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ANIMAL LAW

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INTRODUCTION

ANIMAL LAW IN ACTION: THE LAW, PUBLIC PERCEPTION, AND THE LIMITS OF ANIMAL RIGHTS THEORY AS A BASIS FOR LEGAL REFORM

By
Jonathan R. Lovvorn*

In 1893, a lawyer with a major case pending before the United States Supreme Court was grappling with his doubts. He started to feel so strongly that an appearance before the high court presented grave risks to his client's long-term interests that he typed out a letter laying out his concerns:

> I have been having some very serious thoughts in regard to [the] Case of late, as my preparation for the hearing has extended.
>
> Shall we press for an early hearing or leave it to come up in its turn or even encourage delay?
>
> I know you will be surprised to hear this from me, and I will explain the reason of it. When we started the fight there was a fair show of favor with the Justices of the Supreme Court. . . .Of the whole number of Justices there is now but one who is known to favor the view we must stand upon.
>
> . . .
>
> The court has always been the foe of liberty until forced to move on by public opinion. It moved on up [in other cases] because the general senti-

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> ment of the country was so unmistakably expressed as to have an *enlightening* effect.
>
> It is of the utmost consequence that we should not have a decision *against* us as it is a matter of boast with the court that it has never *reversed itself* on a *constitutional question*.
>
> . . .
>
> My advice is
>
> 1—To leave the case to come up when it will and not attempt to advance it.
>
> 2—To bend every possible energy to secure the discussion of the principle in such a way as to reach and awaken public sentiment.
>
> Of course, we have nothing to hope for in any change that may be made in the court; but if we can get the ear of the Country, and argue the matter fully *before the people first*, we may incline the wavering to fall on our side when the matter comes up.
>
> . . . [At] any rate it could do no harm in comparison with an adverse decision.[1]

The lawyer was Albion Tourgee, and the case he was preparing to argue was *Plessy v. Ferguson*.[2] The Supreme Court went on in *Plessy* to deny basic civil rights to millions of American citizens and to elevate Jim Crow into the supreme law of the land, where it remained for some sixty years until *Brown v. Board of Education* was decided.[3] More than a hundred years later, Tourgee's letter speaks to us as lawyers and conveys an important message about our overriding duty to our clients and ourselves to put things into perspective and to think long and hard about the consequences of our actions.

Indeed, I fear that far too many of us working to protect animals have lost all perspective about the nature of the society in which we live and the degree to which it is ready to embrace our cause. Like Tourgee, we must stop and remind ourselves, and our clients, of the true nature of the battle we are in and soberly assess our tactics for victory.

For example, not so very long ago, our society visited upon humans many of the same atrocities we rail against today on behalf of nonhuman animals, including medical experimentation, inhumane captivity, and forced performances for public amusement.[4] Thus, in 1906, crowds thronged the monkey house exhibit at the Bronx Zoo to view our "evolutionary ancestors"—monkeys, chimpanzees, an orangutan, and an African pygmy tribesman named Ota Benga.[5] Standing

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[1] Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation* 602–03 (West 1977) (emphasis in original) (reprinting letter from Albion W. Tourgee to Louis A. Martinet).

[2] 163 U.S. 537 (1896).

[3] Greenberg, *supra* n. 1, at 586; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

[4] *See generally* Phillips Verner Bradford & Harvey Blume, *Ota: The Pygmy in the Zoo* (St. Martin's Press 1992) (captivity and performance); James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (The Free Press 1993) (experiments).

[5] Bradford & Blume, *supra* n. 4, at 179–90.

one inch shy of five feet tall and weighing 103 pounds,[6] Mr. Benga was sold into slavery in the Belgian Congo just after the turn of the century.[7] He was coerced to "visit" the United States in 1904 by his purchaser, African explorer Samuel Verner.[8] Mr. Benga, along with other pygmies, was displayed at the 1904 World's Fair in Saint Louis before he was delivered to the Bronx Zoo.[9] Dr. William T. Hornaday, then director of the Zoo, decided to "display" him.[10] Mr. Benga was locked in the monkey house with other primates for most of the day and, occasionally, let out under the supervision of a keeper.[11]

