier to progress in this debate. Violence, corruption, hunger, lack of education, and health issues will occupy the docket for a long time yet to come. The more traditional Brazilian law schools continue to replicate the systematic teachings based on long established codes and conservative arguments. Despite all the new calls for reform in Brazilian jurisprudence, a system persists that protects the privileged and impedes changes that could broaden or secure the rights of not only humans, but also animals.

[120] Thomas G. Kelch, *Toward a non-property status for animals*, 6 N.Y.U. Envtl. L.J. 531 (1998).

[121] *Martha C. Nussbaum, Animal Rights: The Need for a Theoretical Basis*, *114 Harv. L. Rev.* 1506, 1548–49 (2001).

[122] Rio de Janeiro State Code of the Protection of Animals - statute number 3,900; July 19, 2002.

[123] Santa Catarina State Code of the Protection of Animals - statute number 12,854; December 22, 2003.

[124] São Paulo State Code of Protection of Animal statute number 11,977, August 25, 2005.

VI. Conclusion

As shown in this article, the Brazilian animal law debate has begun. Despite the obstacles in the legislative, executive, and judiciary branches; the Brazilian courts have developed the debate and decided in some of the cases pro interest of animals. A look at the issues of Festival of Oxen, cockfighting, and principally *habeas corpus* for animals brought to courts along with the unique provision of the Brazilian Constitution stating that the government shall protect the fauna and species, prohibiting the cruelty to animals shows that this debate offers a pattern of understanding of how the Brazilian legal system operates.

In the introduction, the creation of a frame of reference for other scholars on this pattern was set as the goal of this article. Hopefully the discussion has provided a substantive overview of this debate. It is possible to say that the best way to understand another legal system is through a comparative analysis on how Brazilian Justices make their reasoned judgment, which is not all that different from how the United States Supreme Court Justices justify theirs. As the above materials suggest, the debate about the proper balancing of human and non-human interests is now well engaged in Brazil.[125]

[125] *Id*.

With Whom will the Dog Remain? On the Meaning of the "Good of the animal" in Israeli Family Custodial Disputes

Pablo Lerner*

I. Introduction

The legal status of companion animals involves multiple and complex subjects: the responsibility of animal owners for abandoned companion animals; civil liability of animal owners following animal attacks or property destruction by animals; and even claims for compensatory damages in the event of harm or death to a companion animal. However, one of the more interesting questions regarding companion animals is the fate of a companion animal in a custody dispute. With whom will the companion animal remain? The answer to this question involves considerations directly linked to the function the companion animal fills in the family and understanding the particularly strong emotional links that developed between human and non human animals. The question to what extent does the legal status of a companion animal be akin to that of a child falls short of being simple.

This article discusses the decision by an Israeli family court in a companion animal custody dispute[1] and provides a good basis for analyzing different questions regarding companion animals in Israeli law through a comparative perspective. Part I of this article examines relevant issues in Israeli law. Part II analyzes the different approaches to animals; particularly the distinction between the property-based approach and the rights-oriented approach. Part III of the article centers on the main issue in the case: the test or standard—the "good of animal"—used to determine with whom the companion pet will remain and examines different considerations of the test. While it is obvious that for many people companion animals have emotional attachments similar to other peoples' feelings for their children; however, this comparison should be carefully analyzed in order to avoid confusions and misunderstanding regarding the nature of legal status of animals. This section compares the interests of the animals vis-à-vis the interests of the couple and argues that the "good of animal" can be analyzed as a functional concept which allows judicial discretion in order to avoid familiar disputes. The article concludes with recommendations regarding future legal reform in the matter. While the case examined in this article is an Israeli case, the article has a comparative outlook and issues and lessons learned have much to offer even in other legal jurisdictions.

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[1] FC 32405/01 *Ploni v. Plonit* [Mar. 18, 2004] (not published) [hereinafter *Ploni*]. The judgment was given by Judge Shochet in the Ramat Gan Family Court.

II. The Background and the Facts

Let us begin with a comparative note, which can be useful for those not familiar with the Israeli approach to companion animals. By and large American courts have adjudicated many more cases regarding animals than Israeli courts. This is not only a logical consequence of the difference in population and size of both countries but it is perhaps linked to a substantial different approach of the public and of the courts who view the legal arena as a natural framework to debate animal right issues. Even cases of: custodial disputes involving companion animals,[2] the residence of a companion animal,[3] or the awarding of the companion pet to the husband although he had gifted it previously to his wife[4] have all received attention from U.S. courts.

While Israeli courts have not been the traditional platform to decide animal rights' issues, recently more and more cases have made their way to the Israeli courts, which have become increasingly proactive and intervene more often in animal rights issues. Legislation of the 1994 Welfare of Animals Law[5] was the milestone that acted as a catalyst for this intervention; consequently, the case law and the breadth of the court's intervention grew as well. A few well publicized cases assisted in increasing the awareness of this change and each discussed wide-ranging issues such as crocodiles' rights not to be fought and be injured in crocodile fights;[6] circumstances under which a municipality can euthanize animals;[7] moral and ethical issues surrounding issues of harm caused to animals;[8] and the legality

[2] *Bennett v. Bennett,* 655 So. 2d 109 (Fla. Dist. Ct. App. 1995) (recognizing special status to pets in dissolution proceedings).

[3] *Akers v. Sellers,* 54 N.E. 2d 779 (Ind. Ct. App. 1944) (possession should accompany ownership when such decision is not contrary to law).

[4] *In re Marriage of Stewart*, 356 N.W. 2d 611 (Iowa Ct. App. 1984). For cases and other decisions of the American Courts on this topic, *see* Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. Am. Acad. Matrim. Law. 1, 9 (2006), Eithne Mills & Keith Akers, *Who Gets the Cats…You or Me? Analyzing Contact and Residence Issues regarding Pets upon Divorce or Separation*, 36 Fam. L. Q. 283, 292 (2002)*;* Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced,* 2 J. Animal L. & Ethics 231 (2007).

[5] 1994 Welfare of Animals Law, S.H. 1447. Sec 2. prohibits cruelty, torture, or harming animals.

[6] FH 1684/96 *Let the Animals Live v. Hamat Gader Recreation Enter* [1997] IsrSC 51(3) 832 [hereinafter *Hamat Gader*]. An English translation is *available at* http://www.animallaw.info/nonus/cases/caislca1684_96.htm (last visited Dec. 7, 2009).

[7] HCJ 6446/96 *The Org. for the Cat in Israel v. Arad Municipality*, [1998] IsrSC 55(1) 769. *See also* HCJ 4884/00 *The Org. for the Cat in Israel v. The Manager of Field Veterinary Serv's.*, [2004] IsrSC 58(5) 502.

[8] *See* HCJ 9232/01 NOAH—*The Israeli Ass'n of Animal Welfare Org's v. The Attorney Gen. of Israel*, [2003] IsrSC 57 (6) 212. This case dismissed the Animal Welfare Regulations (Protection of Animals) (Gavaging Geese) 2001. An English translation can be found in http://www.animallaw.info/nonus/cases/cas_pdf/Israel2003case.pdf (last visit Dec. 7, 2009). *See* Mariann Sullivan & David J. Wolfson, *What's Good for the Goose…The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 Law & Contemp. Probs. 139 (2007). *See also* HCJ 7713/05 NOAH—*The Israeli Association of Animal Welfare Organizations v. The Attorney General of Israel* [Apr. 4, 2006] (not published) (unequivocally determining that from April 4, 2006 the act of gavaging geese is illegal).

of feeding stray cats.[9] A judgment was even reached on the subject of canine use in medical training.[10]

In *Ploni v. Plonit*[11](John Doe v. Jane Doe), the courts were petitioned for the first time, to the author's knowledge, to adjudicate custodial rights of a family companion animal and issued a detailed judgment that reflected the concern and care the Court purported to the issue. In this issue, the petitioner (John Doe) and the defendant (Jane Doe) were involved in a common-law relationship that began in 1996 and ended in 2001. During those years, the couple rescued and raised a blind street cat named Jane Erye and an ailing dog, who in their care recovered following a hysterectomy. In 2001, with the deterioration of the couple's relationship, the defendant left the couples' home taking with her part of the joint property, including the two family pets. The two years following the separation were characterized by maelstrom, litigation regarding financial matters, and complaints filed by the defendant against the plaintiff claiming harassment. Additionally the plaintiff petitioned the Ramat Gan Family Court ("the Court")—already sitting in judgment over the range of issues under litigation—for joint custody of the dog and cat or conversely the separation of the animals between the two litigants, i.e., each litigant would receive one animal. The defendant countered the plaintiff›s claims with the following three arguments; 1) both animals belonged solely to her; 2) she was and had been the sole provider of the animals for some time; 3) the plaintiff had no interest in the animals and was using them as leverage and a means to harass her.

The Court eventually determined that the companion animals would continue to live with the defendant and adjudicated the issue including the use of expert in animal behavior to determine the «good of the animals.»[12] Obviously, ruling using the standard of the "good of the animal," is favorable in the eyes of animal lovers, particularly since this standard[13] recognizes the special status based on the emotional relationship existing between companion animals and humans.[14]

[9] CrC 897/01 *The State of Israel v. N. Yurobsky*, (The Court for Local Affairs of Jerusalem) (not published).

[10] HCJ 9374/02 *Let the Animals Live v. The Chief Health Officer*, [2003] IsrSC 57 (3) 128.

[11] *Ploni, supra* note 1.

[12] Prof. Joseph Tirkel, Tel-Aviv University, expert witness on animal behavior.

[13] *See* Yossi Wolfson, *Law, Family and Other Animals,* 25 Animals & Soc. 13 (2004).

[14] When discussing pets, people often think of cats, dogs, or birds that are found within homes, but this is not always the case, and pets are not always defined in this manner. Apart from the Law of Execution, 1967 (amended from 1999 S.H 1708) no Israeli legislation contains an all-encompassing definition of the word "pet." Included within the index of property that cannot be attached, the Law of Execution lists pet animals living in the home (or in the yard), which do not have a commercial purpose (*see* art. 22 (a) (6)). This definition professes to provide a comprehensive solution for all situations in which individuals possess animals as pets. *See* Pablo Lerner, *Debtors and Animals: Pets as non- Attachable Assets,* 4 Aliyei Mishpat 205 (2004) [in Hebrew]. A previous version of this article in English is *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1302&context=expresso.

III. The Framework for the Legal Discussion

The attorneys for the parties did not question their clients' basic assumption that family companion animals were the property of the couple and agreed in principle with the concept that the companion animals should be included within the division of property and divided according to the relevant property law.[15] The plaintiff requested equal division of the companion animals —or at least equal division of time with them. However, the defendant believed that the companion animals should remain in her sole custody claiming that there had never been an assumption or intention of equal division. (The parties actually were mostly in disagreement over sharing the dog rather than the cat.)[16] The Court, however, determined that the legal discussion should follow a different path than that proposed by the parties: "The concept of companion animals as property does not provide the legal system with tools to adjudicate and resolve the petitions and bring them to a suitable solution"[17] and added that it is more constructive to consider companion animals as family members.

A. The Property Based View: The Property Approach

Traditionally, companion animals were considered possessions, in effect personal property, a belonging.[18] This approach is rebuked by animal welfare and animal protection organizations, which claim that the Property Based View acts as the basis for "the repression of animals." According to this perspective, only when society ceases to consider animals as a possession "will true protection be bequeathed upon them."[19] Animal abuse and victimization occur often because

[15] *See* Movable Property Law, 1971, S.H. 636, sec. 9.

[16] The defendant›s had stronger feeling s of attachment to the dog, rather than the cat. The dog herself was attached to the cat and this issue was a crucial point in the legal discussions *see Ploni, supra* note 1.

[17] *Ploni, supra* note 1, ¶ 16.

[18] *See* Alain Roy, *Maman, bebe et Fido…! L'Animal de Compagnie en Droit Civil ou l'Emergence d'un Noveau Suject de Droit*, Melanges Jean Pineau 131, 137 (B. Moore ed., 2003); Britton, *supra* note 4, at 23; Mills & Akers, *supra* note 4, at 286; Lesley Petrie, *Companion Animals: Valuation and Treatment in Human Society*, Animal Law in Australasia 57, 58 (Peter Sankoff &, Steven White eds., 2009); Annamaria Passantino, *Companion Animals: An Examination of Their Legal Classification in Italy and the Impact of Their Welfare*, 4 J. Animal L. 59, 62 (2008); Brooke J. Bearup, *Pets: Property and the Paradigm of Protection*, 3 J. Animal L. 173, 177 (2007).

[19] See generally Gary Francione, *Animals, Property, and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721 (1994); Gary Francione, *Animals, Property or Persons*?, *in* Animals Rights: Current Debates Law and Policy 108 (C. Sunstein & M. Nussbaum eds., 2004); Petra R. Wicklund, *Abrogating Property Status in the Fight for Animal Rights*, 107 Yale L.J. 586-74 (1997); David Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473 (2000); A. Sohm-Bourgeois, *La personification de l'animal: une tentation a` repousser,* 7 Recueil Dalloz Serey 33, 35 (1990); Barbara Newell, *Animal Custody Disputes: A Growing Crack in the "Legal Thinghood" of Nonhuman Animals*, 6 Animal 179 (2000).

society regards animals as personal property and as such all interests of the animals are subordinate to the proprietary rights of their owners. This approach is supported by certain American scholarship.[20] However, notwithstanding the rhetorical use of "guardianship" as opposed to "ownership"[21] it has yet to find roots in American legislation. Perhaps it is better to talk about "adoption," a term with an obvious humane connotation, when discussing animals[22]. With that said, this Article opines that the use of one term or another does not fundamentally improve the animals' stake—it certainly does not change their legal status[23]—and the removal of one tag or another does not necessarily promise improved affinity.

The Court in *Ploni* did not relinquish the "property-based" view although it did determine that animals should be considered "creatures with a soul,"[24] stressing that while animals should not be viewed as objects, they should not also be viewed as equal to rational beings.[25] Yet the expression "creatures with a soul" is not found in the Israeli legal system and thus raises the question: what is the breadth and effect of this expression on the system? Does the use of the expression "creatures with a soul" create a completely new category that exists somewhere between inanimate objects and humans? The creation of such a new category was used in *Corso v. Crawford Dog and Animal Hospital,*"[26] a case well-known to animal rights activists and also quoted by Judge Shochet in *Ploni.* In *Corso,* a New York court determined that animals are not property, rather a unique construction existing somewhere between inanimate objects and humans.[27]

While this case is discussed in U.S. legal literature [28] it can hardly be considered *ratio decidendi*, particularly since most of the other U.S. judgments in the matter were determined along traditional lines and view companion animals as pets.[29] It is likely that criticism of the traditional approach grew out of the recognition

[20] *See* Favre, *supra* note 19*;* Francione*, Animals, Property and Legal Welfarism:, supra* note 19, at 114. *See also NOAH—The Israeli Association of Animal Welfare Organizations v. The Attorney General, supra* note 8, at 228.

[21] Particularly found in the legislation of certain states such as Rhode Island or the municipal by-law of Berkley West Hollywood, California. *See* Rebecca Huss. *Separation, Custody and Estate Planning Issues Relating to Companion Animals*, 74 U. Col. L. Rev. 181 (2003).

[22] *See infra* note 77.

[23] Yet it cannot be ignored that a change in the term usage can also bring about a change in the relation to and understanding of animals.

[24] *See Ploni, supra* note 1, para. 6 of Judge Shochet's opinion.

[25] *Ploni, supra* note 1, para. 6(d).

[26] *See Corso v. Crawford Dog and Cat Hospital*, 315 NYS 2d. 182 (1979).

[27] In the matter of Corso, the plaintiff sued the Crawford Dog and Cat Hospital for compensatory damages for pain and suffering after her dog died in their care and its body was replaced with a cat›s body in the funeral casket. The plaintiff petitioned the Civil Court of the City of New York, County of Queens to receive compensatory damages for her pain and suffering, which found that the plaintiff had suffered mental anguish due to the wrongful destruction of her pet's body. *See also* Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 Loy. U. Chic. L. Rev. 479 (2004); Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals,* 10 Animal L. 163 (2004)

[28] Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059 (1995).

[29] *See* Gluckman v. American Airlines Inc. 844 F. Supp. 151 S.D.N.Y. (1994). Actually the debate

that property rights do not infer absolute control over animals. Restrictions exist on ownership in this manner or another or at least on the use of it[30] such that those possessing animals face various restrictions on their use. Two basic restrictions are that animals can neither be harmed nor abused.[31]

As an example of the foundation underlying *Corso* and of the assumption supported by the Court (in *Ploni)* is that no one may decree the death of an animal in his last will. But this limitation imposes on the owner of an animal, it is not enough by itself to jeopardize the characterization of animals as property rather, it strengthens the fact that there are circumstances when the law restricts the freedom of owners and does not allow them to do all they want with *their property*.[32] At this point it is important to clarify the association the Court in *Ploni* makes between the characteristics of animals as material objects and animals within the framework of property law.[33]

The Court noted that even in the event animals are not characterized as objects they still fall within the category of property law, and as such it is important to understand the distinction between inanimate objects and animals as a possession of humans. It is generally accepted that opposed to inanimate objects, animals can suffer and feel pain and humans can even interact and develop a relationship with them, a characteristic that is not associated with the relationship between human and inanimate objects. It is true that unlike unanimated property, animals are protected from cruelty.[34] But it is not enough that they are not "property." I can deny *in limine* the idea that a "non property" approach may afford better protection to animals, although there are many who claim that it is precisely the consideration of animals as property which may bestow upon them protection.[35]

Limitations on ownership create a dual system that allows the consideration of animals as both a separate and a special category of property. The property relationship existing between human and nonhuman animals ought to be different than the property relationship existing between humans and inanimate objects.[36]

is not if companion animals are property or fall within another intermediary category, but rather the amount of compensatory damages (market value, sentimental value) the owner is entitled in the event of damage to the animal.

[30] For instance owners are not allowed to change or amend buildings of historical or artistic value. *See* J. Weisman, *Law of Property – Ownership and Concurrent Ownership* 21, 42 (1996-1997) [in Hebrew].

[31] Welfare of Animal Law (The Protection of Animals), *supra* note 5, art. 2.

[32] *See* Weisman, *supra* note 30.

[33] *Ploni, supra* note 1, para. 7

[34] *See* Britton, *supra* note 4, at 33.

[35] Since on one hand people protect their property and on the other a non property status of animals will not avoid their exploitation. *See* Wise, *supra* note 18, at 79, 101. This is in contrast to those who claim that it is impossible to create guidelines which protect animals without abolishing property rights. *See also* Wicklund, *supra* note 19, at 569.

[36] An example of this can be found in Article 90 a BGB Germany according to which animals are not objects (*sache*), and are provided special protection. With that, according to the same article, they are governed by provisions that apply to objects with the necessary modifications. And thus this article has symbolic worth as opposed to relevant realistic value. *See* A. Sultan, *Rights of Animals to Live*, 30 Animals & Soc. 17 (2006); G. Möhe, *Das Gesetz zur Verbessung der Rechtsstellung der Tieres im Bürgerlichen Recht,* 43 Neu Juristische 1993) (1995); L. Holch, *sec. 90 a,* Münchener Kommentart 712-15 (3rd. ed.); Kate M. Nattrass, *". . . Und Die Tiere" Consititutional Protection for Germany's Animals*, 10 Animal L. 238, 288 (2004).A similar solution is found in Swiss Legal System. See Article 641(a)(1) to the Swiss Civilian Code

When property is viewed from the perspective of man's relation to animals, ownership ought to be characterized as a societal phenomenon; one that not only indulges authority but also assumes obligation and involves responsibility toward the other.[37]

B. On Animal Rights

Deliberation about property rights of animal caregivers brings courts to question if animals are to be recognized as right holders. The further animals are distanced from being recognized as possessions, the closer they are brought to being recognized as right holders. The question, "Are animals considered right holders" is complicated to answer. Moreover, the *Ploni* judgment does not provide an absolute unequivocal answer.

> The Court highlighted the moral facet involved in this protection:
> It is fitting that we give an opinion on those same laws that we were petitioned: humans moral obligations to animals…[38] versus the moral obligation held by us as humans not to abuse animals, not to hunt using illegal methods that cause [unnecessary] pain, not to harm them without reason, etc., *animals possess rights* not to be treated in this manner.[39]

We should be cautious with this approach. Indeed, traditional philosophy followed the recognized Anthropocentric Approach—which is basically a variation of the

[37] "Ownership is just a label, connoting a certain set of rights and also duties, and without knowing a lot more, we cannot identify those rights and duties." Cass R. Sunstein, *The Right of Animals*, 70 U. Chi. L. Rev. 387, 399 (2003).