The exhibit was immensely popular, with some forty thousand visitors on its second Sunday.[12] "They chased him about the grounds all day, howling, jeering and yelling. Some of them poked him in the ribs, others tripped him up, all laughed at him."[13] Finally, after responding to his keepers' use of force by brandishing a knife, he had to leave the park for good.[14] Later, he attended the Lynchburg Seminary in Virginia, and eventually settled in Lynchburg, working odd jobs at the Seminary and a tobacco factory.[15] In 1916, homesick and despondent, Ota Benga stole a revolver and shot himself in the heart.[16]

I was surprised to learn that Ota Benga's story is not unique. Indeed, the captive exhibit of human beings was a feature of our society, right into the early part of the twentieth century.[17] Along with Ota Benga, the 1904 World's Fair in Saint Louis presented an entire "ethnological zoo" for the amusement of fairgoers, with displays of Native Americans, Pacific Islanders, Africans, and other people—most of whom were coerced into coming to the United States to serve as zoo exhibits.[18]

This is not the only familiar outrage visited upon humans. Up to and through the mid-1970s, federal and state governments conducted medical experiments on unwitting prisoners, indigents, and the mentally ill.[19] Most infamous of these cases is the Tuskegee Syphilis Experiment.[20] Over decades, a group of African-American men in Alabama suffering from syphilis were told they were receiving medical

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[6] *Id*. at 181.
[7] *Id*. at 106.
[8] *Id*.
[9] *Id*. at 115–23, 168, 177–90.
[10] *Id.* at 177–78.
[11] Bradford & Blume, *supra* n. 4, at 180.
[12] *Id.* at 185.
[13] *Id.* (quoting N.Y. Times).
[14] *Id*. at 187–90.
[15] *Id*. at 204–09.
[16] *Id.* at 215–18.
[17] Bradford & Blume, *supra* n. 4, at 1–16, 160–61; *see also* Erik Larson, *The Devil in the White City* 207 (Vintage Books 2003) (noting the arrival of human cargo for display at the 1893 World's Fair in Chicago).
[18] Bradford & Blume, *supra* n. 4, at 1–16.
[19] Jones, *supra* n. 4; Howard Markel, *The Ghost of Medical Atrocities: What's Next, After the Unveiling?* N.Y. Times F6 (Dec. 23, 2003).
[20] Jones, *supra* n. 4.

treatment, when, in fact, the doctors only observed what happened as their diseases progressed over time.[21] Even after it was known that penicillin could cure syphilis, they were denied treatment.[22] The experiment continued into the 1970s, and only in the late 1990s did President Clinton formally apologize for the government's unconscionable behavior.[23]

The Tuskegee experiment was by no means the only such atrocity. During the Cold War, unsuspecting patients were secretly injected with radioactive elements to see how radiation would travel through the body.[24] And, believe it or not, similar practices continue today elsewhere in the world, at times under the direction of U.S. corporations and even academic institutions. For example, in 2001, the pharmaceutical corporation Pfizer was accused of testing meningitis drugs on African children without consent,[25] while the Harvard School of Public Health has admitted it conducted genetic experiments on residents of China without their consent in the late 1990s.[26]

Not surprisingly then—in the face of such gross and ongoing violations of human rights—this society's support for granting nonhuman animals meaningful rights is exceedingly low. And it is likely to remain so for a good long time. Indeed, according to a 2000 Zogby poll, about two and one-half percent of the U.S. population is vegetarian.[27] That is roughly five million Americans.[28] About one-third of these people (nine tenths of a percent of the U.S. population) are thought to be vegan.[29] By contrast, a full six percent of the population believes that the moon landing never happened—that it was staged.[30]

A 2003 Gallup poll painted an even bleaker picture of the prospects for this society embracing legal rights for animals. Nearly two-thirds of Americans oppose banning all medical research on laboratory

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[21] *Id*. at 1–9.

[22] *Id*. at 7–8.

[23] Markel, *supra* n. 19, at F6.

[24] *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 290 (D. Mass. 1999) (action for damages arising out of the federal government's radiation experiments on terminally ill patients without their consent); *see also In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 802 (S.D. Ohio 1995) (where "[plaintiffs] allege[d] they were exposed to doses of radiation at levels to be expected on a nuclear battlefield" in an experiment funded by the Department of Defense).

[25] Finnuala Kelleher, Student Author, *The Pharmaceutical Industry's Responsibility for Protecting Human Subjects of Clinical Trials in Developing Nations*, 38 Colum. J.L. & Soc. Probs. 67, 67–68 (2004).