[38] The Court in *Ploni* noted relevant legislation regarding the protection of animals: The Animal Welfare Law, *supra* note 5; The Wild Animals Protection Law, 1955 S.H. 170, Animal Regulations (Slaughter of Beasts), 1944; Animal Welfare Law, (Medical Experiments), 1994, S.H. 1479. *See Ploni, supra* note 1, at para. 6 (b).

[39] *Ploni, supra* note 1, para. 6 (c) (P.L. emphasis added). At this point two aspects are important to understand: First, prohibitions noted within the laws—i.e., the prohibition against abusing animals or the prohibition against hunting—are not just moral suggestions; rather they are legal obligations enforceable to the full measure of the law including explicit punishment. Second, the relationship between the moral obligation and the right is not unequivocal. The concept of right is interwoven with the obligation of another; but the concept of the moral obligation is not necessarily accompanied by the moral right and the existence of the moral obligation does not require recognition of the right of another. Thus, Ploni may be morally obligated to visit a sick friend and he may attempt to visit but get lost along the way. If Ploni performs his moral obligation, the second party cannot claim damages if Ploni did not perform so. This is a different situation than when the obligation is legal rather than moral, and Ploni must prove that certain circumstances prevented him from completing his moral obligation. *See* T. Kelch, *The Role of the Rational and Emotive in a Theory of Animal Rights,* 27 B.C. Envtl. Aff. L. Rev. 1 (1999).

Property Based Approach—and did not consider animals as creatures that possess rights.[40] With that said, contemporary philosophical trends exist that suggest recognizing the special status of animals in society. In this respect are two scholars whose conspicuous advocacy for animal rights should be mentioned: Peter Singer, who campaigns within the totalitarian equality approach,[41] which considers the interests of animals and Tom Regan, considered the most influential figure in the Theory of Rights.[42]

Indeed Judge Shochet in *Ploni* noted the problem associated with recognizing animals as right holders when he quoted from the *Hamat Gadar* judgment, "The school that supports bestowing rights on animals is neither recognized in legislation nor in case law."[43] The theory of animal rights is considered a controversial philosophical trend. In the pure sense, it has neither a basis in legislation nor case law, not in the U.S. nor in other countries. Many are of the opinion that animals are not right holders, rather, humans hold an obligation to them. The determination that humans have a moral obligation to animals is not equivalent to the determination that animals possess rights.[44]

As in other national jurisdictions, Israeli courts refute the claim that animals have inherent rights (as can be claimed regarding humans); but—and within taking a positivist stance—are ready to recognize specific instances in which the law bestows such a right. In *Ploni* the court determined that: "These rights I address are [rights] whose source is human and are bestowed upon animals because this is the humans' aspiration."[45]

[40] The French philosopher René Descartes is known for his radical approach, which refutes animals› status as rights holders and compares them to that of machines (*automates)* lacking all feelings. *See, e.g.,* René Descartes, Discours de la Méthode 124 (Gallimard1991). *Cf.* Susan McCarthy, J. Moussaieff Masson, When Elephants Weep: The Emotional Lives of Animals 30 (1995) (criticizing Descartes' radical approach). A more balanced approach takes into account the need for empathy toward animals and can be found in Kant's approach, which recognized man's obligation to animals but considers man to have a destination of her own and animals an instrument or means for man to achieve her needs. *See* Immanuel Kant Lectures on Ethics 239(trans. Louis Infield, Hackett Publishing, 1980); *see* T. K. Ash, *International Animal Rights: Speciesism and Exclusionary Human Dignity*, 11 Animal L. 195, 208 (2005) (criticizing Kant's approach).

[41] *See* Peter Singer, Animal Liberation (2. ed. translated to Hebrew, S. Dorner, trans) Tel Aviv 1998 at 37; Peter Singer, Ethics in Action*:* Henry Spira and the Animal Rights Movement (1992); Peter Singer, *All Animals are Equal, in* Animal Rights and Human Obligations (Tom Regan & Peter Singer eds., 1989) 148; S. Brooman & D. Legge, Law Relating to Animals 109, 172 (1999); *see also* Z. Levi & N. Levi Ethics, Emotion and ANIMALS 172 (2002) [in Hebrew].

[42] Tom Regan, The Case for Animal Rights (2004); Tom Regan, Animal Rights Human Wrongs (2003); Already in 1889 Henry Salt recognized animal rights see Lyne Létourneau, *Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals,* 40 Alb. L. Rev. 1041, 1043(2003); *see also* Stephen Clark, Animals and their Moral Standing 16 (1997).

[43] *Hamat Gadar* judgment, *supra* note 6, para. 6 (Judge Cheshin).

[44] Joseph R,The Morality of Freedom (1986) (comparing between emotions of man toward animals and between the emotions he (Raz) holds for his works of art) *id*. at 178.

[45] *Ploni, supra* note 1, at para. 6d.

As in other national jurisdictions, Israeli courts refute the claim that animals

How is it possible to amend the discrepancy that animals do not have rights, and man is the one who *bestows* upon them these rights? If the legislator decrees the protection of animals or somehow obligates man to protect animals or act in a certain manner, vis-à-vis animals, is this bequeathing a right on animals?[46] There are those who state that without ability and knowledge, animals cannot "receive" the rights man is bestowing upon them.(need citation) This construction, as is giving expression in *Ploni* by the Court's decision, emphasizes how much this is an elaborate and complicated idea, which requires a framework and discussion larger than the Court is able to provide it in its judgment.

The inability to recognize animals as right holders does not equal the acceptance of cruelty to animals or inacceptable harm to animals. Those who support this concept—Legal Welfarism—are concerned over the welfare of animals,[47] without making animals into right holders.[48] I think that it is legitimate to claim that the good of the animals should not only be a function of the inherent value of the animal (in the style of Tom Regan).[49] Peter Singer himself, a staunch vegetarian, opposes all exploitation of animals and does so almost without mention of the rights theory.

Even if animals do not possess any rights this does not negate the obligations of humans toward them.[50] There are various circles that refuse to accept that animals

[46] *See* W. Hohfeld, Fundamental Legal Conceptions 35 (1996) (reviewing the difficulties on basing the legal relationship between a right and an obligation); *see also* J. Harris, Legal Philosophies (1997).

[47] *See*, e.g., the discussion of animals used in farming. It is acceptable to talk about the welfare of animals in general terms when discussing cruelty to animals. The use of the term "animal welfare" has become more and more recognized after the publication of the Brambell Report in England (1965) which recommended that certain rules be used as a basis for legislation in Europe on the subject. *See* M. Radford, Animal Welfare Law in Britain 264 (2001). *See also* Passantino *supra* note 18, at 82

[48] *See* Francione, *Animals, Property, and Legal Welfarism*, *supra* note 19, at 739; *see also NOAH v. The Attorney General of Israel, supra* note 8, at 230.

[49] With that, Tom Regan also encounters this issue, particularly when he is asked to determine a solution for the following problem: Four people and a dog are caught in a boat during a storm, and in order to survive one of the five needs to be thrown overboard. According to Regan›s theory, a raffle is the fair way to determine who will be thrown overboard, but this solution does not appear to be the correct response. In this situation even if Regan agrees that the correct response is to throw the dog overboard, how in fact does he justify this response that negates the interests of the animals? According to Regan this scenario is the lesser of evils, but with that it should be determined if there are other options existing between choosing between the life of the dog and the life of the animal. While it is clear that the person has greater potential than the dog, this theory is certainly anthropocentric, since Regan is forced to accept the determination about the future potential according to the human criteria and not according to what can be determined to be the dog›s interests. *See* Regan, *supra* note 43, at 306.

[50] Raz, *The Morality of Freedom*, *supra* note 130, at 177; *see e.g.* J.W. Harris, Legal Philosophies 83 (1997) (providing criticism about the difficulty of defining legal relationships in terms of obligations and rights); Wesley Newcomb Hohfeld, Fundamental Legal Conceptions: As Applied in Judicial Reasoning and Other Legal Essays 11 ff. (David Campbell & Philip Thomas eds., 2001) (concerning the rights-obligations relationship)**.**

possess rights, but are willing to accept that animals have interests.[51] The Theory of Interests assists in overcoming the issue of enforcement, which can deter the existence of the right since it is easier to discuss the interests of animals without arguing that animals cannot, by themselves, enforce the protection of their "rights."[52] The use of interests, as opposed to rights, is purely semantic. If the animal has an interest not to suffer, is there no recognition of the animal's right not to suffer?[53] Moreover, the granting of rights to animals does not draw the conclusion that they have the *same* rights as humans,[54] or suggest that their rights are more absolute than human rights.[55] To make a facile equation between the two is tantamount to anthropomorphism[56] an approach that surely should be avoided.[57] There are also those who claim that the general protection of animals is not a question of morals, rights, or animal interests, rather it is a question of emotion.[58] This article is certainly not the suitable framework to debate in depth animal rights. It seems clear that even if animal rights are not recognized, human beings do not have an unlimited privilege to harm them or expose them to cruelty.

[51] *See* R. G. Frey, *Interests and Rights: The Case Against Animals* 79, 142 (1980); *see also* J. Feinberg Harm to Others 70 (1984); L. Létourneau, *Toward Animal Liberation, The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals*, 40 Alb. L. Rev. 1041, 1047 (2003).

[52] It is certainly possible to recognize the rights of animals, even if the enforcement of these rights is carried out by man. One of the criteria of the existence of the right is that the right holder can choose to have that right enforced and ignores the fact that many humans (babies, individuals with special needs, the elderly, etc.) cannot enforce their rights and cannot turn to the courts to have them protected. With that said, this does not negate the existence of their right.

[53] Bentham is famous for noting: The day *may* come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum* are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*?, nor Can they *talk*? but, Can they *suffer? See* Jeremy Bentham, Introduction to the Principles of Morals and Legislation ch. 17, sec. 1 (*reprinted in* Tom regan Peter Singer, Animal Rights and Human Obligations 26 (1976).

[54] For example no one would argue that animals have a right to education or citizenship.

[55] *See* Alan Gewirth, *Are there Absolute Rights?*, in Theories of Rights 91 (Jeremy Waldron ed., 1984).

[56] *Cf.* A. Sohm-Bourgeois, *La personification de l'animal: une tentation à repousser*, Dalloz Chronique 33-37 (1990).

[57] Some theorists try to avoid the problem of comparing humans to animals by using the word "interests" instead of "rights" to describe what animals should be legally entitled to, but this is purely a matter of semantics. *See* Joel Feinberg, Harm to Others 58, 70 (1984) (concerning animals "interests").

[58] *See* Avinoam Ben Ze'ev, *The Reason for the Prohibition on Abusing Crocodiles*, 4 Mishpat U' Mimshal. 763, 774 (1998) [in Hebrew] in which the author claims that the argument to prevent the abuse of animals is emotional and not moral. *See also id*. at 774. *Cf*. Yossi Wolfson, *The Status of Animals under Morality and the Law,* 5 Mishpat U' Mimshal 551, 551-64 (1999).[in Hebrew].

However, there are cases where *the law* seems to recognize that animals have a certain sort of rights. Yet, the recognition in positive law cannot contribute to finding a clear framework for defining the status of animals. A positive law approach creates even more theoretical difficulties because to say that an animal has only those rights recognized by positive law leaves room to question whether there are animal rights not yet recognized by law.[59] This approach leads to cumbersome discussions involving distinctions between "natural rights" and "positive rights,"[60] and will add nothing to the effective protection of the animals. Such debates simply divert us from finding the criteria we should use to determine whether certain animals are owed specific treatment by humans. Israeli Law does not recognize that animals have rights. Moreover, even a recent initiative to change the name of the Welfare of Animals Act (Protection of Animals) 1994 to Rights of Animal Law, was not accepted by the Knesset, the Israeli Parliament.[61] Israeli case law is partner to this approach and the decisions of Israeli ourts fall short of being rights-approach based…[62] The use of rights-talk regarding the status of animals may be linked to ideological considerations and the need of enhance the limited protection that can arise out of utilitarian considerations[63].

The importance of *Ploni* judgment is not in a philosophical discussion of the term "right." Rather its importance is controversially in the search for a solution grounded in facts—in my opinion of which there is no debate—that a large number of people consider their companion animals to be family members.[64] The argument that the parties presented to the counter this claim is based not only in their inability to categorize the animals as right holders or as property, but also a result of existing tension between their interests (i.e., each side wanted to have the animals live with them). The Court in *Ploni* attempted to find an avenue to remove the dispute from focusing only on the interests of the parties and bring it to involving also the interests of the animals and thus, decided to issue its ruling based on the "good of the animal."

Since this judgment is groundbreaking, it is important to determine what is the meaning of the "good of the animal," and particularly to note the differences and similarities between the "good of the animal" and the known family law criteria of the "good of the child."

[59] *See* Pablo Lerner, Alfredo M. Rabello, *The Prohibition Of Ritual Slaughtering (Kosher Shechita And Halal) And Freedom of Religion of Minorities*, 22 J. L. & Rel. 1,24 (2006-07).

[60] *See* Margaret Mc Donald, *Natural Rights*, *in* Theories of Rights 21 (Jeremy Waldron ed., 1984).

[61] The rejection was done during the plenary session of 28.10.2009. See the comments of Ehud Peled *Workers and Women have…also Animals have Rights* www.ynet.co.il/articles/1,7340,L-3800516,00.html [in Hebrew] (last visited Dec. 3, 2009).

[62] *See* Judge Cheshin in *Hamat Gader*, *supra* note 6 at, 857. This is clear, for example, in the decision regarding geese gavaging. *See Noah , supra* note 8, passim.

[63] Deidre Bourke, *The Use of and Misuse of Rights-Talk by the Animal Rights Movement*, *in* Animal Law in Australasia, *supra* note 18, at.128, 149.

[64] *See Bueckner v. Hamel,* 886 SW 2d. 368, 378 (Tex. App. 19 1994) cited in *Ploni, supra* note 1, para. 16. *See also* Britton, *supra* note 5 at 1.

IV. The "Good of the Animal" Test

A. Introduction

While the concept "the good of the animal" standard is recognized in other countries,[65] to my best knowledge, this is the first instance in which a court in Israel has been asked to adjudicate this matter and did so using this standard. And thus the judgment in *Ploni* was a refreshing, innovative decision. As noted previously, the "good of the animal" immediately reminds us of another test used by family courts "the good of the child."[66] The test, the good of the child, is a flexible, wide, and ambiguous test.[67] The expansion of the standard in the direction of the "good of the animal" causes mixed emotions. On the one hand, the use raises the value and status of the animals. On the other hand, those to whom the rights of children are important may be concerned that the comparison between the two tests may blur the differences that exist between the children and animals.

This article opines that the use of the "good of the animal" test does not harm the status of children in society. A person can treat their companion animal as their child but this does not mean, as is detailed below, that a companion animal equals a child, nor should a child be treated as a companion animal. The "good of the animal" test provides a suitable framework to add characteristics that are appropriate for animals, but not the same characteristics that are appropriate for children.

These distinctions raise a few questions: Particularly how is this standard defined, and what are the differences in determining the "good of the animal" as opposed to determining the "good of the child?"

[65] *See, e.g., Raymond v. Lachman*, 695 NYS 2d. 308 (1999) (The "good of the animal" test is well known in the United States). In Switzerland the Article 651 (a) 1 of the Civil Codex notes that in a dispute involving animal owners the criteria for determining to whom the animal will live, is the good of the animal standard ("le juge attribue en cas de litige la propiété exclusive à la partie qui […] représente la meilleure solution pour l`animal"). *See* Roy, *supra* note 18, at 42.

[66] The «good of the child» test is used by family courts to determine child custody battles and other such issues involving children. *See, e.g.,* Y. Kaplan, *From the Good of the Child to the Right of the Child,* 31 Mishpatim 623, 631 (2000) [in Hebrew]; N. Mimon, Child Adoption Law 237 (1993) [in Hebrew]; P. Shifman, Family Law in Israel v. 2, 287 (1988) [in Hebrew]; Yair Ronen, Including Children in Child Custody decision 27 (1996) [in Hebrew]; M. Minow, *Rights for the Next Generation: A Feminist's Approach to Children's Rights,* 9 Harv. Women's J. L. 1-24 (1986); L. Bilsky, *Child-Parent-State: the Absence of Community in the Courts' Approach to Education, in* Children's Rights and Traditional Values 134 (G. Douglas & Leslie Sebba eds., 1998).

[67] *See* CA 2266/93 Ploni v. Almoni [1995] IsrSC 49(1) 221 (ruling of Judge Strassberg-Cohen); *see also* The Report of the Committee to Determine the Standards of Children in Law Report 133 (2003) [hereinafter Rotlevy Report].

B. The Differences in the Two Standards

It is correct to note that in certain instances animals and children are exposed to the same dangers, particularly since both cannot protect themselves against humans who might abuse them. As noted by Judge Cheshin in *Hamat Gader:*

> Animals are like children, innocent and defenseless. Child abuse is likely to shock us as does animal abuse. The animal—like the child—is innocent and does not recognize evil nor does he know how to handle evil. Humans are decreed to protect animals as part of their general decree as they are decreed to protect the weak.[68]

Proponents of animal protection compare the status of animals to that of children.[69] The assumption on which they rest is that in the past children were completely under the control of their parents; today different concepts rule, according to which children have rights that are independent of their parents' rights and without any relationship to their parents' opinions, wants, or desires. With that said, this comparison ignores the differences between the status of children and animals in society; particularly that children are humans.[70] There will be those who claim that this stance is based on Speciesism[71] (a bias against animals in favor of humans based on the fact that they are different species. The protection of animals is not dependent on the complete assimilation between animals and humans; rather *antropoformism*, may blur the need of understanding natural differences between humans and animals and it is important to be careful not to take a bold stance regarding the personification of animals,[72] particularly since the end result can bring about a negative result.[73]

Yet, it is important to remember that *Hamat Gader* discussed the abuse of animals within a commercial framework and *Ploni* hinges upon a family dispute and not harm to the animals. As a matter of fact just the opposite is true; both sides in the dispute argue in favor of their home being the best place to raise the animal.[74]

[68] *See Hamat Gader, supra* note 6, at 859.

[69] Some even compare animals› rights with majority rights such as slaves or women. *See, e.g.,* D. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 Hastings Women's L.J. 255 (1998).

[70] Even though the status of slaves was much worse than the status of children, the same claim can be made about women and slaves. If only not for the fact that children eventually stop being children at some point in their life and slavery is for eternity.

[71] Created in 1973 by Richard D Ryder denoting the prejudice or basis in favor of one species as opposed to the other. *See* Victims of Science: The Use of Animals in Research (1975). *See also* Steven White, *Exploiting Different Philosophical Approaches to Animal Protection in Law*, Animal law in Australasia, *supra* note 18, at 79. Comp. Joan Dunayer, Speciesism passim (2004).

[72] In the Middle Ages it was common to prosecute animals in criminal courts, to find them guilty, and to execute them. *See* Yossi Wolfson, *supra* note 58 at 559; *see also* Gary Francione, Animal Property and the Law 93 (1995).

[73] *See* A. Sohm-Bourgeois, *La personification de l'animal: une tentation á repousser,* Recueil Dalloz chs. 33-37 (1990).

[74] See, e.g., Women's Equal Rights Law, art. 3 (b) 5711-1951, 5 LSI 33 (1951-52); The Legal

The "good of the child" standard has a legal standing and appears in numerous legislation. [75] However, the good of the animal has yet to receive recognition in legislation, and there are also substantial differences between it and the good of the child. Some of these differences are discussed below.

1. The Manner the Relationship between the Animal and Human is Created

The question "to whom does the child belong" usually receives a clear and comprehensive answer. Particularly since parenthood is a biological issue, or in the matter of adoption, according to a court decision or writ. However, the relationship between a person and an animal is—even in the cases the term adoption is used—a matter of ownership[76].

The Court in *Ploni* questioned if the matter was a joint custody dispute? The defendant claimed that the fact that the animals were "collected" and brought into the household of the couple, did not make the issue a question of joint ownership nor did it provide the plaintiff with a standing in the matter. According to the defendant, it was she who took care of the animals, fed them, walked them, and took them to the veterinary; moreover, she paid for their care and food expenses from her funds. An expense, she added, that did not obviously stop after the defendant left the couples jointly held abode. Yet, the fact that one side paid for the majority of expenses and put in the majority of the efforts is not, in itself, a deciding factor.

The standard of the "good of the animal" is only relevant when the sides cannot reach a decision by themselves regarding the fate of the animals. Accordingly, if the Court was able to prove that the animals were the property of one of the sides in the dispute, the question of to whom belongs the animals would not have been asked nor would the use of the "good of the animal" standard be an issue. Additionally, if the animals were the sole property of one of the sides of the dispute prior to the beginning of their relationship, the Court would obviously not have to determine the issue vis-à-vis the relationship between the parties and the animals. Even more to the point, if one of the sides were able to prove that the animals were a conditional gift[77] from one side to the other, conditional on the parties staying together, the use of the standard, again, would not have been an issue. Thus, if the couple were to separate the gift would return to its owner.

Capacity & Guardianship Law of 1962 16 L.S.I. 106*;* Convention on the Rights of the Child, Feb. 16, 1995, 1577 U.N.T.S. 3; *see also* S. Cretney & J. Masson, 1989 Convention on the Rights of the Child, Principles of Family Law 584 (6th ed., 1977).

[75] *See, e.g.,* Women's Equal Rights Law, art. 3 (b) 5711-1951, 5 LSI 171 (1951-52) The Legal Capacity & Guardianship Law 5722 of 1962 16 L.S.I. 106; Convention on the Rights of the Child, Feb. 16, 1995, 1577 U.N.T.S. 3; *see also* S. Cretney & J. Masson, 1989 Convention on the Rights of the Child, Principles of Family Law 584 (6th ed., 1977).

[76] *See also supra* note 18.

[77] *See* Alfredo M. Rabello, GIFT LAW 295. (2d 1996) Not in English in WorldCat; Comp *in Re Marriage of Steward*, *supra* note 4 [in Hebrew].

I am uncertain that the standard the "good of the animal" has any value if the sides refuse to accept the animal. Since, obviously, one cannot force another to take on the responsibility of caring for an animal and in this case another type of solution is needed such as the transfer of the animal to a third party, as a present or sale. This solution is not viable in the matter of children and if this is the case the perpetrator of the act is liable under Article 365 of the Penal Law, 1977.[78]

The relationship between parents and an adopted child can be due to the child being "handed over to adoption" by her biological parents.[79] Or in some instances, social welfare services may remove a child from a family due to real and imminent danger or harm to the child. The same can be said in the case of an animal in which abuse is suspected. The animal can be removed and given to another person.[80] Regardless, this was not the case in *Ploni.*

2. The Development Aspect

Childhood is a temporal status.[81] At a certain stage a child turns into an adult and after the child becomes 18 years old the legal system of rights and obligations existing between the child and the parent change.[82] This is not, however, the case with animals, which are permanently dependent on their care takers. Moreover, the child's age has a great impact in child custody issues. The presumption of early child, in effect in Israel, determines that a child under the age of six years old is best off with his mother.[83] The criteria determined in the presumption of early childhood are obviously not relevant for animals and this subject was not even approached.

3. Scope of Needs

Certainly the system of rights and obligations vis-à-vis children and parents are fundamentally different than the system of rights and obligations vis-à-vis animals and their owners. And there is an additional difference in the scope of

[78] Penal Law, 1977, L.S.I .226 + amendments *available at* http://www.knesset.gov.il/review/data/eng/law/kns8_penallaw_eng.pdf.

[79] An act that in its procedure and substance is greatly different than transferring or giving an animal to adoption, even when the expression "give the animal up for adoption" is used.

[80] *See* the Welfare of Animals Act (Protection of Animals), *supra* note 5.

[81] *See* Avner Shaki, *Main Characteristics of the Law of Child Custody*, 10 Iyunei Mishpat 5, 15 (1984) [in Hebrew]; *See also* I. Kaplan, *New Trends in Corporal Punishment of Children for Educational Purposes,* 3 Kiryat Mishpat 447, 459 (2003). [in Hebrew]

[82] *See* Capacity and Guardianship Law, 5722-1962, 16 L.S.I. 106 (5722-1961/62) (determines that an individual under the age of 18 a child is considered a minor; whereas 18 years and older is considered an adult). In certain situations, such as the right to child support, parental obligations can continue after the age of 18. *See* CA 4480/93 [1994] IsrSC 47 461.

[83] This principle is based in Jewish law. However the Jew Sages have differing opinions about its relevance. *See* Eliav Schochetman, *The Essence of three Principle Governing the Custody of the Children in Jewish Law,* 1 Ybk. Jew. L. 285, 292 (1977) [in Hebrew]; *see also* Israel Gilat, THE Relations Between Parents and Children in Israel and Jewish Law 387 (2000) [in Hebrew].

interests that are brought into consideration in the "good of the child" as opposed to the "good of the animal." As noted by Prof. Shaki:

> These different and changing needs [of the child] are complex mixtures of acceptable living conditions, an adequate financial situation, reasonable cultural and social conditions, an educational environment, dedicated and correct care and treatment, the legal and emotional capacity of the parent to care for the child, and mental capability and availability of the parent to provide the child with proximity, love, warmth, security and belief, and above all—the feeling that he [or she] is wanted by the parent and surroundings.[84]

It is again understandable that some of the aforementioned interests, for instance an educational environment, which is a central issue in child custody cases, are not relevant in animal custody cases. Certainly social relationships, lifestyle, and religious choice is additionally irrelevant. The gender of the child is an additional factor that has an effect in child custody cases, particularly in cases in which the Rabbinical Court is the court of instance[85] but not in animal custody disputes. In many instances, child custody is a function of the socio-economic conditions of the parents and the courts' approval or support of one type of lifestyle over the other;[86] another factor that is irrelevant in animal custodial disputes. Also the financial support needed is different in each matter.

The good of the animal is measured using different standards, such as the effective relationship between the animal and the owner;[87] time and financial resources each owner is able to dedicate to the animal; or the physical conditions each owner can provide the animal; and even sometimes the determining factor can be the animal's health—it is considered unwise to disturb an ill animal by moving them to new surroundings.

4. The Influence of the Child's or Animal's Preference on the Decision

In child custody cases it is customary—at least from a certain age—to consider the child's opinion. Factors such as the child's age, maturity, personal circumstances, etc., influence the emphasis the courts give to the child's opinion.[88]

[84] Shaki, *supra* note 80, at; *see* also Yihiel Kaplan, *New Trends in Corporal Punishment of Children for Educational Purposes,* 3 Kiryat Mishpat 447, 459 (2003) [in Hebrew].

[85] *See* Schochetman, *supra* note 82 (discussing the Rabbinical Courts preference for mothers to be the custodial parent when the child in dispute is a girl and fathers in instances the child is a boy).

[86] Rabbinical Courts are known to find that a religious education is a positive characteristic of the good of the child.

[87] For example in *Ploni* the court appointed expert determined that while the dog was sad after being separated from the defendant, he was apathetic after being separated from the plaintiff. *See Ploni, supra* note 1, para. 17

[88] See Huss, *supra* note 21 at 228; Stroh, *supra* note 4 at 253

A large percentage of the courts' (and the rabbinical courts) decisions regarding the "good of the child" are based on the professional opinions of social workers and psychologists, who examine, inter alia, the child's preference. Additionally, in the past few years there is a trend to consider as well rights the child is entitled to. As part of the transformation of the "good of the child" to the "rights of the minor," [89] it is acceptable to recognize the right of the child to a defined cultural identity [90] or to provide a state appointed attorney for the minor.

It is clear with animals there is no reason to discuss the "right to an identity" or the "right to citizenship." With that said, there is nothing preventing the courts from determining the custody of an animal based on that animal's preference and this is even preferable. For instance, it is possible to consider the independent representation of the animal in court.[91] With that as I have suggested above, I do not purport to suggest that the examination of the "good of the animal" should reach such levels; rather it is enough to appoint an expert as a "proxy witness" to determine the preference of the animal. In the matter of *Ploni,* instead of a social worker, the Court accepted an expert on animal behavior.

In *Ploni* this is not explicit stated; rather in my opinion, the emotional relationship that an animal develops is crucial in determining its best interests. Moreover, it is important to remember that this is a reciprocal relationship. The relationship between the individual and animal is directly determined by the amount of love and attention that individual gives to the animal. Additionally the more a person is attached to an animal the more that animal is attached to the person.[92] It is needless to note that a person who is violent toward an animal has no standing in animal custody disputes.[93]

V. The Standard of the Good of the Animal and Other Interests

The "good of the animal" standard need not be the only criteria used to determine animal custody disputes. Again we must differentiate between children

[89] *See* Kaplan, *supra* note 83; Shifman, *supra* note 66, at 239; Rotlevy Report, *supra* note 67, at 22. The relationship between the good of the child" and the "rights of the child" was examined in the case law. *See* Ploni v. Ploni [1995] IsrSC 49(1) 221, 251 (Judge Strassberg-Cohen). The concept of animal rights is also visible in the Israeli case law, albeit the concept of animal rights, as discussed above, has not yet fully crystallized nor is it without dispute.

[90] *See* Yair Ronen, *The Rights of a Child to an Identity as a Right to Relevance*, 26 Tel Aviv University Law Review 935 (2002) [in Hebrew].

[91] *See* Chistopher Stone, *Should Trees Have Standing: Towards Legal Rights for Natural Objects,* 45 S. Cal. L. Rev. 450 (1970); St. Pierre, *supra* note 69, at 271. In actuality, this concept discusses natural treasures or animals that are in danger or on the verge of extinction and individuals or groups turn to legal instances for their protection and this is not a custody battle between animal owners. See also Mills and Akers, *supra* note 4 at 298.

[92] It is recognizably likely that because of an individuals' life style, work schedule, etc. an animal will develop an affinity toward one family member as opposed to the other; even considering that the other individual loves the animal and even then cannot develop a significant relationship with it.

[93] *See* Dianna Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence,* 13 Yale J.L. & Feminism 97 (2001).

and animals. There are those who claim that the "good of the child" standard should be given the most weight and greatest influence among all the other tests;[94] and there are those who claim that the "good of the child" standard loses its standing in light of other relevant interests such as: peace in the family, the interests of other children, the needs of the parents, etc.[95] However, even if we recognize the "good of the animal" standard in order to settle animal custody disputes, the need for the standard will always be conditional upon other interests, and there might even be cases in which the "good of the animal" standard is not applied at all.

For instance, if the animal is used as a means to support one of the sides in a custodial dispute, for instance a speaking parrot in an artistic performance, the court is likely to degrade the importance of the "good of the animal" standard.[96] Another example is instances in which a family member's, particularly a child's, positive relationship with the animal can overcome the "good of the animal" standard. In this case the "good of the child" is deemed more important than the "good of the animal."[97] In *Ploni* the good of the animals was understood, not just on the basis of the relationship between man and animal, but also between animal and animal. The Court paid special attention to the fact that the dog and the cat had developed certain interdependence.[98] Nevertheless I should assume that if in a family of two children and two animals, the children are separated between the parents, the court will likely divide the animals as well[99]. However, if both children remain in the custody of only one parent, the court would likely keep the animals together with the children.[100]

A. The Purpose of the Good of the Animal Standard

The Court was correct in determining the case using the "good of the animal" standard. This is an important determination. I stand by and support the recognition of the needs of animals in all matters and in custodial disputes in particular. With that said, it is important to recognize the complexity of the "good of the animal" standard.

[94] See Rotlevy Report, *supra* note 67, at 137, 138.

[95] Shifman, *supra* note 66, at 217.

[96] Of course, unless the animal act causes harm or abuses the animal in some manner. In these cases the «good of the animal» takes precedence over the economic benefits of the animal act. *See Hamat Gader, supra* note 6, at 853.

[97] In *Ploni,* the dog and the cat were used to living together and thus the court determined that the dog and cat should remain together. *See Ploni, supra* note 1, para. 23.

[98] *See* Huss, *supra* note 21, at 229 discussing this situation.

[99] In a case that two animals living under the same roof do not have an amicable relationship, would a court separate them? Separation of a couple can provide an opportunity to separate the two animals, which can either benefit them both or at least one. Can the court force the sides to separate the animals, disregarding the desires of either side, or getting them to agree to the change? I suggest that the court cannot force the separation of the animals or force one of the sides to care for one of the animals, except in situations such as *Ploni* in which both sides were in a dispute.

[100] «[U]sually if there are children in the family, companion animals will be allocated to the parent with primary custody, leaving the ‹pact› intact.» Huss, *supra* note 21, at 229.

The Court in *Ploni* stated that it examined the case based solely on the good of the animal and even declared that it did not consider the parties emotions or their affinity to the animals.[101] This would seem to mean an animal centered view; however, in fact this is really a human centered view since the Court recognized the interests of the couple or to be more exact each of the interests of the sides. In this sense the "good of the animal" test applied by the Court is an expression of *Legal Welfarism*.[102] Israeli case law has traditionally placed animal's interests below that of humans' interests.[103] When the issue relates to the interests of humans vis-à-vis interests of the animals, it is acceptable to cause—at least at certain amount of pain and suffering to the animal, when considerations for the justification for inflicting pain are utilitarian. If the benefit to man outweighs the distress and harm caused, the pain caused to the animal is therefore acceptable.[104] Judge Shochet does not detour from these thoughts and notes this explicitly:

> Animal rights are proportionate and not defined[;] since their most basic right given to all living creatures—the right to life—can be taken away from them only if it is a just purpose allowed by law and with reduction and minimization of pain and suffering caused to them.[105]

There are those who will claim that Judge Schochet's statement is incorrect since the Court was not asked to take a stance on harm and suffering to animals; rather it was asked to determine their custodial arrangement. The "good of the animal" does not just need to prevent the abuse of the animal, it also needs to recognize and consider all of the needs of the animal itself. However, in my opinion, regardless of the use of the standard of the "good of the animal," in *Ploni* it served the general interests of the sides (or, at least, what the court determined was the interests of the sides). In *Ploni,* the use of the "good of the animal" was also used to prevent the use of the animals as a means for one side to hurt the other.

How is the "good of the animal" standard determined? According to Judge Shochet the standard is based on two layers: The *first* layer is the visible interests of the animals, i.e., recognition of the needs of the cat and dog by examining which of the sides was the most qualified to care for them. In his judgment Judge Shochet agreed with the Court's expert who had examined the physical conditions available

[101] *See Ploni, supra* note 1, at para. 17.

[102] *See supra* the text adjacent to note 44.

[103] *See, e.g., Hamat Gader, supra* note 6; *The Organization for the Cat in Israel v. Arad Municipality, supra* note 7; *State of Israel v. N. Yurobsky, supra* note 9. This is in fact the Jewish approach, which justifies a certain level of pain and suffering to an animal, on the condition that it is not without reason or cause. *See, e.g.,* Rambam, The Teacher of the Perplexed, 3 (17). *See also* the opinion of Judge Tirkel in *Hamat Gader, supra* note 6, at 873.

[104] *See, e.g.,* Robert Nozick, Kantianism for People-Utilitarianism for Animals 35, 39 (1974); Evelyn B. Pluhar & Bernard E. Rollin, Beyond Prejudice: The Moral Significance of Human and Non-Human Animals 58 (1995); Harold Guither, Animal Rights 15 (1998); Francione, *supra* note 37, at 110-18; Regan, *The Case for Animal Rights*, *supra* note 42, at 89, 174.

[105] *Ploni, supra* note 1, at para. 6(c).

to each animal at each sides' disposal, and even the relationship that existed between the cat and the dog. The *second* layer is relatively hidden and relates to the Court's attempt to enlarge their basis of discretion and create a larger set of interests and standards—more encompassing that used in simple property disputes—to arrive at a just decision. And in retrospect what sounds better than the decision was determined according to the "good of the animal" standard, which itself is based on a series and combination of the animals' interests.

The Court's use of the "good of the animal" standard allowed the court the freedom to determine the issue on a series of considerations and prevent the sides of the dispute from using this issue to harm one another and in consequence harm the animals as well.[106] The Court sought to balance the interests of the animals and the need to avoid possible future conflicts between the couple. Or in other words, removing the animals from the arena of dispute existing between the man and the woman and since the relationship between the sides and the animals is subjective, the Court is at liberty to examine additional objective components (physical surroundings, time dedicated to the animal, etc.).

One issue that needs to be considered in reviewing the "good of the animal" standard is visitation rights between the noncustodial caregiver and the animal. In *Ploni,* the plaintiff requested visitation rights—customary in child custody disputes as well—which were in principle agreed upon by the expert. However the Court decided to not allow visitation rights and based its decision on the following two considerations:

1. Visitation, on its own, is not a meaningful experience for animals and is considered by the animal as the creation of a new relationship each visit due to the long interim between visits.
2. Visitation can eternalize the friction between the sides in light of the disturbing relationship that had developed between the two. This is particularly acute in light of the plaintiff's attempts to not only continue his relationship with the dog, but also with the defendant as well. Attempts, which according to the defendant, constituted harassment as she claimed during the trial.[107]

The two considerations of the Court expose the issue from two different angles. Under the first consideration, the Court examined if the visits were necessary for the animal and in fact contributed to the animal's well-being on a whole. Under the second consideration the Court analyzed other factors not associated with the "good of the animal;" the difference between determining according to the "good of the animal" standard and allowing visitation rights based on other considerations. As opposed to visitation rights by the noncustodial parent which greatly benefit the child, visitation of the dog by the plaintiff once every two weeks would not likely

[106] According to the expert›s opinion, the dog was unable to be separated from the defendant, and such a separation would harm the dog. *See Ploni, supra* note 1, at para. 18.

[107] *See Ploni, supra* note 1, at 22.

aid the well-being of the dog. Thus, anyone reading the opinion of the expert would realize that the visitation rights were not to benefit the animal, but rather to benefit the plaintiff who was not awarded custody but was still interested in maintaining an emotional relationship with the animal.

Yet, the determination—without considering the *Ploni* case—that a continued relationship is not important to the animal is too sweeping. There are certainly animals, particularly certain types of dogs, who can have a relationship with individuals other than their owners, even their past owners; thus, there is certainly no reason to negate the existence of benefits in such a relationship between an individual and animal,[108] especially one which likes to go for walks, play, etc.[109]

Behind the second consideration by the Court lies its doubt regarding the plaintiff's true feelings toward the dog, and determined that if this was his true feeling, at face value, there was no reason to allow the plaintiff to use the visitation of the dog as a source of friction between the plaintiff and the defendant.[110] If we are to understand the "good of the animal" standard whose goal is inter alia, to prevent continuing disputes between the sides, visitation can foil this aim. Here again the differences between the "good of the child" standard and the "good of the animal" standard are clear. In child custody cases, the court only in very rare instances prevents the noncustodial parent from visiting with the child; whereas in animal custody cases, the court will easily bock visitation upon the assumption that the lack of visitation will not harm the animal nor the noncustodial owner. Theoretically it could be though a third person taking the dog to a safe place where the man could meet the dog, without meeting the women (and in this way avoid potential friction). But this solution seems cumbersome.

The adjudication of the matter according to the "good of the animal" standard does not solve another problem: one side using the need to determine the "good of the animal" to harm the other side to the dispute. In children custody disputes, social workers and welfare officials are asked to give their opinions on the "good of the child," whereas in animal custody disputes, experts—which are paid by the sides to the dispute—are asked to give their opinions in the matter. Payment of an expert can be expensive, and might deter some couples who have no means to pay from bringing this issue to court.[111] It is even feasible that one side of the dispute will insist on the "good of the animal standard" in order to cause additional stress to the opposing side knowing that she or he cannot pay the additional costs of an expert. In order to prevent the "good of the animal" standard from being used as a double-edged sword, court should include the use of "good faith" when examining the disputants' actions to determine if the disputant is really concerned over the "good of the animal" or rather is suing the standard as a means and tactic to harm or punish the opposing side.

[108] *See* Stroh, *supra* note 4, at 245.

[109] I am grateful to Prof. Joseph Tirkel for clarifying this issue.

[110] It is likely that the expert witness, when determining visitation rights, was not aware of the unhealthy relationship between the parties.

[111] I am grateful to Judge Rivka Makayes, Judge in the Kfar Saba Family Court for bringing this point to my attention.

An important fact to be considered is does the noncustodial owner in fact loose all control over the destiny of the animal? Let's say that the noncustodial owner suspects that the custodial owner is in fact not caring for the animal in an acceptable manner. Can the noncustodial owner verify the care of the animal or in fact ensure that the custodial owner does not give away or sell the animal? One possible solution to this problem is the completion of periodic reports by the custodial owner to be turned over to the noncustodial owner regarding the care and treatment of the animal. Moreover, if the custodial owner acts in a manner that is opposed to the court's order or harms the animal in any form, the noncustodial owner can always consider a tort suit based on claims of negligence. Furthermore, as is the case in child custody cases, if the custodial conditions and circumstances change, the noncustodial owner can submit a petition to the court for a change in custody[112].