[26] Vera Hassner Sharav, *Harvard President Laments China Study_Globe*, http://www.ahrp.org/infomail/0502/15.php (May 15, 2002) (quoting The Boston Globe).

[27] Vegetarian Resource Group, *How Many Vegetarians Are There? A 2000 National Zogby Poll Sponsored by the Vegetarian Resource Group (VRG)*, http://www.vrg.org/nutshell/poll2000.htm (last updated Aug. 30, 2000).

[28] *Id.*

[29] *Id.*

[30] Gallup Org., *Did Man Really Land on the Moon?* http://poll.gallup.com/content/default.aspx?ci=1993&pg=1 (Feb. 15, 2001).

animals.[31] Sixty-one percent oppose banning all product testing on laboratory animals.[32] And a whopping seventy-six percent oppose banning all hunting.[33] A 2004 Gallup Poll found that sixty-three percent of Americans feel that buying and wearing clothes made of animal fur is acceptable.[34]

Even accounting for the possibility of error and bias in such polls, these numbers are not very comforting for those of us working to better this society's treatment of animals, but they do give us a good idea of how few Americans might support legal rights for animals, otherwise known as "animal rights," as a legal reform. However, the good news is that public support for a more limited agenda—one short of legal personhood for animals—is overwhelming. More than two-thirds of Americans find it unacceptable that there are no federal laws that protect the welfare of animals on the farm.[35] More than four-fifths believe there should be effective laws that protect farm animals against cruelty.[36] And nearly three-quarters of Americans believe there ought to be federal inspections of farms to ensure humane treatment.[37] A significant seventy-five percent of Americans oppose the use of leghold traps.[38] Sixty percent of Americans object to capturing wild dolphins and whales for display in zoos and aquariums.[39] Sixty percent also oppose cloning of animals.[40] A poll of New Jersey residents found that more than four out of five surveyed consider two-foot-wide crates for pigs and calves and forced molting through starvation of egg-laying hens to be cruel.[41] And, most recently, a national poll found that the vast majority of Americans favor humane slaughter methods for chickens, turkeys, and ducks who are raised for food,[42] as opposed to cur-

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[31] David W. Moore, *Public Lukewarm on Animal Rights*, Gallup Poll Tues. Briefing 35, 35 (May 21, 2003).

[32] *Id.*

[33] *Id.*

[34] Heather Mason, *Americans Unruffled by Animal Testing*, Gallup Poll Tues. Briefing 119, 120 (May 25, 2004).

[35] Poll Rpt. from John Zogby, Pres., Zogby Intl., to Brad Goldberg, Pres., Animal Welfare Trust, *Nationwide Views on the Treatment of Farm Animals* 5 (Oct. 22, 2003) (available at http://www.animalwelfareadvocacy.org/externals/AWT%20final%20%20poll%20report%2010-22.pdf).

[36] *Id.* at 6.

[37] *Id.*

[38] Poll Rpt. from Op. Research Corp. to Animal Welfare Inst., *Wildlife Traps* 9 (Nov. 21, 1996) (copy on file with *Animal L.*).

[39] Stephen R. Kellert, *American Perceptions of Marine Mammals and Their Management* 18 (Humane Socy. U.S. 1999) (copy on file with *Animal L.*).

[40] Linda Lyons, *Americans Register Strong Feelings on Cloning Issue*, Gallup Poll Tues. Briefing 97, 98 (July 6, 2004).

[41] NJFarms.org, *"Humane" Farming Issue Heats Up in New Jersey: Poll Finds Widespread Opposition to Practices Labeled "Humane" by New Jersey Agriculture Department*, http://www.njfarms.org/pr_poll.htm (accessed Mar. 10, 2006).

[42] Poll Rpt. from Penn, Schoen & Berland Assocs., Inc. to Humane Socy. U.S., *Humane Society of the United States: Humane Slaughter Agenda* 1 (Apr. 11, 2005) (copy on file with *Animal L.*).

rent U.S. Department of Agriculture policy allowing these animals to be slaughtered without first rendering them insensible to pain.[43]

So there is undoubtedly a gap, and quite a large one, between the current cruelties visited upon animals and where society is ready to go in terms of reform. And standing in this gap are millions upon millions of animals whom society is ready to help[44]—we just need to give people a good push. But, why the disconnect between these high poll numbers and the relatively low level of receptiveness of legislators and courts to humane reforms?