B. Can There be a Price Tag on the Price of the Cat and Dog?

One issue which was not determined in *Ploni* is how much is a dog and cat worth?[113] As a matter of fact the issue raises two questions: *First,* was the animal or animals transferred to one of the sides based upon the "good of the animal" standard. *Second,* does this in itself nullify all claims by the non-custodial owner for monetary damages? In either case, is it possible to calculate monetary damages? In *Ploni,* the defendant offered to assist the plaintiff adopt a dog and cat that were similar to the animals in the dispute or alternatively pay the monetary value of a spayed mixed-breed dog and a blind cat.[114] The defendant's focus on the market value of these animals—objectively null—is clear; however, why should the plaintiff not receive a reasonable monetary sum to compensate him for his emotional attachment and emotional loss.

In this matter, there is a reasonable expectation for monetary damages based on the emotional distress and aggravation the plaintiff underwent and the Court itself recognized that anguish over the loss of an animal can be the basis for monetary damages. U.S. case law[115] determined that the monetary value of a companion

[112] *See* Capacity and Guardianship Law, 5722-1962, sec. 74.

[113] The Court in *Ploni* (*supra* note 1, at para. 13*)* cited Brosseau v. Rosenthal (443 N.Y.S.2d. 285 (NY Civ. Ct. 1980)) and Mitchell v. Heinrichs (27 P.3d 309 (Alaska 2001)), which discuss monetary damages because of harm caused to an animal; however, the cases do not explicitly discuss the monetary value of companion animals in divorces.

[114] The defendants response to the petition in *Ploni,* (on file in the author*)*.

[115] This approach is particularly felt in the determination of monetary damages given in the case of the death of an animal. *See* Margit Livingston, *The Calculus of Animal Valuation Crafting a Viable Remedy*, 82 Neb. L. Rev. 783 (2004); St. Pierre, *supra* note 69, at 270; Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Torts,* 70 N.Y.U. L. Rev. 1059 (1995); Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals,* 86 Marq. L. Rev. 47 (2002); Mark Sadler, *Can the Injured Pet Owner Look to Liability Insurance for Satisfaction of a Judgment? The Coverage Implications of Damages for the Injury or Death to a Companion Animal,* 11 Animal L. 283 (2005); *See also* Suzanne Antoine, *Le Droit de l'Animal: Evolution et Perspectives*, Recueil Dallotz ch. 126-31, at 39 (1996) (examining the French perspective).

animal is not just based on the market value of the animal.[116] The court in Florida and Hawaii frequently choose this trend and are willing to take into consideration pain and aggravation caused by this loss, above and beyond the market value of the animal.[117] In the U.S. legislation exists that affords monetary damages for the loss of an animal.[118] With that said, there is no reason to exaggerate the emotional value in the matter of harm caused to a companion animal. And there are strong rationales supporting the notion that monetary damages should not been given in cases of emotional trauma due to the loss of a companion animal. For example, this can lead to an increase in law suits and transform a simple family matter into extensive, expensive litigation, particularly due to the difficulty in valuing the loss of the animal.[119]

I opine, particularly in family matters, that it is not a good idea to use concepts and terms from tort law with emotional issues and the right to receive monetary damages. I support this opinion with the following: *First,* in contrast to objects that have an explicit market value, it is difficult to give a monetary value to an emotional issue since they are more difficult to measure.[120] If the emotional value is calculated, the sides are provided with an additional forum in which to battle over a figure that is difficult to calculate and will in effect empty the standard of the "good of the animal," of all objective, valuable, and useful context. Measuring the emotional value as a component in a fiscal calculation can encourage a barter system in the style of "you take the dog, who I love; I will take the automobile, which is very valuable!" This situation can obviously reach ironic heights such that in order to search for a manner that prevents the emotional pressure of each side looking to "win" the animal custody case, monetary damages in itself will likely cause emotional pressure based on economic blackmail. Yet with that said, if we consider animals in a similar fashion to human children, in which monetary damages to the noncustodial parent are not relevant, than there is no reason to even discuss the granting of monetary damages in animal custodial issues. However, if the animal has a high price tag and high market value, the court can certainly consider this issue and compensate the party left without the animal. Particular since beyond the

[116] *See, e.g.*, Brousseau v. Rosenthal, 443 N.Y.S.2d. 285 N.Y. Civ. Ct. (1980); Mitchell v. Heinrich, 27 P.3d. 309 Alaska (2001).

[117] *See, e.g., Laporte v. Associated Independents,* 163 So. 2d. 267 (Fla 1964); Cambell v. Animal Quarantine Station, 632 P.2d. 1066 (Haw. 1981).

[118] The state of Tennessee indeed has legislation in this spirit. And a bill, has been put forth pushing for adopting this approach in Massachusetts and New York. *See* Elaine Byszewski, *Valuing Companion Animals in Wrongful Death Cases,* 9 Anim. L. 215 (2003).

[119] The need to determine monetary damages can come about due to damages caused too an object; for instance, when a family photograph is damaged.

[120] Even in tort matters, case law exists that recognizes this value, since the amounts determined are different than the amounts handed down in instances humans are injured or hurt and the amounts are particularly small in relation to the amount determined when a human family member is injured or harmed.

animals' emotional value the animal also has an economic value.[121] Nevertheless this sort of solution should be adopted only in a very limited number of case, when using this indicator (that is the economic value of the animal) allows to arrive at a balanced, just decision.

What about the expenses associated with the care and treatment of an animal? While the defendant in *Ploni* did not request financial support for the animals, the defendant brought this subject up during the trial as proof that her emotional attachment to the animals was stronger than that of the plaintiff's (i.e., her continued economic support of the animals). Should the expenses of the animals be paid jointly by the parties in a custody dispute or in the least should the right to offset costs be allowed? While it is clear that when a couple lives under one roof, expenses—nourishment, veterinary expenses, kennels or pet pension—should be paid jointly and it would seem that this burden should be transferred to the custodial owner of the animal. But is this the case? Can these expenses be offset against other obligations? Say for example the wife receives the custody of the children and the husband receives the custody of the animals, can the expenses of the animals be offset against the father's obligation to pay child support. At face value, the idea appears absurd. However, it is important to remember that all sums above the minimal child support, is dependent on the father's financial ability.[122] Why should the fact that custodial ownership of animals carries a financial burden that should be considered?[123] I opine that this issue should be left for further discussion at a later time.

[121] For example in the matter of a horse, a pure breed dog, or a talking parrot.

[122] Which in itself is based on a number of factors: the level of income, lifestyle, earning capability, etc.

[123] The daily expenses of caring for an animal cannot be the basis for determining the financial obligations of child support or alimony and I was not able to find a legal precedent for this in Israeli case law. However, a question in this spirit was discussed in France in which the man, who was the custodial caregiver to the family›s animals who submitted that he should be allowed to offset the animals› expenses from his wife›s alimony payments. *See* François Pasqualini, *L'animal et la famille*, 1 Recueil Dalloz 257, 259 (1997).

VI. Conclusion and Recommendations

The issue that examined herein can be analyzed according to animal law and according to family law. From the viewpoint of the family it is important to find ways to prevent friction between the sides and prevent the victimization of the animals as a means for one party in the dispute to harm the other. In the view of animal law, *Ploni* raises the legal status of animals and supports the concept that the "good of the animal" should be considered in animal custody disputes. As long as the status of animals continues to grow and their rights be recognized, it is reasonable to assume that the more courts will be requested to determine animal custody cases as it was in *Ploni.* While it is likely there will be those who claim that the court should spend its valuable time adjudicating other, more worthy causes; yet, this can only be claimed by those who are indifferent to the situation of animals in society. For all of those who care, have an opinion regarding the importance of animal rights, and tie their future to the future to the treatment of animals in society—and particularly those who believe that the discussion about rights and values cannot ignore the rights of animals—will support the direction *Ploni* is leading us.

I attempt in this article to question: the proper limit of recognizing animal rights; the necessary protection of those rights; and the relationship between animal rights and property rights. In conclusion, I suggest using the "good of the animal" standard and adopting the solutions that service custodial disputes over animals in the U.S. Moreover, in the U.S. it is acceptable to determine in prenuptial agreements future custodial arrangements for companion animals in the event the couple's relationship ends.[124] With that, there is no ignoring the difficulty in determining the parties' feelings for an animal before the relationship actually begins.

As was noted above, the Swiss system recognizes the special status of companion animals in custodial disputes[125]. I would also recommend amending the Israeli Moveable Property Law[126] to add an article that notes: "Custody disputes regarding companion animals will be determined according to considerations such as the welfare of the animal. In the instances the parties cannot determine the custodial caregiver, the court will adjudicate the matter or chose a relevant, qualified expert to determine the caregiver." Legislation such as this will not only prevent future disputes but will also improve the status of animal in society. Society is compelled to slowly provide animals with the status they deserve, bringing their status closer to that of humans and to support the confirmation of their protection and respect by humans.

In my opinion, the importance of Judge Shochet decision was in the emphasis he placed on the need to consider animals' needs and interests and to understand the special relationship that can exist between humans and animals. Only when it

[124] *See* Stroh, *supra* note 4, at 249.

[125] *See supra* note 65.

[126] *See supra* note 15.

is understood that for many this special relationship is no different and certainly no less important, than relationships with other humans, can we be certain that we are marching in the correct direction of creating a society that is willing to respect animals.[127]

[127] A relationship can grow stronger if the visits are longer and more frequent. However, the same can be said for a relationship between a stranger and the animal. *See Ploni, supra* note 1, at para. 21.

The Fine Line Between Animal Advocacy and Enterprise Terrorism

Daniel Albahary*

"Every member of every animal rights group must decide where they stand on the issue of terrorism. They must either repudiate the terrorists, or by their silence, recognize that they have joined with them in supporting the attempted murder of those who are trying to provide better health care. Silence on this issue will condemn even the truly moderate groups that continue to strive for improved animal welfare, a goal that we all must share."

—J.G. Collins[1]

"I think I am telling you that the animals of the planet are in desperate peril, and that they are fully aware of this. No less than human beings are doing in the world, they are seeking sanctuary. But I am also telling you that we are connected to them at least as intimately as we are connected to trees. Without plant life human beings could not breathe. Plants produce oxygen. Without free animal life I believe we will lose the spiritual equivalent of oxygen."

—Alice Walker[2]

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[1] J.G. Collins, Editorial, *Terrorism and Animal Rights*, Science, July 27, 1990 at 345, (J.G. Collins is a Ph.D. in the Yale University School of Medicine, Department of Anesthesiology.)

[2] Alice Walker, Living by the Word 191 (1988).

I. Introduction

Amidst the beautiful ocean views and air, it perhaps takes something as seemingly innocuous as a visit to Sea World California, the San Diego Zoo, or the San Diego Wild Animal Park, for some people to become conscious of the exact commercial states of captivity and oppression various animals live in.[3] Some of the animal exhibitions in theme parks such as these may be seen by some people as a unique and wonderful display of nature in which certain species of animal are cared for and carefully studied in an effort to preserve them for posterity. Others may see them as nothing more than an enterprising and highly capitalized circus where the animals suffer immeasurable cruelty and tyranny under the guise of preservation when in reality they suffer for the motives and benefits of human vanity and corporate enterprise.[4]

Nonetheless, one might even simply visit the local supermarket to shop for beef, chicken, lamb, venison, pork, tuna, shrimp, milk, yogurt or cheddar cheese, among other animal products, for example, or even a leather and fur coat shop or a hunt camp,[5] to bear witness to the deadly fate of certain animals and the sometimes malevolent means and uses to which they are put in our society.

In the context of biomedical and scientific research on animals, some, perhaps bordering on contemptuously, even liken the fate of animals to that of human beings during the Holocaust.[6] "They honestly and truly believe that animals are equal to Jews in the Holocaust, and they are fighting to liberate them," says one researcher targeted by animal rights activists.[7] Such activists' claims are essentially

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[3] Joan S. Epstein, *Laws Surrounding the Treatment of Animals in the Entertainment World*, 40-OCT Md. B.J. 34, 34 (2007) ("…what people do not understand is that there is absolutely nothing natural about the life of wild animal confined to the zoo or circus.").

[4] *See* Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and The "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721 (1994); *see also* Stephanie F. Cahill, *An Elephant Handler Never Forgets*, 2 No.6-A.B.A. J. E-Report 9 (2003) ("A spokeswoman for Feld Entertainment, which owns and produces the circus [which was a target of activists says] [t]his is a political agenda. They are trying to tell Americans what to eat, what to wear and how to spend their free time.").

[5] Symposium, *Legal Standing for Animals and Advocates*, 13 Animal L. 61, 70 (2006) [hereinafter *Symposium*] ("Canned hunting operations are enclosed ranches; people visit because they want to acquire the head of one of these exotic species as a 'trophy.' These are beautiful antelope species. They have beautiful horns and are just gorgeous. People pay thousands of dollars for the privilege of riding around in a truck shooting one of these animals, and then taking them home as a 'trophy' and putting it on their wall.").

[6] Matthew Liebman, Book Note, *I Fought the Law: A Review of Terrorists or Freedom Fighters?: Reflections on The Liberation of Animals, Edited by Steven Best & Anthony J. Nocella II*, 1 J. Animal L. 151, 159 (2005) ("…genocidal projects like the Holocaust and zooicidal projects like modern industrial meat production require enormous amounts of bureaucracy: 'The responsibility for suffering becomes obscured by the complex process of implementing mass slaughter.' These bureaucracies function by inducing complicity in the general public, obfuscating the reality of suffering and blocking compassionate responses.").

[7] Greg Miller, *Animal Extremists Get Personal*, Science, Dec. 21, 2007, at 1857 [hereinafter *Miller Personal*].

that animal research is unnecessarily cruel and that such research could be conducted using alternative non-animal means.[8] Notwithstanding the truth, falsity or logic of such claims, most Americans, still, however, "wrestle with the concept of what duty man owes to animal or, indeed, if there are any limits to human use of animals at all."[9] It is the use of animals in biomedical and scientific research, however, that remains one of the most bitterly contested aspects "of the ongoing debate over our moral relationships with other species."[10] This is perhaps unsurprising as it is estimated, for example, that each year in the United States, 20 to 30 million vertebrate animals are used in biomedical and behavioral research projects.[11]

In the end, despite how one may eventually develop a consciousness towards animals (if at all) and the ways in which they are manipulated for human ends, the *legal* issues that humankind's relationship(s) with animals provokes are multifarious. Indeed, there are such basic legal complications in American law such as the doctrine of standing (or more appropriately lack thereof) with respect to legal claims involving animals.[12] Even more fundamental than the doctrine of standing are American society's conceptual view of animals as property and the legal statuses of animals that attach thereto. Partly spawned out of the enduring legal conception of animals as property and the desire to ensure better legal protection for them in many contexts, two major but greatly diverging philosophical approaches have emerged among animal advocates: the animal "welfare" movement and the animal "rights" movement.[13]

Those advocating for animal rights, such as People for the Ethical Treatment of Animals (PETA), Band of Mercy (BOM) and the Animal Liberation Front (ALF),[14] in some cases have so ardently and unflinchingly pursued the animal *rights* cause that Congress, deeming such activism—in the words of an FBI agent—the number one form of domestic terrorism,[15] has sought through the Animal Enterprise

[8] Greg Miller, *Hundreds Gather for Rally to Defend Animal Research*, SCIENCE, May 1, 2009, at 574 [hereinafter *Miller Rally*].

[9] Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 587 (2002); *see also* Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 137 (2006).

[10] Harold Herzog, Book Review, *Animal Rights and Wrongs*, SCIENCE, Dec. 17, 1993 at 1906.

[11] *Id*.

[12] *See* Symposium, *supra* note 6, at 61-63; s*ee also* Payne, *supra* note 10, at 604-10, 630 ("It is unlikely that the average American will pay much attention to, or even understand, the technical doctrine of standing."); *see also ALDF v. Glickman*, 154 F.3d 426 (1998) (holding that human plaintiffs successfully injury, causality, and redressability requirements of standing in order to successfully bring suit against the U.S. Department of Agriculture.).

[13] *See* Payne, *supra* note 10, at 592-599.

[14] Liebman, *supra* note 7, at 153.

[15] *See Animal Rights: Activism v. Criminality: Hearing Before the Comm. on the Judiciary*, 108th Cong.70-77 (2004) (statement of John E. Lewis, Deputy Assistant Director, Counterterrorism Division, FBI) *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1196&wit_id=3460 [hereinafter *Lewis*]; *see also* Henry Schuster, *Domestic terror: Who's most dangerous?: Eco-terrorists are now above ultra-right extremists on the FBI charts*, CNN, Aug. 24, 2005, *available at* http://www.cnn.com/2005/US/08/24/schuster.column/; *see also* Will Potter, *The Animal Enterprise Protection Act: Using an obscure law to charge nonviolent activists with terrorism*, GRRENISTHE-NEWRED.COM, Jul. 29, 2006, *available at* http://www.greenisthenewred.com/blog/aepa/ [hereinafter *Potter1*] ("The Patriot Act, domestic spying, no-fly lists: the scope of the War on Terrorism's impact on activism, and everyday life, grows wider and wider. But the legislation that led to these charges started long before 9/11, and had been sitting idly until now.").

[16] 18 U.S.C. §43 (2008).

[17] Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3, 42-43 (2007) ("… animal rights organizations estimate that 25 to 28 billion animals per year are killed for human use in The United States. Another estimated 360 million animals are kept as pets in the United States, according to a pet industry group. According to animal rights organizations, another 20 million animals are being used for scientific research.").

[18] Miller Rally, *supra* note 9, at 574; Lewis, *supra* note 16.

[19] Payne, *supra* note 10, at 632 ("[T]the animal welfare movement is that more moderate of the two camps…").

[20] David Favre, *Integrating Animal Interests Into Our Legal System*, 10 ANIMAL L. 87 (2004) [hereinafter *Favre Integrating*] ("The general public overuses the term [rights]. A more appropriate term than 'rights' is 'interests,' because it enhances mental clarity…If we can enhance the interests of animals within the legal system, their 'rights' will come into existence in the natural course of events.").

[21] Payne, *supra* note 10, at 602.

[22] A third year UCLA law student says such tactics "are giving animal-rights activists a bad name." Miller Rally, *supra* note 9, at 574.

[23] Jeff Victoroff, *The Mind of the Terrorist: A Review and Critique of Psychological Approaches*, 49 THE JOURNAL OF CONFLICT RESOLUTION 3 (2005) ("It perhaps would not be an exaggeration to state that…fast-evolving trends…constitute a clear and present danger to the security of civilization.").

Terrorism Act[16] to limit—even subvert—the degree to which free Americans can bring to the forefront of American political and legal consciousness the plight of billions of suffering animals.[17] In fact, in April 2009 the Federal Bureau of Investigation (FBI) placed animal rights activist Daniel Andreas San Diego on its Most Wanted Terrorists list—a list that contains Osama bin Laden and the like—for his alleged participation in bombing two San Francisco office buildings.[18]

While the animal welfare movement takes what might be classified as a less anarchistic approach[19] to ensuring the legal protection of animal interests[20] through incrementalism or "legal gradualism,"[21] the animal rights movement has through untactful media attention brought negative light on animal advocates everywhere. Indeed, the now resulting fine line public perception may be to view animal advocacy strictly as violence against property or a form of "terrorism," instead of as a political and legal cause which altogether seeks to advance the interests of animals.[22]

The purpose of this Note is to therefore briefly canvass a few of the important social and legal issues in contemporary animal advocacy and explain how they have become inextricably politically altered in the post September 11, 2001 (9/11) American consciousness.[23] It is my thesis that while the Animal Enterprise Terrorism Act (AETA) presents a number of serious legal problems, it still continues to be seen by those in power as the best social and legal response Congress can develop in the face of the broad domestic *violence* (albeit political violence) committed

by animal rights extremists.[24] While much of this purported activity nevertheless falls under the general purview of states' criminal law power, some argue that our world has changed too much since 9/11 to leave the acts of these activists to only the workings of the criminal justice system. Such an argument might be part truth and part falsehood.

In ascribing the label of "terrorist" and "terrorism" upon animal rights extremists and their activities, the government, notwithstanding the corporate lobbying that helped created the AETA, is aiming to win sympathy for its side in the animal interest propaganda wars by painting the crimes and intimidating acts of violence as a vicious brand of "terrorism." Some argue that the ascription of the terrorist label animal activists reflects the establishment's struggle to protect corporate private property.[25] In short, animal rights extremists and their illegal acts could simply be prosecuted under the criminal law; however, labeling and prosecuting them as terrorists serves the specific purpose of branding them as dangerous, and only further confuses our understanding of what terrorism means and is in the unpredictable modern age in which we live. Part I of this Note briefly traces the view of animals as property. Part II discusses the two main camps in the animal interest movement. Part III investigates the roles of the courts and the media in the context of understanding the plight of animals, and Part IV examines animal advocacy as a dubious or questionable form of "terrorism."