I believe there are lots of reasons, including institutional gridlock, economic factors, and, perhaps a deep-seated fear of animal rights. This fear of animal rights—and of animal rights activists—is undoubtedly fueled, at least in part, by the violent extremists of the movement and the spectre of direct action, which is also sometimes called animal "terrorism."[45] When I looked at the rhetoric of direct action, I was shocked to discover that the so-called animal terrorists are our fault—i.e., the fault of animal lawyers. Thus, the people who step outside the law allegedly in the name of "animal rights" almost invariably justify their extreme actions based on our failures—failures to pass better laws and the failure to succeed in the courts.

For example, in *Thinking Pluralistically: A Case for Direct Action*, Steve Best tells us:

> In terms of conditions for entering a conflict, direct action groups like the ALF and SHAC have strong reasons for resorting to illegal actions, sabotage, and intimidation tactics . . . . Where laws protecting animals exist at all, they are weak, poorly enforced, and constantly revised and watered-down. *In cases where the legal system fails the animals, . . . activists have no choice but to circumvent it and apply direct pressure on exploiters*.[46]

Likewise, Adam Nicolson recently appeared to defend animal rights activists' indefensible decision to exhume and steal the remains of the grandmother of a guinea pig farmer in the United Kingdom by noting:

> We all hate terrorists, but as a side-light on this nasty and bitter corner of modern life, it is interesting to read what Nelson Mandela, at his trial for violence and sabotage in October 1963, had to say about those crimes. This was the trial at which he was convicted and sent to Robben Island for life. He admitted quite freely that he was guilty of what he was accused of. "I do not deny that I planned sabotage," he told the court. "I did not plan it in a spirit of recklessness, nor because I have any love of violence. I planned it

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[43] 70 Fed. Reg. 56624, 56624–25 (Sept. 28, 2005).

[44] *See e.g.* Natl. Agric. Statistics Serv., *Poultry Slaughter: 2004 Annual Summary* 2 (U.S. Dept. Agric. Feb. 2005) (8.89 billion chickens slaughtered in 2004) (available at http://usda.mannlib.cornell.edu/reports/nassr/poultry/ppy-bban/pslaan05.pdf).

[45] Paul Elias, *Animal Rights Extremism FBI's Top Domestic Terrorism Priority*, Associated Press (June 21, 2005) (available in WL 6/21/05 APDATASTREAM 04:05:15).

[46] Steve Best, *Thinking Pluralistically: A Case for Direct Action*, http://www.animalliberationfront.com/Philosophy/A_Case_for_Direct_Action.htm (accessed Mar. 10, 2006) (emphasis added).

> as a result of a calm and sober assessment of the political situation. Without violence there would be no way open to the African people to succeed in their struggle."[47]

As animal lawyers we bear the burden of proving this thesis wrong. The same way that those who eventually freed South Africa proved wrong Mandela's early views on the role that violence would play in ending that struggle, we must prove to would-be direct action advocates that things can change for animals through peaceful and lawful means. How do we accomplish this?

We can make a good start by jettisoning our own revolutionary rhetoric—such as granting animals "personhood" or otherwise eliminating the property status of animals. It is an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories while billions of animal languish in unimaginable suffering that we have the power to change.[48] Moreover, these revolutionary legal theories sound disturbingly similar to, and provide academic fuel for, the rhetoric of some direct action proponents—i.e., that animals can never receive protection without radically revising the U.S. legal system.[49]

Even among those in our own ranks who look to the courts, rather than the streets, to help animals, far too many of us have fallen under the intoxicating thrall of the fantasy of creating something like *Brown v. Board of Education*[50] for animals. The root of this theory is that if we simply find the right legal and scientific arguments, with the right animals, on the right day, with the right judge, we will have an epic courtroom struggle in which the inalienable legal rights of animals will be declared once and for all. But as we daydream about a heroic legal victory for animals that will most likely not occur in our lifetime, millions and millions of animals are suffering in conditions that we have the power, and the societal support, to change today.