II. Animals as Property

The most commonly held belief held by humans towards animals is they are "inferior to humans because they lack the capacity for reasoning, intellectual pursuits or moral concerns," and furthermore, "that for these reasons animals can never be a part of the legal or moral community."[26] "This deep-seated conception of animals as unthinking inferiors," writes one scholar "has had a profound impact on the shape of Western law dealing with animals."[27] Much of the perception of animals as inferior to humankind stems from Judeo-Christianity where religious thought espoused the idea that "humans have immortal souls but animals do not, and that this distinction calls for treating humans with infinite dignity and treating animals as lesser beings placed on earth for the benefit and use of humans."[28] Leaving aside the study of the historical religious and political origins of human perception of animals' existence for another paper, for much of the early part of

[24] Irrespective of criminal law or terrorism legislation, those activists who target peoples' homes and families would generally find intolerable opposition from the public in just about any context.

[25] *See* Jared S. Goodman, Note, *Shielding Corporate Interests From Public Dissent: An Examination Of The Undesirability And Unconstitutionality Of "Eco-Terrorism" Legislation*, 16 J.L. & Pol'y 823 (2008); *see also* Ethan Carson Eddy, *Privatizing The Patriot Act: The Criminalization Of Environmental And Animal Protectionists As Terrorists*, 22 Pace Envtl. L. Rev. 261 (2005).

[26] Payne, *supra* note 10, at 589.

[27] *Id*. at 590.

[28] Cupp, *supra* note 18, at 10.

English and American history, cruelty to animals, for example, was a "crime only in the sense that it caused damage to the property of another."[29] It was not until the middle of the 19th century that laws which protected animals against cruelty were enacted and over the last 100 years these laws have remained virtually unchanged.[30]

Thus, "[t]he holy grail for many animal rights activists," a group of advocates which shall be discussed in a moment, "is abolishing animals' property status."[31] Indeed, the full extent and legal history of animals as property can not be canvassed here; however, it is sufficient to recognize that from the conception of animals as legal property, two diverging groups of advocates have emerged in modern animal advocacy. The first, the animal welfarists, advocate on behalf of animals without a full vision of their removal from the legal system whereas the second, the animal rightists, advocate on behalf of animals with the fullest vision of emancipating them from the oppressive status of property within the legal system and enabling them with the rights that are normally inherited by sentient beings.

Within this paradigm, one scholar writes, "the lingering conception of animals as property creates a stumbling block to any large-scale public support of animal rights…[d]aily American life reinforces this perception; people buy and sell animals, they speak of 'owning' their pets, and they purchase meat for their dinners. Conceptually, as long as the public considers animals to be property, people will not accept that these creatures can enter into any legal relation."[32] This reality has made it not only difficult for the animal interests movement (as a whole) to advocate on behalf of animals, but even to bring to the forefront of American consciousness some of the issues affecting animals *without* resorting to violent political means.

From the perspective of the existing legal regime, "[a]nimals are viewed as property in the law which means that the animals used in entertainment or kept in captivity are owned by the circus or zoo that house them. This status of animals severely restricts their protection under the law."[33] At a symposium of animal law scholars, one advocate added:

> When we talk about whether or not we have to change the property status of animals—yes, of course, we have to change the property status of animals. But the whole notion of private property is so problematic and so visceral that if Congress passed a law tomorrow saying animals are not property, the only thing that would happen is you would have the kind of backlash that would set this movement back probably 150 years. We have to cognizant of that backlash as we agitate for the kind of important changes you are noting.[34]

[29] Payne, *supra* note 10, at 590.

[30] *Id*.

[31] Cupp, *supra* note 18, at 3.

[32] Payne, *supra* note 10, at 622.

[33] Epstein, *supra* note 4, at 34.

[34] Symposium, *supra* note 6, at 82-83.

Things will not change, a fellow panelist added, until "the standard of [animals as] chattel and property changes over to guardianship. Someone like a guardian ad litem could say, 'Look, this animals cannot speak English, but I'm going to speak for it.'"[35] Embedded in this response, there is advocacy for the de-propertization of animals, but not to the point of enabling them with rights; in other words, there is a utilitarian appeal to the law to provide some other form of exercising legal control over animals. Noted animal law scholar David Favre, for example, focuses on possibly developing a "legal argument on behalf of animals without demanding that they are on equal footing with humans…a place were the property concept is not a barrier to being a participant in the legal community of today."[36] He describes a vision of incrementalism in the form of a series of "stepping stones"[37] and "makes an imaginative proposal for changing the property status of animals using existing concepts in property law."[38] He concludes that "[p]roperty status [does] not have to be a barrier to the recognition and protection of [animal] interests within our legal system."[39] This idea of incrementalism or legal gradualism among animal welfarists as way of effecting change in the legal system will be revisited again shortly. [40]

III. Two Views of Animal Interests

As society and the propertization of animals in the law has developed, "so too has the organized resistance of those who believe that prevalent suppositions about animals are incorrect, and now have worked…to alter conceptions about animals and laws dealing with them."[41] As discussed earlier, there two main camps of animal advocacy that have emerged in American society. Although they tend to be consumed about what makes them different, "the two movements actually have much in common, and unified strategy would be the benefit of the animal advocacy movement as a whole."[42] This commonly held opinion reflects a possible middle ground between the two diverging points of view. However, in order to better illustrate how animal activism has perhaps unwittingly diverged from this middle ground and ventured into the realm of "terrorism," it is worthwhile to discuss these two movements further.

[35] *Id*. at 81.
[36] David S. Favre, *Judicial Recognition of the Interest of Animals—A New Tort*, 2005 Mich. St. L. Rev. 333, 338 (2005) [hereinafter *Favre Interests*].
[37] *Id*.
[38] *See* Ellen P. Goodman, *Animal Ethics and the Law*, 79 Temp. L. Rev. 1291, 1312 (2006) (reviewing Cass R. Sunstein & Martha C. Nussbaum eds., A Review of Animal Rights: Current Debates and New Directions) (2004)) ("He proposes that title to animals be similarly divided (either voluntarily or through legislative action), with people taking legal title, but with the animal itself holding equitable title—a state Favre calls "equitable self-ownership.").
[39] Favre Integrating, *supra* note 37, at 352.
[40] Payne, *supra* note 10, at 602 ("The animal welfare movement's guiding principle is a strategy of legal gradualism.").
[41] *Id*. at 592.
[42] *Id*. at 588.

A. Animal Welfare Movement

The animal welfare movement sees "nothing wrong with treating animals as a means to an end, so long as the animals' interests, to the extent that they can be ascertained, are considered on an equal footing with the interests of others."[43] In essence then, "the goal of the animal welfare movement is to prevent animals from suffering needlessly, and thereby to improve the quality of animal lives." [44] This goal can be achieved," it is argued, "through measures designed to alleviate the suffering of animals in all settings in which humans interact with them."[45] In short, although remaining the bane of the more insistent animal rights movement, this approach in some ways continues to see animals as subordinated to human beings, but argues for the continued humane and ethical treatment of animals as the law continues to evolve in the context of the larger contemporary world.[46] In short, it might be said that this approach aims to comply with the law and to effect change without resorting to the use of violence, political or otherwise.

B. Animal Rights Movement

In contrast, the animal rights movement sees "all animals, human or otherwise, as 'subjects of a life.'"[47] In short this means that all creatures have an inherent value and, therefore, their worth is not wholly determined by their usefulness to humans."[48] This approach is unsurprisingly Kantian,[49] taking as its starting point for the claim that it is wrong to treat animals as means to human ends that animals have moral claims to life and liberty.[50] "Followed to its logical conclusion, the animal rights position calls for a radical change in human society… [where] zoos, circuses, and even pet-keeping should be banned [as well as] all animal experimentation, even experimentation aimed at finding cures to the worst diseases plaguing humanity…."[51] In contrast, welfarists do not seek anything like radical fundamental changes to society.[52]

Animal rightists adopt a "direct action"[53] paradigm, where, in the words of the ALF, for example, activists "take all necessary precautions against harming any animal and nonhuman."[54] However such a view apparently turns on a strange or radical understanding of what might be necessary, even contextually including the

[43] *Id*. at 594.
[44] *Id*. at 595.
[45] *Id*.
[46] *See* Goodman, *supra* note 39, 1314-16.
[47] Payne, *supra* note 10, at 596.
[48] *Id*. at 596.
[49] *See* Bernard E. Rollin, Animal Rights & Human Morality 57-60 (3rd ed. 2006)
[50] Goodman, *supra* note 39, at 1293.
[51] Payne, *supra* note 10, at 597.
[52] *Id*. at 613.
[53] *See* Liebman, *supra* note 7 at 153.
[54] *Id*.

use of violence. Some animal rightists reason "that violence can only be perpetrated against a sentient being, one who can suffer and feel pain, and therefore speaking of violence against property is nonsensical…[u]nder this definition of violence, [the] property destruction and vandalism [of those who exploit animals commercially and personally even is] nonviolent activism, and can be justified, despite their illegality."[55] Stated another way, the animal rights movement has "moved beyond attempts to treat animals more humanely and [has taken] on a more radical form calling for the abolition of *all animal exploitation*."[56] However, the rightists' rejection of the gradual approach posited by the welfarists has not been accompanied by any realistic counter suggestions of ways in which public support for animal interests might be produced.[57] There is thus even a chasm between these two groups of animal activists that remains partially unbridged, unless, for example, "rights-based theories… [are] used to support more moderate welfare reforms, especially if such theories conclude that very few species of animals are actually vested with moral rights."[58]

III. The Role of the Courts & the Media

Despite the potential validity or plausibility of legal claims (not discussed in his paper) that advocates seek to bring on behalf of animals, and the saga of standing issues,[59] the judiciary itself may not be receptive to a more progressive view of animal welfare or rights that would satisfy either camp of advocates. Some scholars even take a decidedly legal realist point of view and suggest that conservative members of the Supreme Court use standing (or lack thereof) to keep animal interest activists and advocates out the judicial system for reasons not having to do with law *per se* and perhaps more with politics.[60]

With respect to animal law, despite the fact that one can more often than not only obtain property damages for the value of the animal, but none of the visceral aspects that emanate from animal guardianship and companionship or the horrible atrocities that some animals suffer in zoological captivity or scientific research labs, one advocate claims "the problem is that the courts do not really think the injury about which we are talking is a real injury. It is just an emotional subjective preference. It is not the same as somebody losing money. It is not the same as someone seeing a mountaintop sheared off where they have hiked for twenty years, although obviously it is."[61] This problem likely exists for the reason that people

[55] *Id* at 158; *see also* Miller Personal, *supra* note 8, at 1856.

[56] Payne, *supra* note 10, at 595-596 (emphasis added); *see also* Goodman, *supra* note 39, at 1311 ("Gary Francione advocates the abolition of animals as property. Animal status as property, he contends, is the primary obstacle to animal welfare.").

[57] Payne, *supra* note 10, at 622.

[58] Goodman, *supra* note 39, 1296-97.

[59] *Id*. at 1313 ("Standing doctrine has been one of the chief impediments to using the courts to vindicate animal interests.").

[60] Symposium, *supra* note 6, at 65.

[61] *Id*. at 77.

have emotional attachments to cats and dogs, for example, but have more difficultly forming—even conceiving of forming—relationships with other animals such as chimpanzees:[62] "[w]e may see chimpanzees on a National Geographic television special, but most people, including judges, have never actually met or spent time with them. For that reason, chimpanzees do not necessarily make a more compelling plaintiff."[63] But yet, "because animals are property, Americans [still] look to the government to protect their interests in these animals."[64]

It is hard for many members of society to envision animals as rights bearers even though "courts routinely grant legal rights to non-persons such as corporations and trusts."[65] The existence of such legal fictions, however, only contributes to a befuddled legal landscape: "to the extent that the American public, consciously or unconsciously, gives credence to this idea of rights, the probability of these individuals supporting the recognition of legal rights for animals is virtually non existent."[66] Some critics are skeptical not only of the legal rights movement itself but also even of the aptitude of the legal system as a framework to address animal interests, for example, suggesting that "legal victories are often 'more symbolic tha[n] real,' and they may 'serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an *illusion of change*."[67]

Nevertheless, despite the problems that the framework of the law presents, "[m]any believe that the media attention that court cases and other campaign have brought to the movement will be the key to success."[68] One scholar argues that "too often direct action [animal rights] activists disdain media coverage and dismiss it as irrelevant, thereby missing out on an enormous opportunity to bring animal abuse into the spotlight."[69]

Animal welfarists take a less scornful approach, for example, recognizing, in the words of Professor Favre, that even as an useful advocacy tool "[a]nimal issues are never among top three issues of the day in the media or on anyone's political agenda. It is virtually impossible to raise awareness of animal issues when war, terrorism, job losses and access to the medical system are always given priority."[70] Still yet another scholar precisely devotes her scholarship entirely to the study of animal law and the media.[71]

[62] Jane Goodall & Steven M. Wise, *Why Chimpanzees are Entitled to Fundamental Legal Rights*, 3 Animal L. 61 (1997) ("…chimps are genetically so like us [humans], differing by only just over 1% in the structure of DNA, that they are susceptible to all known human contagious diseases with the apparent exception of cholera.").

[63] Symposium, *supra* note 6, at 83.

[64] Payne, *supra* note 10, at 621.

[65] *Id*. at 618.

[66] *Id*. at 621.

[67] *Id*. at 626 (emphasis added).

[68] *Id*. at 611.

[69] Liebman, *supra* note 7, at 164.

[70] Favre Integrating, *supra* note 21, at 92.

[71] A good online source for animal rights and media is http://www.dawnwatch.com/; *see also* Karen

"One of the most common objections lobbed at the animal rightists is that they undermine progress for animals by driving away those in the 'middle ground of opinion.'"[72] One might add to this the progress that animal welfarists have made. Corporations feed off of the lack of consensus and otherwise supposedly "non-violent guerilla organizations"[73] seeking to abolish the law's dominion over animals: "[animal] industry front groups like the Center for Consumer Freedom are using the current climate of fear to throw 'terrorist' accusations at mainstream groups like the Physicians Committee for Responsible Medicine."[74] In the end, "the underlying animal rights message is lost as the public's focus is drawn to the simple acts of vandalism, destruction, and extremist rhetoric."[75] Because of the fierceness of their beliefs in the rights of animals, animal rightists are the most likely of the two movements or camps to resort to *violence* to achieve its goals.[76] Thus, in the wake of the tragic and horrific events of 9/11 which irrevocably changed American consciousness forever, the animal rightists have through violent means arguably brought animal advocacy into the realm of "terrorism," perhaps the biggest blow that non-violent civil disobedience with respect to animal advocacy could suffer in America.

IV. Animal Advocacy as Terrorism

A. Acts of Terror?

In June 2007, a California surgeon was alerted by a neighbor as to the presence of a suspicious package, which turned out to be a crude incendiary device, under his car.[77] The bomb squad was called in and neighbors on his street were evacuated.[78] Police advised him that the device would have destroyed his car had it gone off as intended.[79] He had ties to only one animal research project, which studied an electrical stimulator that could bring paralyzed eye muscles back to life; yet, involvement in this one project was enough to place him on the Animal Liberation Brigade's (ALB) hit list, which three days later claimed responsibility for the incident.[80]

Another incendiary device was mistakenly delivered by the Animal Liberation Front (ALF) to the doorstep of a 70-year old neighbor of Lynn Fairbanks,

Dawn, *From the Front Lines to the Front Page: An Analysis of ALF Media Coverage*, *in* Terrorists or Freedom Fighters? Reflections on the Liberation of Animals, (Steven Best ed., 2004).

[72] Payne, *supra* note 10, at 627.

[73] Liebman, *supra* note 7, at 153.

[74] *Id*. at 168.

[75] *Id*. at 163.

[76] Payne, *supra* note 10, at 598.

[77] Miller Personal, *supra* note 8, at 1856.

[78] *Id*.

[79] *Id*.

[80] *Id*.

who studies primate genetics and behavior at the UCLA Neuropsychiatric Institute.[81] Investigators concluded that had the device gone off as intended, the house and any inhabitants would have been engulfed in flames.[82] Shortly after this incident, another UCLA neurobiologist announced that he had given up his research with nonhuman primates.[83] Hooded and masked activists would often bang on the windows of his children's bedroom in the middle of the night, unimaginably frightening them. He sent an email to animal rights activists: the subject line read "You win"; the body of the message read "Please don't bother my family anymore."[84] He now conducts his research with human volunteers and has not been further targeted by activists.[85]

In October 2007, ALF animal activists broke the first floor window of the home of a UCLA neuropharmacologist and inserted a garden hose into the home and caused $30,000 in flood damages; but for fears of brush fires, arson would have been the activists' first choice.[86]

In August 2008 a University of California at Santa Cruz developmental neurobiologist and his family awoke to their home burning as result of a Molotov-cocktail which police suspect had been ignited by animal rights activists.[87] In a similar incident, another researcher had his car firebombed.[88]

In a particularly gruesome case that took place in the United Kingdom, in an effort to stop a family's trade in guinea pigs, activists blackmailed them to cease operations with the illegally exhumed bones of one of their dead and buried family members.[89] In another, perhaps more comical 2010 incident, People for the Ethical Treatment of Animals (PETA) managed to crush a tofu pie into the face of Gail Shea, Canadian Fisheries Minister, in protest for the government's role in enabling the Canadian seal hunt.[90] In a statement released by PETA following the incident, the group's executive vice-president wrote: "A little tofu pie on her [the minister's] face is hardly comparable to the blood on Ms. Shea's hands."[91] Of

[81] *Id*. at 1857.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*. (The activists wrote in a communiqué, "It would have been just as easy to burn your house down…as you slosh around your flooded house consider yourself fortunate at this time.").

[87] Greg Miller, *Scientists Targeted in California Firebombings*, Science, Aug. 8, 2008, at 755 [hereinafter *Miller Firebombings*].

[88] *Id*.

[89] Amy K. Geurra, Book Review, *Capers in the Courtyard: Animal Rights Activism in the Age of Terror*, 16 San Joaquin Agric. L. Rev. 239, 239 (2006-2007).

[90] Canadian Press, *Is a pie in the face a terrorist act?*, The Globe and Mail, Jan. 26, 2010, *available at* http://www.theglobeandmail.com/news/politics/is-a-pie-in-the-face-a-terrorist-act/article1444392; Canadian Press, *PETA claims responsibility after Fisheries Minister pied in face*, The Globe and Mail, Jan. 25, 2010, *available at* http://www.theglobeandmail.com/news/politics/peta-claims-responsibility-after-fisheries-minister-pied-in-face/article1443179/.

[91] Ron Nurwisah, *Seal hunt protester pies fisheries minister*, National Post, Jan. 25, 2010, *available at* http://network.nationalpost.com/np/blogs/posted/archive/2010/01/25/seal-hunt-protester-pies-fisheries-minister.aspx.

course, in 1992, the first animal rights extremist to go to jail for terrorist activity was Rodney Coronado, who bombed a Michigan State University research laboratory, destroying thirty-two years of research and causing $125,000 worth of damage.[92]

According to a study conducted of the period between 1981 and 2006, biomedical research comprised 66% of activists' targets, food production 13%, fur 11%, circuses, horse-racing, rodeos and zoos 3%. Vandalism was the number one type of incident, comprising 43%, theft 20%, harassment 14%, arson 8%, and bombings 6.5%. So, the key question is: are these statistics and the above examples acts of "terrorism"? The answer is, unfortunately, mostly unclear. In most cases these are all criminal offenses, but whether they actually amount to terrorism is another matter; however, according to the AETA they are acts of terrorism and are thus treated such, irrespective of which side of the political spectrum one views the logic, legality, and efficacy of the statue.

The point, however, is that radial activists have undermined the whole animal interest movement "by ignoring the very paradigm of animal rights, respect for all conscious beings."[93] Animal activists have been "baptized" by the government as "the country's most threatening and violent domestic terrorists."[94] In the words of John Lewis, "[t]he FBI estimates that the ALF/ELF and related groups have committed more than 1,100 criminal acts in the United States since 1976, resulting in damages conservatively estimated at approximately $110 million."[95] Either way, this figure represents a lot of property damage, criminal and even perhaps "terrorist" activity.

B. What is Terrorism?

There is no universally agreed upon definition of terrorism, either domestically (in the United States) or internationally.[96] Most of us might paraphrase from Supreme Court Justice Potter's views on pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…"[97] In other words, we probably have a good sense of what terrorism is or know it when we see it.[98]

From a sociological point of view, it is essential to remember that terrorism is a *social construction* infused with interpretations of events that occur in the real

[92] PR Newswire, *For the First Time in U.S. History—Animal Rights Extremist to go to jail for A.L.F. related Terrorist Activity*, PR Newswire, Mar. 4, 1995 available at LexisNexis US News Combined.
[93] Guerra, *supra* note 90, at 239.
[94] Dara Lovitz, *Animal Lovers and Tree Huggers Are the New Cold-Blooded Criminals?: Examining the Flaws of Ecoterrorism Bills*, 3 J. Animal L. 79, 79 (2007).
[95] Lewis, *supra* note 16.
[96] *See* Kimberly McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 Animal L. 55 (2007)
[97] *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).
[98] *See* McCoy, *supra* note 97 at 55 for some examples of how people might envision terrorism.

world.[99] Turk argues that "these interpretations are not unbiased attempts to depict truth but rather conscious efforts to manipulate perceptions to promote certain interests at the expense of others."[100] Naturally, then, when a government or entity uses the word "terrorism" to describe a certain action or behavior, it is essentially engaging in a war of words.[101] Turk further adds: "to study terrorism presupposes investigating the ways in which parties in conflict are trying to stigmatize one another. The construction and selective application of definitions of terrorism are embedded in the dynamics of political conflicts, where ideological warfare to cast the enemy as an evildoer is a dimension of the struggle to win support for one's own cause."[102] This is not only an accurate description of terrorism in general, but also in the animal interest context. At its most basic level, one scholar contends that terrorism is "atypical of human behavior."[103] A brief look into history, however, particularly the violence of the twentieth century might evidence such a claim to be somewhat specious. Terrorism may be a social construct, but humankind's capacity for brutal violence is not.

C. Understanding Terrorism in the Animal Context

Nevertheless, we might conclude then that terrorism is at least generally speaking, a "systematic threatening or intimidating of one individual or group to another, usually characterized by an act of destruction or violence."[104] One of the usual assumptions when studying terrorism generally rings no less true in the animal law context than it does in others: that peaceful methods have proved either ineffective or useless in effecting changes and the only recourse left to gain attention for one's cause is through violence.[105] But how are we to understand the events leading up to the point where one adopts such a consciousness? Possible answers are too extensive to explore in a space as short as this; however, terrorism in the animal context might be seen as a form of political violence often justified on a theory of animal oppression.[106]

Ironically, this oppression justification theory raises the question of who, *exactly*, has the authority or agency to speak on behalf of animals, i.e. the standing issue. Sometimes the activists are confused themselves, even mistaking animals for people. For example, on the same day that terrorists attacked the World Trade Center in New York and the Pentagon in D.C., i.e. 9/11, the ALF attacked a McDonald's

[99] Austin T. Turk, *Sociology of Terrorism*, 30 Annual Review of Sociology 271, 271 (2004).
[100] *Id*. at 272.
[101] *Id*. at 272.
[102] *Id*. at 273.
[103] Victoroff, *supra* note 24, at 4.
[104] Lovitz, *supra* note 95, at 80.
[105] Turk, *supra* note 100, at 275 (He also adds an interesting observation: "A complicating factor is that a satiation effect has been noted as a contributor to terrorism, in that acts of terrorism must be ever more horrendous in order to overcome the tendency for newsmakers and their publics to become inured to "ordinary" violence.").
[106] Victoroff, *supra* note 24.

restaurant in Tucson, Arizona by torching it and causing half a million dollars in fire damage.[107] In taking responsibility for the attack, the activists said: "[t]his action is meant to serve as a warning to corporations worldwide: You will never be safe from *the people you oppress*."[108] It is not clear whether the activists saw themselves as the oppressed or the animals they claim to represent as the oppressed. In some ways, this ambiguity is indicative, metaphorical, or even symbolic of how much the animal rightists' ideology has radically and perplexingly evolved.

D. Legislative Responses to Animal Interest "Terrorism"

In 1992, Congress enacted the Animal Enterprise Protection Act (AEPA) which "created the crime of 'animal enterprise terrorism' for anyone who travels in 'interstate or foreign commerce'…and '*intentionally damages or causes the loss of any property* (including animals or records) used by the animal enterprise, or conspires to do so.'"[109] In 2006, the AEPA was amended to become the Animal Enterprise Terrorism Act (AETA). Through this amendment the U.S government attempted to reign in violent activists who use often illegal means in support of the animal rights cause.[110] But a change in the provision has lessened the threshold of possible criminal culpability to the point where even non-violent activism—civil disobedience, in other words—may erroneously fall within the purview of the legislation.[111]

The AETA now defines the offense as follows: "[w]hoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce: for the purpose of *damaging or interfering* with the operations of an animal enterprise."[112] Whereas the threshold of the AEPA was to have the "purpose of causing physical disruption to the functioning of an animal enterprise," now one may be charged simply for "*interfering* with the operations of an animal enterprise."

Looking further into the provision, such interference is characterized by intentionally damaging or causing the loss of any real or personal property, intentionally placing a person in reasonable fear, or conspiring or attempting to do so.[113] Thus, the law not only "targets activity against an 'animal enterprise' (a term defined so broadly that it includes any business that 'uses or sells animals or

[107] Nick Nichols, Editorial, *Let's battle homegrown terrorists*, Daily Oklahoman, Oct. 24, 2001, available at LexisNexis Us Newspapers Combined.

[108] *Id*. (emphasis added).

[109] Potter1, *supra* note 11 (emphasis added).

[110] *See* Tricia Engelhardt, *Foiling The Man In The Ski Mask Holding A Bunny Rabbit: Putting A Stop To Radical Animal Activism With Animal And Ecological Terrorism Bills*, 28 Whittier L. Rev. 1041 (2007).

[111] *See* Will Potter, Analysis of Animal Enterprise Terrorism Act; Using "terrorism" rhetoric to chill free speech and protect corporate profits, GreenIsTheNewRed.com, Oct. 10, 2006, *available at* http://www.greenisthenewred.com/blog/aeta-analysis-109th/ [hereinafter *Potter2*].

[112] 18 U.S.C. §43 (a) (1) (2008).

[113] *Id*. §43 (a)(2)(A)-(C).

animal products') but it also targets activity against any person or business with any connection to an 'animal enterprise.'"[114] Threats and harassment by activists at a researcher's home "can now be prosecuted as acts of terrorism."[115] It is interesting and somewhat apocryphal in contrast to note that animal advocates may be labeled terrorists, even the most extreme ones, yet anti-abortion activists who murder remain only "criminals" and not "terrorists."[116] No one has yet been charged significantly under the AETA where the provisions argued to be vague and overbroad could be challenged.

Altogether, proponents of AETA argued such amendments were "desperately needed to go after so-called 'tertiary targeting' where activists don't just target a specific business or organization, they target anyone doing business with them."[117] Thus, advocacy activities directed towards an animal enterprise or an enterprise doing business with one that merely interferes with their operations (as opposed to disrupting it) could be labeled "terrorism."[118] This has the unfortunate effect of trapping both animal rightists *and* welfarists in the government leg-hold trap of terrorism's indiscriminate sweep.

Furthermore, under the reasonable fear provision, "conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation,"[119] for example, "hurling red paint on Jennifer Lopez's red furs,"[120] is also grounds for criminal sanction. Even simply protesting outside a research laboratory might fall within the ambit of the provision and be deemed a form of "terrorism" under the Act.[121] However, for these weighty ambiguities the statute might be unconstitutional on the basis of jurisprudential doctrines of overbreadth and vagueness.[122] Such an argument might be unlikely to succeed, however, as the

[114] Potter2, *supra* note 112.

[115] Miller Personal, *supra* note 8, at 1858.

[116] *See* Dane E. Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 Or. L. Rev. 249 (2007).

[117] Potter2, *supra* note 112.

[118] 18 U.S.C. §2331 (The Federal Criminal Code defines terrorism as "…activities that involve violent… or life-threatening acts… that are a violation of the criminal laws of the United States or of any State and… appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping…."); *see also* Kimberly E. McCoy, *Subverting Justice: An Indictment Of The Animal Enterprise Terrorism Act*, 14 Animal L. 53 (2007).

[119] 18 U.S.C. §43 (a)(2)(B) (2008).

[120] Goodman, *supra* note 39, at 1292.

[121] The events of February 28, 1992 where "animal rights extremists firebombed a Michigan State University research laboratory, destroying 32 years of research directed at benefiting animals," is for example, the kind of activities the legislation in meant to cover. *See* Denise R. Case, *The USA Patriot Act: Adding Bite To The Fight Against Animal Rights Terrorism?*, 34 Rutgers L.J. 187, 1987 (2002).

[122] *See* McCoy, supra note 97; s*ee also Virginia v. Hicks*, 539 U.S. 113 (2003); see also *Andrew N. Ireland Moore*, *Caging Animal Advocates Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 Animal L. 255 (2005); *see also Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Third Circuit found the AEPA, the AETA's predecessor, not to be constitutionally vague.[123] In *U.S. v. Buddenberg*,[124] a California district court did not find the provisions the defendants were charged with to be facially unconstitutional on the basis of vagueness. Additionally, on one hand, the AETA nevertheless may still be indicative of poorly reasoned social policy. On the other hand, it may, as some claim, reflect the best response that Congress can develop if, in the FBI's words it is true that animal activists are the "number one domestic terrorist threat in the United States."

Yet, proponents of the AETA, "animal oppressors" in other words, "say AEPA didn't go far enough, and they need this sweeping legislation to crack down on illegal actions by underground groups like the Animal Liberation Front."[125] Crystal Miller-Spiegel of the American Anti-Vivisection society writes "[u] nfortunately, biomedical lobbyists and interest groups are taking advantage of a society already on edge, attempting to paint with one broad stroke anyone who works to advance the welfare of nonhuman animals used in laboratories as a 'domestic terrorist' or potential terrorist."[126] Others claim that legislative responses from Congress such as the AETA are the product of corporate lobbyists whose main goals are the preservation of animals as property and continued generation of profit in businesses and industries that depend on animals.[127] Miller-Spiegel also added, "[s]imply because legal activities and an evolving social ethic regarding the treatment of animals are threatening to biomedical groups does not mean that advocates for animals are threatening to scientists, institutions or the public."[128]

Hardly a tenable assertion when in February 2009, four animal activists were charged under the AETA in connection with nefarious incidents targeting researchers at the University of California.[129] Frankie Trull, president of the Foundation for Biomedical Research in Washington D.C. said, "[t]he message has now been sent pretty clearly that law enforcement is invested in this, that they're expending resources to stop the violence."[130]

Andrew N. Rowan, Executive Vice President, Operations, for the Humane Society of the United States, on the other hand, claims that reasonable animal welfare proposals are often ignored by the biomedical and scientific research communities.[131] They claim that such proposals would lead to the end of all animal research.[132] Rowan adds, "even more damning for a community that professes

[123] *U.S. v. Fullmer*, 584 F.3d 132 (3rd Cir. 2009).
[124] Slip Copy, 2009 WL 3485937 (N.D. Cal. 2009).
[125] Potter2, *supra* note 112.
[126] Crystal Miller-Spiegel, Editorial, *More on the Animal Rights Debate*, Science, Feb. 14, 2003, at 1013.
[127] *See* Lovitz, *supra* note 95 at 79, 96.
[128] Miller-Spiegel,*supra* note 127, at 1013.
[129] Miller Rally, *supra* note 9, at 574.
[130] *Id*.
[131] Andrew N. Rowan, Editorial, *Animal Activism and Intimidation of Scientists*, Science, Nov. 10, 2006 at 923.
[132] *Id*.

to encourage open and vigorous debate, organized academe dismisses legitimate animal welfare critics as dangerous zealots and engages in blatant political control of the terms and the content of the animal welfare debate."[133]

What most people in the public fail to realize, however, is that "the animal advocacy movement has become increasingly consumed with the idea that the ultimate goal should be securing the legal rights of animals, and that, as a result, there has been an increase in the use of language and philosophy of rights."[134] But use of rights language itself maybe counterproductive, fostering a sense of senseless absurdity because so many people already believe that rights apply *only* to human beings.[135] Coupling this with the destruction of another person's property—possibly a sacrilegious event in American consciousness—animal advocacy in its entirety may be swept into the dustbin of America's "war on terror."[136] Thus, "animal liberationists [may] face [dire consequences] in the wake of the post 9/11 expansions of the 'domestic terrorist' label."[137] National sensitivity to animal rights terrorist activity has of course heightened significantly since 9/11.[138] For some scholars, "the linkage of compassionate, pro-animal acts with the heinous events of those like Osama bin Laden 'represents the true capricious, unscrupulous, and evil nature of the USA Patriot Act.'"[139]

As unfortunate and arguably true such an assertion may be, it is at least alarming to imagine that the animal rights movement has been the cause of this linkage and perhaps irreparably set the animal advocacy movement back to such a point where all advocacy on behalf of animals now has the potential to be labeled a form of "terrorism."[140] If that is indeed the case, there now exists a fine line between non-violent animal activism and domestic terrorism. Beyond the scope of this paper, there exists the greater question of what is and the necessity for a better definition and response to terrorism generally. As one scholar has put it:

> A comprehensive review of the literature suggests that a lack of systematic scholarly investigation has left policy makers to design counterterrorism strategies without the benefit of facts regarding the origin of terrorist behavior—or, worse, guided by theoretical presumptions couched as facts. Investigating the terrorist mind may be a necessary first step toward actualizing modern political psychology's potential for uncovering the bases of terrorist aggression and designing an optimum counterterrorism policy.[141]

[133] *Id*.
[134] Payne, *supra* note 10, at 616 ("Tom Regan, perhaps the best known rights advocate…contends that the exclusion of animals from the field of legal rights is a form of discrimination that is as baseless as racism or sexism.").
[135] *Id*. at 627-628 (emphasis added).
[136] *See* McCoy, *supra* note 97.
[137] Liebman, *supra* note 7, at 166.
[138] Engelhardt, *supra* note 111, at 1050.
[139] *Id*.
[140] *See* Eddy, *supra* note 26.
[141] Victoroff, *supra* note 24, at 4.

V. Conclusion

For those sympathetic to the plight of animals, "at least some animals experience the world in ways that are similar to the way humans experience the world, [and] any differences between them and us is one of *degree* and *not of nature.*"[142] To then employ violent means as a ways of achieving rights, let alone simply advancing animal interests, is not helpful and probably only does indeed make certain activists nothing more than terrorists. Scientists and research workers have the right to perform their work in security and free from the threat of political violence or terrorism.[143]

"New law is built on compromise and incremental change," Professor Favre argues.[144] Tom Regan, on the other hand, argues that "those willing to accept intermediate 'advances' for animals to those who wished to improve the conditions of slavery rather than abolish the institution altogether." [145] This incrementalist approach, he posits, "only undermines the eventual goal of abolition by making the terms of bondage less onerous and, therefore, making it less pressing that any action be taken."[146] Nonetheless, "while education and enlightenment will change the conduct of some, only by altering the law can we force changes of behavior upon the unwilling."[147] This seems to be the inevitable truth that animal interest advocates must currently resign themselves to; but, that is not necessarily a dire result. As Professor Favre writes, "our legal system can and should do what it has always done: balance the interests of competing individuals in a public policy context, always seeking to strike an ethically appropriate balance."[148] Viewed in that light, "the stepping stone approach is to pursue evolution in a number of legal arenas that will not directly lead to rights, but which will pave the way for eventual abolition of property status for some or all animals through incremental heightening of their legal status."[149] This seems to be the most prudent course of action if animal interest advocates everywhere are not to be deprived of the spiritual oxygen animals provide to humankind by being labeled "terrorists."

[142] Favre Integrating, *supra* note 37, at 336 (emphasis added); *see also* Francione, *supra* note 4, at 721.

[143] Steven L. Teitelbaum, Editorial, *Response to Crystal Miller-Spiegel*, Science, Feb 14, 2003 at 1014.

[144] Favre Integrating, *supra* note 37, at 359.

[145] Payne, *supra* note 10, at 613.

[146] *Id*. at 613.

[147] Favre Integrating, *supra* note 21, at 89.

[148] Favre Integrating, *supra* note 37, at 334.

[149] Cupp, *supra* note 13, at 6.

Adapting the Child's Best Interest Model to Custody Determination of Companion Animals

Tabby McLain*

I. Introduction

Consider a young woman who leaves her parents' home to attend a university and later graduate school. She takes along her Yorkie, registered with the American Kennel Club in her own name, as a companion. She later marries, and she and her husband purchase two more dogs, a Welsh terrier and an Airedale, who are listed in the American Kennel Club Registry with the woman listed as the primary owner and her husband as the co-owner. While she is a student, he is the sole source of their income, and provides the funds to purchase these two dogs. On the other hand, it is she who works countless hours in training them; the Welsh terrier learns an expansive repertoire of tricks up his sleeve, although the Airedale seems rather hopeless despite the time the woman dedicated. The wife and husband have a happy marriage, a house, and three "fur kids." While their marriage is at present soundly intact with no end in sight, it would be irresponsible of them not to consider the fact that divorce is always possible. With differing amounts of time and money invested and dissimilar registrations (not to mention the tendency for divorcing couples to use human children, and so by virtue of extrapolation well-loved dogs, as tools for hurt and negotiation), where will their "fur kids" end up if the wife and husband part in a bitter divorce? When a marriage dissolves, the home's companion animals are at the mercy of the current legal system for decisions as to where they will make their homes in the future. Currently, the legal system dispenses with companion animals in the exact manner of any other personal property, without regard to the desires of, or consequences to, the companion animal. The current state of the law leaves much to be desired when dealing with such living beings.

This discussion is bounded by considerations of only the American jurisprudential system. Also, while companion animals may include any number of species, I limit my discussion to those of the feline, canine, and avian persuasion. This is not to disregard the importance of any other species of companion animal, but for the sake of proposing viable standards and provoking thoughtful (and hopefully little objectionable) discourse. Most law-making bodies, upon a reference to animals, in actuality are referring to mammals.[1] If this is the standard most

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[1] David Favre, Animal Law: Welfare, Interests, and Rights 217 (2008).

acceptable to courts and legislatures, then that is where the discussion should begin, and the likely point from which it will eventually progress. I do make the leap to include birds in the broad discussion as well, considering the in-depth research having been completed with birds such as Alex the African Grey which have been converted to news stories and which are well known to many people, including those outside of animal advocacy circles. Such cognition studies recognize that parrots should be included in the list of animals we recognize as having a "complex mind."[2] I believe that this is the determination, whether conscious or not, which leads courts to consider mammals as opposed to reptiles in the context of animals which legislation should target. Mammalian mental complexity is that with which we are most familiar, being mammals ourselves, and more so because most of us (59%[3]) have now or have had a cat or dog waiting for us at home.

In this note, I propose a statutory scheme allowing judges overseeing divorce settlements to determine custody awards of traditional companion animals based upon the best interest of the animal. Part one examines reasons that our society is ready for this change. In constructing this statute, I first consider which factors should be included when determining what a companion animal's best interest includes and refer to both physical and psychological well-being, as well as proposals for measurement of the psychological component. Part two discusses the current state of the law, and distinguishes the court system's treatment of companion animals from its treatment of children in custody determinations. Part three advocates a best interest of the animal approach in determining custody of companion animals upon guardian divorce. This requires initially a reevaluation of the current property classification of companion animals. I base my best interest model on a modification of that model currently used in deciding what is in the best interest of children who are the subject of custody disputes. I set forth similar factors and discuss how those factors should apply to companion animals and by what methods we might measure them in subjects who cannot speak to us. As a conclusion, I set forth the proposed statute.

II. Accounting for the Best Interest of Companion Animals

Before proposing a change to our current jurisprudential system to allow for a consideration of companion animals' best interest, the question of whether our society is ready for such a change must first be asked. Following an affirmative answer to that question, it still must be determined which interests, both physical and psychological, require consideration, and how an unseen psychological status can be gauged.

[2] Paria Kooklan, Animal Law, American Bar Association Student Lawyer, Feb. 2008 at 19, *quoting* Steven Wise.

[3] Jeffrey M. Jones, Companionship and Love of Animals Drive Pet Ownership (2007), http://www.gallup.com/poll/102952/Companionship-Love-Animals-Drive-Pet-Ownership.aspx.