And while it is certainly far too easy to attack the legal campaigns of the Civil Rights golden age of the 1950s and 1960s as outdated and bygone models for effectuating social change through the courts,[51] the

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[47] Adam Nicolson, *Animal Rights and Wrongs*, http://www.guardian.co.uk/animalrights/story/0,11917,1555032,00.html (Aug. 24, 2005).

[48] A quick search of Westlaw (searching for "property status of animals" or "legal personhood for animals" in the Journals & Law Reviews database) reveals that more than a dozen articles have been published between 1996 and 2005 exploring how to change the property status of animals, how to grant certain animals personhood, and other means of reordering the legal system.

[49] *See e.g.* Gary L. Francione, *Animal Rights and Animal Welfare*, 48 Rutgers L. Rev. 397, 400, 468 (1996) (arguing that the "eradication of the *property* status of animals" is the only method to achieve meaningful protection for animals, and that this "property status of animals . . . ensures that welfarist reforms will generally only facilitate the efficient exploitation of animal property" (emphasis in original)).

[50] 347 U.S. 483.

[51] *E.g.* Richard A. Posner, *Animal Rights*, 110 Yale L.J. 527, 539 (2000) (Posner reviews the book *Rattling the Cage: Toward Legal Rights for Animals* and claims, "There is a sad poverty of imagination in an approach to animal protection that can think of it

fact remains that many of us are still captivated by the glory of the Civil Rights movement and look to it as a model for how the courts could confer legal rights upon animals in this country in the foreseeable future.[52]

However, according to Jack Greenberg, former head of the Legal Defense Fund, the lawyers that made *Brown* a reality could not have achieved what they did in a society that was not ready for it.[53] Although it is unclear how many Americans supported public school integration at the time of *Brown*,[54] it certainly was several orders of magnitude above the small percentage of Americans who might now support personhood for animals.[55] Indeed, at the time *Brown* was decided, several states had already banned racial segregation in public schools.[56] By contrast, I am not aware of any state, county, or city in America that has ever even recognized that animals have legal rights.

Second, even to talk about replicating the civil rights legal campaign for animals is a bit of a misconception. The legal campaign culminating in *Brown* was a strategy to enforce legal rights granted one hundred years earlier.[57] *Brown* did not recognize African Americans as legal persons, the Thirteenth Amendment did.[58] So what some animal lawyers are actually talking about is trying to recreate *Dred Scott*—which was an action asking the courts to expand the class of "citizens" under the Constitution to include African Americans, much the same way some animal lawyers talk about expanding the term "person" to include non-human animals.[59] But for some reason, they

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only on the model of the civil rights movement. It is a poverty that reflects . . . the extent to which liberal lawyers remain in thrall to the constitutional jurisprudence of the Warren Court."); Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 Va. L. Rev. 1693, 1696 (2004) (observing that "by the end of the twentieth century most of the planned litigation campaigns had petered out" in the face of "an increasingly conservative judicial climate").

[52] *E.g.* Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 260–61 (Perseus Books 2000) (offering civil rights cases as models for recognizing the rights of chimpanzees and bonobos).

[53] *See* Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* 152–211 (BasicBooks 1994) (detailing the process of bringing *Brown v. Board of Education* to the Supreme Court and noting support from social scientists and others).

[54] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 310 (Oxford U. Press 2004) (noting that "[s]lightly more than half of the nation supported *Brown* from the day it was decided").

[55] *See* Moore, *supra* n. 31, at 35–36 (explaining how the poll result suggesting that twenty-five percent of Americans feel animals should have the same rights as people is likely an overstatement, and inconsistent with the responses to other polling questions showing widespread opposition to banning all medical research, etc.).

[56] Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-*Brown *North*, 44 UCLA L. Rev. 677, 680 (1997).

[57] 347 U.S. at 488.

[58] U.S. Const. amend. XIII, § 1.