A. Societal Views

Because "animals as property" is a common law topic, state courts and legislatures both have the capacity to change the current legal atmosphere regarding companion animal status.[4] However, until recently, the relatively minimal economic value of companion animals (traditionally, the companion animal's fair market value has been its only indicator of worth[5]) has resulted in a lack of pressure on legislatures and courts to make such changes, and even now that pressure is not significant.[6]

Pressure has been increasing, however. Since World War II, a strong advocacy of basic human rights has dominated our culture.[7] This has laid a foundation from which to advocate for basic animal rights as well. Further, the fact that there exists an American cultural trend toward treating animals more like children in everyday life serves to effect change as well. Recently, our society has been more and more willing to recognize that animals should be viewed in a way which takes into account their best interests. More pets are in homes than ever before and families are smaller than in the past.[8] This seems to be as a result of less stable human families (divorce being more common today than in the past) and the fact that some households are substituting pets for children.[9] This tendency to view animals more as living beings than as property, combined with recent news stories that have brought a new awareness and sense of outrage to the public (consider the societal awakening generated by the Michael Vick case), are effecting a change in the way people want animals treated in the law. As society's views change, its people become more willing to accept changes in the animal welfare laws (a best interest consideration in pet custody is just that) that may affect them. When public policy progresses, legislatures tend to take notice and act accordingly. As an example, the American Bar Association recently listed the legal system's view of animals as property as one of the top challenges to animal law.[10] It appears the time is ripe for a change in our animal-legal system of jurisprudence.

B. Physical Welfare

Obviously, any determination of best interest for a living being would be incomplete without a physical component. This paper is intended to delve into issues of significant question within the animal-legal field regarding considerations in determining a companion animal's best interest. As a result, this component's discussion will be brief and will rely on generally accepted and fundamental necessities to physical welfare. For a companion animal, physical requirements are relatively obvious to even the most inexpert of guardians. While certain physical

[4] Favre, *supra* note 1, at 34-35.

[5] *Id*. at 138.

[6] *Id*. at 35.

[7] Kooklan, *supra* note 2 at 19, *paraphrasing* Steven Wise.

[8] David Favre, Professor of Animal Law, Michigan State University College of Law, Animal Law Lecture, "Vet Malpractice & Harm to Animals" (Feb. 11, 2009).

[9] *Id*.

[10] Kooklan, *supra* note 2 at 19.

necessities are topics of debate within both the professional and layperson realms (e.g., the necessity of spaying or neutering a companion animal), those issues are beyond the scope of this paper. As a guide, I offer the American Veterinary Medical Association's principles of proper physical care: "Animals must be provided water, food, proper handling, health care, and an environment appropriate to their care and use[.]"[11]

C. Psychological Well-Being

Also obvious is the need to consider mental processes when determining an animal's overall interest. An animal's psychological well-being can and should be taken into account in an evaluation of its overall welfare. Fortunately, research indicates that scientifically-based methods exist for determining a companion animal's emotional state, utilizing both behavioral and biological methods. The existing research serves to aid in recognizing whether an animal's psychological needs are being met. Future research is important because, combined with advents in veterinary behavioral and biological studies, scientists expect to establish a baseline from which to determine behavioral and hormonal norms,[12] which will be useful not only in treating companion animals but also in determining their general overall well-being. This creation of a baseline may someday allow us to consider "dogness" or "catness" in a quantitative inquiry of well-being: imagine a set standard which will take into consideration a companion animal's natural behaviors and emotional states; from this, measurements of a companion animal differing from that standard would tell us much about its well-being.

1. Behavioral Cues

Because more companion animal owners own a dog than a cat,[13] the majority of cognitive and behavioral research has been completed on domestic canines. In fact, the number of papers aimed at studying canine behavior has risen dramatically in recent years.[14] This has likely been driven as well by the popularity of television programs such as *The Dog Whisperer*, and by the overall increase in obedience concerns as more homes come to include companion animals. Therefore, much of the research I rely on for support in this note is based on canine studies.

Studies indicate that there exist behavioral cues to an animal's emotional state. For example, research reveals that positive human interaction results in psychological and concomitant health benefits for dogs- a dog being petted, for example, displays behaviors which indicate emotional well-being.[15]

[11] American Veterinary Medical Association Animal Welfare Principles, http://www.avma.org/issues/policy/animal_welfare/principles.asp.
[12] Daniel S. Mills, *Human-Animal Interactions- the Importance of Examining the Whole of a Subject*, 165 The Veterinary Journal, 180, 180 (2003).
[13] Jones, *supra* note 3
[14] A. Miklosi, J. Topal, & V. Csanyi, *Comparative Social Cognition: What Can Dogs Teach Us? (Review)*, 67 Animal Behaviour, 997, 997 (2004).
[15] Mills, *supra* note 12.

General behavioral cues to an animal's emotional state include play behavior, affiliative behavior, self-grooming, vocalizations, and information gathering.[16] Using these behavioral cues, we can determine whether an animal's psychological interests are being met. Such cues encompass a broad range of behaviors and each category by its presence or absence serves as an indicator of specific positive or negative emotional states:

(1) Play behavior may encompass "functional" behaviors (where the elements are exaggerated) such as fleeing, fighting, sexual, and predatory behavior; also encompassed are locomotor play and social play, as well as traditional play behaviors.[17] Play behaviors are suppressed in harsh and unfavorable environmental conditions associated with bad welfare.[18] However, it is important to note that in some species (such as lambs), castration eliminates play behavior.[19]
(2) Affiliative behavior is marked by maintaining proximity, providing food or protection to conspecifics, or grooming of conspecifics.[20] This category, besides indicating current positive emotional state, may also increase positive emotional welfare.[21]
(3) Self-grooming, marked by licking, scratching, rubbing of the fur, wallowing, and bathing, tends to increase in mammals responding to a novel or stressful situation and to increase in birds reacting to a thwarting or conflict situation.[22]
(4) Vocalization is traditionally a reliable indicator of negative emotion in animals and has recently been determined to be reliable in a finding of positive emotional states at certain wavelengths (e.g., the 50—kHz frequency produced by rats when engaging in sex or when winning a fight) or during certain behaviors (e.g., purring as an indicator of pleasure in cats).[23]
(5) Finally, information gathering behavior (exploration) also indicates the current emotional state of animals: engagement in inquisitive (the animal is looking for a change) exploration indicates no lack of immediate needs and that the animal is finding continuous pleasure in its exploration; when engaging in inspective (the animal is responding to a change) exploration, the animal is likely indicating a negative emotional state (e.g., fear).[24]

[16] Alain Boissy et al., *Assessment of Positive Emotions in Animals to Improve Their Welfare (Review)*, 92 Physiology & Behavior, 387, 387-90 (2007).
[17] *Id*. at 387-88.
[18] *Id*. at 387.
[19] *Id*.
[20] *Id*. at 388-89.
[21] *Id*. at 388.
[22] Alain Boissy et al., Assessment of Positive Emotions in Animals to Improve Their Welfare (Review), 92 Physiology & Behavior, 387, 389 (2007).
[23] *Id*.
[24] *Id*. at 389-90.

2. Hormonal Cues

Biological markers indicative of emotional state are also emerging from current scientific study. Fluctuations of hormone concentrations are indicative of emotion.[25] The presence, absence, and concentration level of certain hormones or the measurement of certain physiological processes can denote the emotional state of an animal which is incapable of verbally communicating those emotions. Some examples of the potential value of gaining such an understanding follow:

(1) In the petting experiment mentioned above, positive human-animal interactions, in addition to resulting in physical signs of well-being, also resulted in lower mean arterial blood pressure; significantly higher levels of the following neurobiological markers: β-endorphin, oxytocin (a hormone which promotes intimate bonding), prolactin (which promotes bonding associated with parenting behavior), phenyl acetic acid, and dopamine; and an increase of cortisol, all of which combined indicate a general relaxation in the dog.[26] These sorts of indicators can be used as comparative measures between when the companion animal is in the custody of husband or wife to see with which owner a companion animal has the most positive emotional state.

(2) Among other things, dopamine can reflect the intensity of "wanting" (based in terms of appetite or motivation by incentive), and opioid presence can indicate what is wanted.[27] Measurement of these markers could be useful in determining whether an animal is in a good situation, based on whether what is wanted is something seen as a necessity (e.g., food or water).

(3) Salivary alpha-amylase production increases in humans in response to both physiological and psychological stress, and researchers are hopeful that similar indications apply to non-human mammals.[28] This would allow a determination of whether the animal found one home, or the loss of one of its owners' companionship, to be more stressful than the other.

(4) Oxytocin can indicate, from the companion animal's own perspective, social recognition and attachment based on positive social bonding.[29] Higher levels of oxytocin and vasopressin indicate increased bonding and reduced stress in mammals as

[25] *Id*. at 382

[26] J.S.J. Odendaal & R.A. Meintjes, *Neurophysiological Correlates of Affiliative Behaviour Between Humans and Dogs*, 165 The Veterinary Journal 296, 297-99 (2003).

[27] Boissy et al., *supra* note 16, at 379-81.

[28] *Id*. at 383.

[29] *Id*.

a class.[30] Additionally, tests created in ethological research on human attachment, particularly between human mothers and their infants, have also been applied to dogs and their owners; these tests can identify patterns of attachment in the dog-owner relationship.[31] In this author's opinion, this line of research is perhaps the most valuable in indicating the well-being of a companion animal. Studies have shown the strong propensity of companion animals to bond with one particular person, even when the animal is jointly owned.[32] This is due in part to the alpha theory of dog behavior- based on the idea that, in the wild, canines live and hunt together in groups which look to one leader, the alpha dog. The same one-person bond is very visible among pet bird owners- parrots are notorious for bonding with only one member of its owner pair, to a stronger degree than is seen in dogs; this behavior may stem from the fact that strong monogamous pair-bonding is typical of parrot species in the wild.[33] Cats, of course, do whatever they like and answer to no one. When this bonding occurs, and the companion animal is sent to live with its titled owner, as is a common practice, the interest of the companion animal is compromised when this owner is not the person to whom it is bonded.

III. Contrast of Current Jurisprudential Accommodations Between Children and Companion Animals in Guardian Divorce

It is imperative to understand the current state of the law before any change for the better can be made. In this section, contemporary devices for determining companion animal custody are discussed and are contrasted with methods being used to determine custody of children when their guardians divorce.

A. Current Accommodation for Companion Animals

1. Companion Animals as Property

Currently, in American jurisprudence, animals are regarded as personal property.[34] Ownership of domesticated animals equates to title in the animal. In

[30] C. Sue Carter , *Neuroendocrine Perspectives on Social Attachment and Love*, 23 Psychoneuroendocrinology 779, 802 (1998).

[31] Miklosi et al., *supra* note 14 at 999.

[32] Milos Pesic, *Dog Training and the Dog-Human Bond* (2008), http://ezinearticles.com/?Dog-Training-and-the-Dog-Human-Bond&id=1033042. The author is a certified dog trainer.

[33] L. Bottoni, R. Massa, & Lenti Boero, *The Grey Parrot (Psittacus erithacus) as Musician: An Experiment With the Temperate Scale*, 15 Ethology, Ecology & Evolution 133, 140 (2003).

[34] Favre, *supra* note 1, at 53.

obtaining title to an animal, the human owner gains the right to control, direct, or consume it-[35] within, of course, a framework of what is accepted by society.[36] Property rules "reflect the ethical and moral positions within a society."[37] While some, including Michigan State University College of Law Professor David Favre, point out the obvious distinction between the majority of personal property and "living property-" that which includes "physical, movable living objects- not human- that have an inherent self-interest in their continued well-being and existence-"[38] most courts recognize no such distinction. Instead, companion animals are allocated to either the husband or wife based on the same property concepts which govern allocation of the sofa. While the sofa clearly has no self-interest, companion animals differ: as thinking and living beings, they retain interests in their survival, happiness, and well-being despite who retains title to them. Based on the psychological research cited above, I would venture that as a result of those interests, companion animals likely have a preference for their permanent placement as well.

2. Equitable Division of Property in Divorce

In a typical divorce, companion animals are treated as property and included in the marital estate to be divided up between the husband and wife.[39] Most courts approach this issue from a perspective known as equitable division. Relative to the division of the marital estate, the court must consider the following nine factors when equitably dividing an estate: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity.[40] Note that these factors include no consideration for the happiness or comfort of the articles to be divvied up between the parties- which is sensible, considering that these factors were intended to be the basis for determining title to inanimate objects, but which is at the same time laughable when considering that companion animals are being treated under the same standard. These factors bring into sharp relief the need for a new category of property and a new system of division for companion animals when a marriage is dissolved. The Animal Legal Defense Fund offers advice that, based on the companion animal's

[35] *Id.* at 34.
[36] *See id*. at 218-221, discussing anti-cruelty legislation.
[37] *Id*. at 34.
[38] *Id*. at 36.
[39] Diane Sullivan & Holly Vietzke, *An Animal is Not an iPod*, 4 J. ANIMAL L. 41, 55 (2008).
[40] *Sparks v. Sparks*, 485 N.W.2d 893, 901 (Mich. 1992); *cited in* James P. Cunningham, *Separate Property in Michigan*, 87 MICH. B.J. 20, 22 (June 2008); Julia L. Birkel et al., *Litigating Financial Elder Abuse Claims*, 30 L.A. LAW. 19, 20 (Oct. 2007); John M. DeStefano, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521, 521 (Summer 2007); Shayna M. Steinfeld, *The Impact of Changes Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Family Obligations*, 20 J. AM. ACAD. MATRIM. LAW. 251, 272 (2007).

place in the law of property, proof that "you were the one who adopted the animal, or if the animal was purchased, that you were the one who purchased the animal" will be helpful in gaining custody.[41] But what if the person who cut the check is not the person to whom the animal is bonded or its primary caregiver?

3. Legally Cognizable Options for Companion Animal Interest Consideration

Based on the lack of a "best interest" standard for companion animals, probably the absolute best (for the animal) solution at present is to keep the issue out of court—and consequently out of a judge's hands, who by common law has no requirement to consider anything outside of traditional inanimate property concepts in companion animal allocation. It should instead be in the hands of the owners, the people who ostensibly love and care for the companion animal most, and who are most likely to consider his interests when determining his permanent placement. A pre-nuptial agreement may serve this purpose, but considering the dynamic nature of lifestyles throughout a long-term marriage, this may not be the best solution. The Animal Legal Defense Fund advocates alternative dispute resolutions such as mediation or arbitration, where the husband and wife can present his or her argument as to why custody would be most appropriately awarded to him or her.[42]

On the other hand, litigation remains open as an option available to couples unable to reach an agreement through other methods. Some courts are willing to entertain considerations outside the normal property factors when determining to whom title of a companion animal should be given. For example, proof that you are the companion animal's primary caregiver may carry weight in some courts.[43] Such proof may include "receipts for veterinary care, licensing records, receipts for grooming, dog training classes, food, and other items purchased for the companion animal."[44] On the other hand, most of these proofs remain less than helpful for couples who maintain joint checking accounts. The court may also be willing to consider who provided the most consistent human interaction to the animal. Neighbors willing to testify to who walked the dog or took him to the park can provide helpful evidentiary considerations in that sense.[45]

However, these outside considerations, which sometimes include shared custody agreements, remain a bone of contention in animal-legal jurisprudence. Some courts stick to the letter of the law, citing the lack of statutory support and the public policy argument of an unwillingness to "open the floodgates." [46] One court stated blatantly the "Appellant [was] seeking an arrangement analogous, in law, to a

[41] What To Do If You Are Involved In A Custody Battle Over Your Companion Animal, http://www.aldf.org/article.php?id=239.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Nuzzaci v. Nuzzaci*, No. CN94-10771, 1995 WL 783006 (Del. Fam. Ct. April 19, 1995).

visitation schedule for a table or a lamp."[47] Others, however, have taken quite a wide and novel approach to decision-making in companion animal custody disputes and do, at least in part, consider the animal's best interest in those cases. Some courts have agreed to judicially sanction shared custody agreements created by the parties themselves.[48] Indeed, some judges have even granted shared custody agreements for roommates,[49] although that discussion is beyond the scope of this paper. Courts in varied jurisdictions have even taken it upon themselves to arrange "reasonable visitation" for the owner who does not gain custody of a pet; for example, a Texas trial court created such an arrangement for a dog under its jurisdiction, and the appellate court affirmed the decision, stating that "Bonnie Lou is a very fortunate little dog with two humans to shower upon her attentions and genuine love not frequently received by human children from their divorced parents."[50] In a clear example of the animal's best interest, the Supreme Court of Alaska awarded sole custody to the ex-husband when his ex-wife's other pets threatened the safety of the divorced couple's Labrador.[51] In some cases, "petimony,[52]" a court-awarded monetary amount toward care of the companion animal, has even been ordered. [53]

B. Current Accommodation for Children

On the other hand, when the custody of a human child is at issue upon dissolution of marriage, all states require the Court to consider which parent will provide a better home for the child in terms of the child's best interest.[54] The first inquiry, when determining which home is in a child's best interest, involves each parent's evaluation as to whether he or she is fit to provide a home to the child; "unfitness" has been defined as "personal deficiency or incapacity which has prevented, or possibly will prevent, performance of reasonable parental obligations in child rearing and which has caused, or probably will result in, detriment to a child's well-being."[55] Upon a finding that each parent is fit, the inquiry then moves on to a determination of which parent's home is more in line with the child's best interest- a standard based on the child's physical and mental well-being.[56] The factors to be included in this consideration differ by jurisdiction, but often include

[47] *Desanctis v. Pritchard*, 803 A.2d 230, 232 (Pa. Super. Ct. 2002).
[48] *See Dickson v. Dickson*, No. 94-1072 (Ark. Garland Cty. Ch. Ct. Oct. 14, 1994).
[49] *See* Raymond v. Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999); Lawyers Must Plan for More Pet Custody Cases, http://www.aldf.org/article.php?id=308, *citing Zovko v. Gregory*, No. CH-97-544 (Arlington Cty. (Va.) Circuit Ct., Oct. 17, 1997).
[50] *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. App. 1981); *see also Raymond*, *supra* note 49 at 308; *Assal v. Kidwell*, Civil No. 164421 (Md. Cir. Ct., Montogomery Cty. Dec. 3, 1999).
[51] *Juelfs v. Gough*, 41 P.3d 593 (Alaska 2002).
[52] Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 Univ. Colo. L. Rev. 181, 223-24 (2003).
[53] *See Dickson, supra* note 48.
[54] Linda Elrod, *Child Custody Practice and Procedure* §4:1 (2009).
[55] *Id*.
[56] *Id*.

"the wishes of the child and the parent or parents, the interaction and relationship of the child with the parent, siblings, and any other person who may significantly affect the child's best interest, the mental and physical health of all individuals involved, and the child's adjustment to home, school, and community."[57] The court has wide discretion in this area, and judges often base the analysis on their own prediction of "with which person a child will have the chance for a better life."[58] The judge himself assesses the child's "life chances" in each of the parent's homes, and then "tries to predict with whom the child will fare better in the future."[59] "At the bottom line, what is in the child's best interest equals the fact finder's best guess."[60]

IV. A Proposal For Determining Custody of Companion Animals Upon Guardian Divorce

In order to effectively create a judicial basis for considering a companion animal's best interest in determining which spouse should retain custody over the animal following a divorce, it is first necessary to reconsider the companion animal's basis in law as property. Following a more prudent legal classification system for companion animals, adaptation of the current best interest scheme used for children for those animals can occur. Here, those adaptations are discussed and measurement parameters applied.

A. Prerequisite Reassessment of Property Classification

As to the companion animal's classification as property, I advocate a new and separate classification in which to group companion animals, and the abolition of the view of companion animals as personal property. These ultimate objectives require both short- and long-term goals. I do not believe that the American jurisprudential foundation is capable of accommodating the consideration of a companion animal's best interests while the companion animal is still legally viewed as personal property. In the immediate future, I would, at a minimum, suggest a new category of legally-recognized acceptance of Professor Favre's "living property" category, which takes into account the companion animal's own interest in its survival and happiness. Eventually, this category would expand to include all animals, rather than only companion animals. In the long term, a more expansive category encompassing animals as their own legal entities, completely separate from traditional property concerns and with a right to jurisprudential personhood and the attendant ability to seek legal redress, would be appropriate. After all, if a corporation is afforded legal personhood[61], able to seek redress of its own accord, why is a living animal legally

[57] 2 Thomas Jacobs, *Children and the Law: Rights and Obligations* §6:6 (2009).
[58] Elrod, *supra* note 54.
[59] *Id*.
[60] *Montgomery County Dep't of Soc. Servs. v. Sanders*, 381 A.2d 1154, 1163 (Md. Ct. Spec. App. 1977); *cited in Child Custody Practice and Procedure* §4:1 (2009).
[61] 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates

prevented from doing the same?[62] Note, however, that this new category would necessarily include some traditional property concepts, but which would be tailored by the legislature or the courts to directly consider the animal's best interests. For example, the benefits of ownership will still need to be realized for animals in a sense loosely akin to the power of attorney awarded to human custodians or the guardian ad litem appointed for juveniles in probate proceedings: consider the domesticated animal's inability to fend for itself, a societal need for human liability, and our role as stewards of wild animals.