[59] *Compare Dred Scott v. Sandford*, 60 U.S. 393 (1856) *with* Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 Animal L. 1 (2001) (discussing the theory of including

think this time around we are going to win. Even if you somehow managed to win the animal *Dred Scott*, or found some other way to slip animals into the personhood club, that would not end animal suffering and exploitation in America, just as the Thirteenth Amendment's grant of personhood did not end systematic oppression of African Americans.[60]

Granting animals personhood does not fix everything, or really anything. What about the one-hundred-year journey after personhood is declared? Recall that after a brief flirtation during post-Civil War Reconstruction, in which freed slaves enjoyed something approaching a full set of civil rights, the country turned around and plunged into the depths of Jim Crow,[61] as legally codified in *Plessy*,[62] and as predicted by *Plessy*'s horrified and insightful counsel in the days before *Plessy* was argued.[63]

Thus, I fear that some of us have a fundamental misunderstanding of our position in the history of the struggle for animal rights *vis-à-vis* other movements for legal personhood. And those that look to the struggle for civil rights as an analogy for gaining legal personhood for animals must live with the reality of their own analogy: that such a victory is decades and perhaps even a century or more away.

Organized opposition to slavery in the United States began around 1800.[64] *Dred Scott* was decided in 1856.[65] The Civil War and Thirteenth Amendment were in the 1860s.[66] *Brown* was decided a hundred years later in 1954.[67] The Civil Rights Act was enacted in 1964.[68] The total evolution was at least one hundred fifty years. How much time has lapsed between the emergence of the organized animal rights movement—as opposed to the humane movement—and now? Thirty years? Forty years? Even starting with a date of 1970, it appears we are still at least twenty years away from the animal *Dred Scott*. And we should get to legal personhood on paper for animals in the 2030s. Jim Crow follows shortly after that. And then we finally get to the animal *Brown v. Board of Education* sometime in the middle of the twenty-second century. And yes, all this assumes animal personhood progresses at the same rate as the movement for African American freedom did. Theoretically it could be quicker, but it could be much, much slower too. And in this time how many hundreds of bil-

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animals within the term "person"); Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 Animal L. 75, 83–87 (1997) (advocating including animals within the term "person").

60 *See* Klarman, *supra* n. 54, at 71–76 (discussing laws passed to perpetuate de facto slavery after enactment of the Thirteenth Amendment).

61 *Id.* at 10–23.

62 163 U.S. 537.

63 Greenberg, *supra* n. 1, at 602–03.

64 Stanley Harrold, *American Abolitionists* 21 (Longman 2001).

65 60 U.S. 393.

66 Harrold, *supra* n. 64, at 89–94.

67 347 U.S. 483.

68 *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000 to 2000h-6 (2000).

lions of animals will have endured unspeakable suffering and torment that could have been ameliorated?[69]

The bottom line is that, given the current state of our society and the cruelties we still inflict on human persons, animal personhood is for all intents and purposes an impractical and unattainable goal. And, each and every one of us is most likely going to depart this Earth living in a country that does not recognize the legal personhood of animals. Now this is a hard truth, and I suspect that more than a few people will utterly reject that conclusion. But as lawyers, we have a heightened responsibility to tell our clients the hard truths.[70] And the sooner we face and accept this hard truth, at least for the time being, the better off the animals will be.

So, where does that leave us? Pack up and go home? Hardly. It leaves us with a lot of really hard, miserable, and backbreaking work. There are huge opportunities staring us in the face if only we were not too busy daydreaming about constitutional rights for animals. Recall the sweet spot of public policy towards animals—the space in between current practices and where current polling data tells us society is ready to go in terms of reform? The billions of animals trapped in this gap need our help now, not one hundred years from now. This is where the real battle lines for animal protection are drawn—between the forces of animal exploitation seeking to hold this ground that public opinion has already forsaken, and animal advocates fighting to sweep aside the last remnants of opposition to reform.

Nowhere is this gap larger, or more heavily populated, than with regard to farm animals—the numbers are simply staggering. For example, sixty to seventy percent of the six million hogs kept for breeding in the U.S. spend a majority of their lives confined in gestation crates.[71] If you eliminate just this one practice, you are reducing the

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[69] Rather than turning to the civil rights movement as a fitting strategic model, we and our non-human clients might be better served by looking to the environmental movement and its legal gains over the last thirty years. Indeed, there are important lessons to be learned from their legal successes, and, perhaps more importantly, their diligence and a roll-up-your-sleeves work ethic that lawyers in the animal movement would do well to emulate. The significant legal protections now afforded to our natural environment were not won by lawyers advancing radical theories about the "rights" of trees, rivers, and oceans. *But see* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 456 (1972) (arguing for giving legal rights "to the natural environment as a whole"). Rather, they were won by an organized army of environmental lawyers carrying out professional, systematic campaigns in the courts and legislatures of America. *See* Michael E. Kraft, *U.S. Environmental Policy and Politics: From the 1960s to the 1990s*, in *Environmental Politics and Policy, 1960s–1990s*, 17, 21–33 (Otis L. Graham Jr., ed., Pa. St. U. Press 2000) (reviewing effects of legislative and executive action on environmental policy along with the use of the courts to promote environmental protection).