B. Modification of the Child's Best Interest Model to Apply to Companion Animals

Due to its wide acceptance and repeated testing in child custody disputes, the best interest of the child standard is the clearest platform from which to extend the best interest of the companion animal standard and, while modifications are clearly necessary, many parallels exist between what each entity (child and companion animal) requires. In the realization of this goal, short- and long-term goals would be set as well.

1. Child's Best Interest Factors Translated to Companion Animal Best Interest Factors

Of course, an agreement, reached by the husband and wife, will be best for the companion animal; but there need to be options available if they are unable to reach an agreement. In the short term, it is important that the courts involved in divorce settlements gain cognizance of the animal's perspectives and interests in its permanent placement. In the long term, the companion animal would ideally achieve the status of a legal being, and would be treated as living beings whose interests are paramount in custody determination.

The short-term goal could be achieved, as a stopgap measure, through applying the best interest standards used in child custody disputes to companion animals. By applying these standards, the development of a judicial body of law can be created which are better suited to companion animal interests. Does the best interest standard for children contain an ability to encompass companion animals as a whole? What about individual animals? I believe so. There will obviously be a little extra "something" associated with application of the approach created for children to companion animals, as companion animals and children have inherently different needs despite some parallel requirements, and the veterinary community's acceptable standards can be taken into consideration when deciding what those needs consist of. Further, as is not the case with children, different breeds have

otherwise— the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.")

[62] Companion animal jurisprudential standing also remains beyond the scope of this discussion.

different needs. The American Kennel Club and veterinary community standards will serve to define these; in the case of mixed-breed animals, the parties' own knowledge combined with that of the family veterinarian's should serve to inform the court of those needs.

A "fitness" evaluation of the proposed guardians would be foremost, as is the case in child custody disputes. Even without judicially imposed test cases, certain considerations would be evidently necessary: e.g., does the proposed guardian's income permit the purchase of food and veterinary care? Does the proposed guardian's work schedule and health allow for adequate exercise (which would differ based on the breed but which would be easily determined based on breeder and veterinary recommendations) and social interaction? In the alternative, does the proposed guardian's living situation provide an adequate exercise area? Does the companion animal's proposed living situation drastically alter that which he is used to (for example, is an indoor dog suddenly placed in a full-time outdoor doghouse)? Does the animal's proposed living area include adequate shelter, length of chain, and a fenced-in yard? Simple considerations of health and safety (of the companion animal and the public) are relatively obvious inquiries. The American Veterinary Medical Association's guidelines can easily be pared down to serve as standards for judges to utilize.

The inquiry would next proceed to the general best interest factors taken into account for children, including "the wishes of the child and the parent or parents, the interaction and relationship of the child with the parent, siblings, and any other person who may significantly affect the child's best interest, the mental and physical health of all individuals involved, and the child's adjustment to home, school, and community."[63] These inquiries would translate thus: With whom does the animal prefer to live? With whom does it have more interaction? What is its relationship like with others who may live with either the husband or wife? What is the animal's mental and physical health? How is the mental and physical health of the husband or wife? Once an animal has been placed, how has it adjusted to its new home or, if the home is the same, to its loss of one owner's companionship?

This inquiry may proceed to the question of who can say what the best interest of a companion animal may be? Is it even a predictable standard? This discourse will be as important to the progress of the law as any other inquiry. Researchers will be tasked with measuring what works, and doubters will likely find what does not. As noted above, the fields of animal biology and behavior have already discovered real and measurable methods by which to determine when an animal is relaxed and content based on the presence or absence of hormones, physiological indicators, and behavioral cues which the companion animal exhibits or refrains from exhibiting. Courts, as well, will be able to create their own common law stemming from the results of such companion animal best interest orders. As a whole, our legal system is at a stalemate which has stood too long as an archaic view of animals solely as personal property. It is an exciting time when so much

[63] Jacobs, *supra* note 57.

scientific progress has been made and courts are willing to stretch the boundaries a little at a time in order to achieve a better outcome for a cat than for a television set. The creation of new laws relating to the topic will doubtless encourage even more progress and judicial accommodation. That, after all, is what our jurisprudential system is based upon.

2. Evaluating the Proposed Factors

A companion animal's physical needs are clearly visible and easily measurable as to having been met or not: it will be an easy task to decide, based on either visible observation or a confirmation with the family veterinarian, whether an animal is losing weight or dehydrated, whether it is receiving its scheduled health care, and what sort of environment it inhabits.

On the other hand, the psychological needs of an animal are more difficult to determine for a variety of reasons, not the least of which are the facts that the psychological processes obviously occur internally and that companion animals are unable to verbally communicate their state of well-being. This is where the indicative behavioral and biological cues will best serve as a measurement of the animal's emotional state: through behavioral observation and testing for blood-hormone levels, the animal's psychological interests can be evaluated. I advocate allowing the companion animal to spend a month in the spouse of each home, consecutively, and undergoing the behavioral observations and blood-draws in that home at the end of the month. This would reduce concerns that the animal is exhibiting a remnant psychological state from the other spouse's home or due to the stress of a veterinary visit, and also reduce the potential for abuse from either spouse. From there, the results could be compared to determine in which home the animal's psychological interests are best being met. Through these tests, both the owners and the court would gain an understanding as to the animal's stress or conflict level, whether its emotional state is positive or negative, whether it is satisfied with its environmental conditions, whether it displays behavior indicative of general satisfaction, whether it is lacking in its immediate needs, whether its appetite is healthy, its relaxation level, and its degree of bonding with each owner, among other things. These determinations, along with the physical best interest component, the fitness determination of the proposed guardian, and the modified child best interest standard, should be considered as a whole in order to facilitate the decision as to which spouse should retain custody of the companion animal. Only when the two sides are truly equal would I advocate a shared custody agreement; after all, the determination should be based on the animal's best interest, and not the guardians'.

C. Statutory Considerations

Following is a proposal of statutory text for the best interest approach. The purpose of the proposed statute is not to immediately commence lobbying in

favor of its national adoption, but rather to serve as a basis for the stimulation of intelligent discussion and consideration in the legal and animal advocacy fields. In this discourse and the subsequent development of this and other companion animal best interest statutes, it should be kept in mind that it will be important to choose wording which will not be objectionable if possible. Broad agreement is the best vehicle for passing a controversial law. Creativity will be key in convincing a legislative body that a law which has stood unchanged for so long needs to be changed now. Again, until this or similar legislation is adopted accomplishing full jurisprudential accommodation of companion animal interests, I urge interim judicial cognizance that the companion animal, as a living being, has interests in its well-being, and that courts involved in divorce settlements should consider those interests in determining allocation of companion animals.

In applying the proposed statute, a court would need to be aware of the public policy considerations set forth above; obviously, each case is unique, and I would submit that a judge should retain the same wide degree of discretion in applying the best interest standard in the case of companion animal custody disputes that he does in child custody disputes. While the standards set forth in the proposed statute may apply best to the general situation, just as with any other law, the applying court must be free to use its own judgment in the determination. This is not, and should not be construed as a "bright-line" rule. Also, the parameters for measurement and the relevant decision-making criteria, which the court has experience applying in child custody disputes, will obviously differ from the acceptable best interest standards regarding companion animal custody disputes, and the judiciary will need to remain free to develop the common-law in these situations.

Finally, I address some areas of difficulty which I predict will surface in the implementation of the companion animal best interest standards:

(1) The greatest potential difficulty in the determination of the animal's physical and psychological state of being will be whether the spouse caring for the animal during divorce proceedings allows the other access to the animal and its health records in the interim; a judicial order can easily cure the problem, and will likely be granted by a judge who actually intends to engage in a good-faith determination of the animal's best interest.

(2) Tests for blood-hormone levels also have the potential to be prohibitively expensive for some divorcing couples. However, the availability of other options should not preclude availability of those tests to couples who can afford it. By requiring the disputing couple to pay for the blood analysis, courts would promote freedom in evidentiary methods while also promoting judicial economy. Although the couple itself may have to limit what seems ideal, other inexpensive or free-of-charge options exist aplenty for the best interest determination. Beyond the hormonal analysis, courts would also have access to the following

free resources: veterinary record consultation, the family veterinarian's personal testimony, observations of behaviors and general physical considerations, and testimony that the husband and wife offer against each other.

(3) Judicial resources may become a concern when a court is forced to continuously reconsider its custodial determination; therefore, I have limited the opportunity to one re-consideration, and that will occur only at the judge's discretion.

(4) Judicial resources may further be stretched based on whether this best interest determination is made by the judge in a hearing separate from the divorce hearing. I advise that it all remain part of one ongoing proceeding, so that the disputing spouses may easily be held accountable for court costs.

(5) Judges may also be hesitant to order financial support such as "petimony." I advocate such a solution only under two specific instances: 1) when the divorcing spouses specifically agree to it the court should sanction the agreement, and 2) when one spouse was the sole income source in the household, the judge should consider that when awarding alimony if the non-income producing spouse is determined to be the better overall interest provider for the animal. While it is generally accepted that a person who cannot afford to keep a companion animal should not attempt to do so, it would be unjust to base the income in that situation on the amount of money that the spouse was bringing in during the marriage.

V. Conclusion: A Proposed Statute For Accounting For the Best Interests of a Companion Animal Upon Divorce

Custodial Determination of Companion Animals in Divorce Act of 2009

§ 1: Policy

It is the intent of the legislature in the creation of this statute that members of the judiciary ruling upon divorce settlements shall determine which party shall retain custody of companion animals common to the marital estate based upon the best interest of the companion animal.

§2: Definitions

As applied in this statute:

a) A "companion animal" or "animal" shall be defined as any domesticated canine, feline, or avine.

b) "The parties" refer to a divorcing husband and wife.

c) A companion animal "common to the marital estate" indicates one which is co-owned by a husband and wife or obtained during marriage.

d) The term "living property" indicates physical, movable living objects- not human- that have an inherent self-interest in their continued well-being and existence.

e) "Alternative dispute resolution" may include, but is not limited to, mediation or arbitration.

f) A payment of support should be limited to a monetary sum for payment of veterinary care, food, boarding, or grooming costs, or for any other matter which is directly attributable to a need or perceived desire of said companion animal.

§3: Living Property Status of Companion Animals

Upon divorce, a court overseeing the divorce settlement shall consider any companion animals which are included in the marital estate as a separate class of "living property."

§4: Order of Alternative Dispute Resolution

a) The Court shall first order the divorcing husband and wife to engage in alternative dispute resolution in order to come to an agreement regarding the companion animal's custody.

b) Upon an agreement as to custody which is acceptable to both parties, the Court should adopt said agreement by judicial resolution, even when that agreement includes shared custody agreements, visitation, or a payment of support.

§5: In the Event of Failed Resolution Between the Parties

If the parties are unsuccessful in reaching an agreement after good faith efforts at alternative dispute resolution, the Court should impose its own order of award of custody based upon the best interests of the companion animal.

§6: Judicial Determination of Companion Animal's Best Interests

a) The Court shall consider the best interests of any companion animal's best interests when determining which party shall retain custody of the companion animal.

(1) The Court shall first evaluate each party as to its fitness for guardianship of the companion animal.

a. In determining fitness, the Court shall consider the following factors, along with any others the Court, in its discretion, feels should be considered: the proposed guardian's income, schedule, health, immediate and future living situation; and the companion animal's proposed immediate and future living area.

(2) Upon the Court's determination that both parties are fit, the Court shall next evaluate each party based on general foundations of companion animal best interest.

a. In determining guardianship ability based on general foundations of best interest, the Court shall consider the following factors along with any others the Court, in its discretion, feels should be considered: animal's guardian preference, level of interaction, relationship with others who

live with either party, animal's mental and physical health, each party's mental and physical health, ability of animal to adjust to new home or loss of companionship of either previous owner.

(1) The Court shall next evaluate the parties based on the following general physical interest factors: ability and willingness to provide water, food, proper handling, health care, and an environment appropriate to their care and use.

(2) The Court shall next evaluate the parties based on the following psychological interest factors, taking into account the needs of the individual companion animal: the animal's stress or conflict level, whether its emotional state is positive or negative, whether it is satisfied with its environmental conditions, whether it displays behavior indicative of general satisfaction, whether it is lacking in its immediate needs, whether its appetite is healthy, its relaxation level, and its degree of bonding with each owner.

§7: Judicial Award of Custody

a) After a consideration of all of the relevant factors, the Court should make a determination, based on the companion animal's best interests as defined by the factors set forth above, of which party should be awarded custody of said companion animal.

b) If the Court, in good faith, believes that it is within the companion animal's best interest, shared custody agreements, visitation, and/or monetary support should be ordered.

c) The Court shall also be permitted to allow for one re-consideration of the issue at a period of time to be determined by the Court upon motion of either party and at the Court's discretion.

CASE LAW REVIEW

John F. Hilkin

Case	Citation	Summary of the Facts	Summary of the Holding
Merced v. Kasson	577 F.3d 578 (5th Cir. 2009)	Appellant performed Santeria ceremonies involving animal sacrifice without governmental interference from 1990 until 2006 when local police officers told Appellant it was illegal to perform the sacrifices. Appellant attempted to obtain a permit but was told that no such permit was available. Appellant challenged the ordinance, which forbid any keeping of certain types of animals (sheep and goats), the keeping of more than four animals at a time, and the slaughter of animals. The city offered expert testimony stating the ordinance's purpose was to protect the health and safety of the public.	On appeal, Appellees conceded that Appellant's religious motivations were sincere in nature. The court found Appellant was substantially burdened because he was unable to perform ceremonies dictated by his religion. The court found the city was unable to meet its burden of proving a compelling government interest. The court noted that even if the city had proven a compelling governmental interest, the ordinance was not the least restrictive means to further that interest.

Case	Citation	Summary of the Facts	Summary of the Holding
Dias v. County of Denver	567 F.3d 1169 (10th Cir. 2009)	Appellant challenged a breed specific ban on pit bulls in the City of Denver alleging the ordinance was unconstitutionally vague on its face and deprived dog owners of procedural and substantive due process. The court dismissed the charges for failure to state a claim under F.R.C.P. 12(b)(6).	On appeal, the 10th Circuit concluded *sua sponte* that the Appellants had no standing for the prospective relief sought. Appellants had left Denver to avoid enforcement of the ordinance; therefore, the court found they did not allege a credible threat of future prosecution. Regarding the retrospective relief, the court held that the district court had correctly dismissed the vagueness complaint for failure to state a claim. However, the district court was found to have erred in dismissing the substantive due process claim because under a rational basis analysis, sufficient evidence was proven to withstand a motion to dismiss for failure to state a claim.

Case	Citation	Summary of the Facts	Summary of the Holding
Reams v. Irvin	561 F.3d 1258 (11th Cir. 2009)	Georgia Department of Agriculture impounded forty-six horses and three donkeys from plaintiff because they were not being provided with adequate food and water. Appellant was out of state at the time the warrant was executed and was not made aware of her right to challenge the impoundment of the animals. The district court granted Appellee's motion for summary judgment Appellant appealed claiming the district court erred by holding pre-deprivation notice was not required, statutory notice was sufficient, and that the process satisfied due process.	The court held that a hearing is not always required before seizure. The private interest, the government interest, and the risk of erroneous deprivation should be considered when determining the requirements of the pre-deprivation process. The court found the statutory notice to be sufficient because appellant was given thirty days to request a hearing, which the court determined to be "ample" time. The court held that due process is satisfied when post-deprivation hearings provide adequate remedy for the procedural deprivation, which was provided when appellant was allowed an opportunity to present her allegations, to show the impound was wrongful, and to receive redress for the deprivation.

Case	Citation	Summary of the Facts	Summary of the Holding
Kaufman v. Langhofer	222 P.3d 272 (Ariz. Ct. App. 2009)	Plaintiff's scarlet macaw died following surgery performed by defendant veterinarian. Plaintiff sought "special damages" including emotional distress damages, veterinary medical expenses, damages for the loss of companionship, other pecuniary loss, and damages at law. The court dismissed the emotional distress damage claims and instructed the jury plaintiff's damages were limited to the fair market value of the bird at the time of its death. The jury allocated 70% fault to the plaintiff and awarded no damages.	On appeal Plaintiff argued Arizona common law should be expanded to allow pet owners to recover for emotional distress and loss of companionship because damages had previously been awarded when owners' personal property had been negligently damaged or destroyed. The court distinguished the previous cases because the tortious act directly harmed a person's interest, rather than an economic interest. The court declined to expand the common law to allow a pet owner to recover based on emotional distress or loss of companionship damages given family members are not allowed to recover when non-nuclear family members are harmed.

Case	Citation	Summary of the Facts	Summary of the Holding
Price v. Indiana	911 N.E. 2d 716 (Ind. Ct. App. 2009)	An officer responding to a complaint witnessed the defendant striking a small dog twelve times across the face and stomach with a belt. During his bench trial, Defendant testified that he struck the dog as an attempt to modify the dog's behavior because striking the dogs nose and placing the dog in its training crate had not worked. Defendant was found guilty and sentenced to one year in jail, with all but eight days of the sentence suspended. Defendant appealed claiming the State's animal cruelty statute was unconstitutionally vague because it allowed an exemption for "reasonable" training.	The court held that no person could find the defendant's actions to be "reasonable training." As to the defendant's claim on vagueness, while people of ordinary intelligence could disagree as to "reasonable" training, such hypothetical situations were not present in this case. The judgment of the trial court was affirmed.

Case	Citation	Summary of the Facts	Summary of the Holding
Hurd v. Maryland	2010 WL 366582 (Md. Ct. Spec. App. 2010)	Appellant shot and killed his neighbor's dog while the dog was chasing deer on Appellant's property. Less than a year later Appellant shot and injured another neighbor's dog while it chased wild turkeys on Appellant's property. Upon injuring the animal Appellant reloaded his gun and killed the dog. After a bench trial, Appellant was found guilty of two counts of aggravated cruelty to animals in violation of Md. Code §10-606 and sentenced to two concurrent three year jail terms. All but ninety days of appellant's imprisonment were suspended with the rest of the term being served as probation. Appellant appealed questioning whether Natural Resources Article §10-416(b)(3) was a defense to his actions in the first shooting and whether the court erred in finding that he cruelly killed the dogs.	The appeals court held the purpose of Natural Resources Article §10-416(b)(3) was to prevent humans hunting deer with dogs and was not to punish those preventing such hunts. Thus the appellant should have been acquitted of the charges arising out of the first incident when the dog was shot while chasing a deer. In regard to the second shooting, the appeals court concluded that the Appellant acted with cruelty when shooting the dog because the animal suffered after being injured with the first shot and before being killed by the final shot. Nothing in the record showed the acts to be justified or necessary.

Case	Citation	Summary of the Facts	Summary of the Holding
Massachusetts v. Zalesky	906 N.E. 2d 349 (Mass. Ap. 2009)	The defendant was seen beating a dog with a whiffle ball bat while driving a van. After being stopped the defendant told the responding officers he used the bat to "modify the dog's behavior." The defendant was convicted of animal cruelty after a bench trail. Cruelty was defined in the statute as "[s]evere pain inflicted on an animal . . . without any justifiable cause." Defendant appealed claiming the State failed to prove his actions were beyond those required to train a dog.	Based on the testimony of the witness and officers and the behavior of the dog the court concluded that Defendant's actions were cruel "whatever their motivation." The court elaborated by stating bruising or other damage was not a required element of animal cruelty.

Case	Citation	Summary of the Facts	Summary of the Holding
Youngstown v. Traylor	914 N.E. 2d 1026 (Ohio 2009)	Appellee was convicted under a vicious dog statute after his two large dogs attacked a man and another dog while Appellee's dogs were unaccompanied. The appeals court held the ordinance to be unconstitutional because it violated procedural due process.	The Ohio Supreme Court held the ordinance to be constitutional because it does not unilaterally classify a dog as vicious and gives the dog owner notice and an opportunity to be heard in compliance with due process requirements because no unreviewable pre-charge determination is made by a state actor and no prehearing burden is placed on the dog owner.

Case	Citation	Summary of the Facts	Summary of the Holding
Goodby v. Vetpharm, Inc.	974 A.2d 1969 (Vt. 2009)	Appellant sued after two cats she owned died, allegedly following treatment and medication for hypertension provided by the appellant, a veterinarian. The trial court dismissed claims of loss of companionship and negligent infliction of emotional distress stemming from a breach of the implied warranty of merchantability of the medication.	The court stated that a compelling public policy interest was required because a grant of non-economic damages would expand the common law. The court found no compelling interest for the law to offer greater compensation for a pet than a friend, relative, work animal, or heirloom. Noting that negligent infliction of emotional distress requires "someone" to face physical peril, the court held that even if a pet is considered "someone," appellant never felt a fear of immediate personal injury and was not in the "zone of danger."