[70] *See* Model R. Prof. Conduct 2.1 (ABA 2004) (lawyers have a duty to render "candid" advice not only about the law, but also about "economic, social, and political factors that may be relevant to the client's situation").

[71] Natl. Agric. Statistics Serv., *Quarterly Hogs and Pigs* 1 (U.S. Dept. Agric. Dec. 2005) (available at http://usda.mannlib.cornell.edu/reports/nassr/livestock/php-bb/2005/

unimaginable suffering of nearly four million animals, every day, every year. Likewise, eighty-five percent of the one million veal calves raised each year live in crates.[72] Banning such crates would significantly reduce the suffering of another eight hundred fifty thousand animals.

Ninety-eight percent of the more than three hundred million hens in the U.S. are confined in battery cages so small the birds cannot even walk or spread their wings—that is 294 million birds, more than one animal for each and every man, woman, and child in America.[73] All 8.89 billion chickens killed each year in the U.S.[74] are not covered under U.S. Department of Agriculture's interpretation of the Humane Methods of Slaughter Act (HMSA),[75] which means they can be cut, shackled, and hoisted without first being rendered insensitive to pain. If you change this, you provide meaningful relief for more animals than the total number of people on the planet.[76]

And these are not just theoretical numbers, or ideas for discussion. They are real, attainable goals according to published data. To attain these reforms would relieve more animal suffering than all of the efforts of the animal rights movement combined to date. But, what about those that say that the existing legal system has not yielded results and therefore will never come to the aid of these animals?

The available evidence suggests otherwise. The record from the last decade of hard work in the trenches trying to push courts and legislatures to close the gap between public opinion and public policy shows that change within the legal framework is a viable strategy,

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hgpg1205.pdf); E. A. Pajor, *Group Housing of Sows in Small Pens: Advantages, Disadvantages and Recent Research*, in Coop. St. Research, Educ., & Extension Serv., *Proceedings: Symposium on Swine Housing and Well-being* 37, 37 (Richard Reynnells ed., U.S. Dept. Agric. 2003) (available at http://www.ces.purdue.edu/pork/sowhousing/swine_02.pdf).

72 Elizabeth Weise, *Illegal Hormones Found in Veal Calves*, http://usatoday.com/news/health/2004-03-28-veal-usat_x.htm (Mar. 28, 2004) ("About 1 million veal calves are slaughtered in the USA each year."); U.S. Dept. Agric. Food Safety & Inspection Serv., *Safety of Veal. . .from Farm to Table*, http://www.fsis.usda.gov/Fact_Sheets/Veal_from_Farm_to_Table/index.asp (May 2005) (leaving eighty-five percent of veal calves as living in "stalls" as opposed to being slaughtered within three weeks of birth).

73 Humane Socy. U.S., *The Hen Factory Farm*, http://www.hsus.org/farm_animals/factory_farms/the_hen_factory_farm/ (accessed Mar. 11, 2006) (reporting conditions at commercial egg farms); Natl. Agric. Statistics Serv., *Chickens and Eggs* 1 (U.S. Dept. Agric. Jan. 2005) (average of 345 million layers) (available at http://usda.mannlib.cornell.edu/reports/nassr/poultry/pec-bb/2005/ckeg0105.pdf); United Egg Producers, *United Egg Producers Animal Husbandry Guidelines for U.S. Egg Laying Flocks* 1 (2d ed., United Egg Producers 2005) (ninety-eight percent of layers are caged) (available at http://www.uepcertified.com/docs/2005_UEPanimal_welfare_guidelines.pdf); U.S. Census Bureau, *Your Gateway to Census 2000*, http://www.census.gov/main/www/cen2000.html (Apr. 1, 2000) (U.S. population of 281,421,906).

74 Natl. Agric. Statistics Serv., *supra* n. 44, at 2.

75 7 U.S.C. §§ 1901–1906; 70 Fed. Reg. at 56624–25.

76 U.S. Census Bureau, *Total Midyear Population for the World: 1950-2050*, http://www.census.gov/ipc/www/worldpop.html (last updated Apr. 26, 2005) (reporting a figure of 6,525,486,603 people in 2006).

even if it is a long, slow, and difficult one. In the last decade, those who have chosen to apply themselves—rather than bemoan the failings of the legal system—have made concrete gains in the courts and in the legislatures. "Animal reform," as opposed to "animal rights," is now a commonplace and accepted legislative topic throughout the country, with a dozen new federal animal protection laws in the last decade.[77] Most recently, both houses of the U.S. Congress, in response to humane concerns, voted overwhelmingly to ban the slaughter of horses for food—the first-ever federal ban on slaughtering an animal for commercial consumption.[78]

At the state level, we have seen more than thirty new animal protection laws in just the past four years[79] on topics ranging from a phase-out of foie gras production and sale[80] to bans on various unethical hunting practices.[81] And since 1990 animal advocates have passed

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[77] 7 U.S.C. § 2156(a) (Supp. 2002) (criminalizing the interstate transport of birds for cockfighting); 10 U.S.C. § 2582 (2000) (providing for adoption, rather than destruction, of military dogs retired from military service); 16 U.S.C. § 1385 (Supp. 1997) (prohibiting driftnet and purse seine net harvesting of tuna labeled "dolphin safe"); 16 U.S.C. § 1857(1)(P) (2000) (prohibiting the practice of "shark finning"—the capture and removal of shark fins and tails and then discarding the wounded animal at sea); 16 U.S.C.A. § 3371–3372 (West Supp. 2005) (prohibiting the interstate transport of lions, tigers, cheetahs, jaguars, and cougars except by federally licensed exhibitors); 16 U.S.C. § 6304 (2000) (establishing a fund for great ape conservation); 18 U.S.C. § 48 (Supp. 1999) (making it a crime to create, sell, or possess depictions of animal cruelty); 18 U.S.C. § 1368 (2000) (making it a federal crime to harm a federal law enforcement dog or horse); 19 U.S.C. § 1308 (2000) (making it a crime to import or export dog and cat fur products); 42 U.S.C. § 287a-3a (2000) (establishing a federal sanctuary system for chimps retired from animal research); 42 U.S.C. § 285l-3 (2000) (establishing an Interagency Coordinating Committee on the Validation of Alternative Methods to develop alternatives to animal testing); 49 U.S.C. § 41721 (2000) (requiring airlines to submit monthly reports to the Secretary of Transportation on the death or injury of animals transported by plane).

[78] *See* Pub. L. No. 109-97, § 794, 119 Stat. 2120, 2164 (2005) (de-funding U.S. Department of Agriculture inspections of horses, effectively banning their slaughter). Recognizing the significance of this new law as a precedent for animal reform, the U.S. Department of Agriculture, at the urging of the livestock industry, quickly issued an administrative rule to try to nullify Congress' decision. *See Ante-Mortem Inspection of Horses*, 71 Fed. Reg. 6337, 6341 (Feb. 8, 2006) (to be codified at 9 C.F.R. § 352.19) (interim final rule establishing a voluntary fee-for-service program in which official establishments that slaughter horses can apply and pay for ante-mortem inspection). That decision has been challenged in the U.S. District Court for the District of Columbia. Compl. at 2, *Humane Socy. U.S. v. Johanns*, No. 1:06CV00265 (D.D.C. filed Feb. 14, 2006) (copy on file with *Animal L.*); Humane Socy. U.S., *HSUS and Others Seek Injunction to Halt USDA in Its Attempt to Buck Congress on Horse Slaughter*, http://www.hsus.org/pets/pets_related_news_and_events/usda_threatens_horse_slaughter.html (Feb. 22, 2006).

[79] *See* Humane Socy. U.S., *Enacted and Vetoed State Legislation*, http://www.hsus.org/legislation_laws/citizen_lobbyist_center/enacted_and_vetoed_state_legislation.html (accessed Mar. 12, 2006) (linking to annual reports on state legislation).

[80] Cal. Health & Safety Code Ann. § 25980–25982 (West Supp. 2004).

[81] *See* Cal. Fish & Game Code Ann. § 3003 (West Supp. 2005) (outlawing shooting or killing birds or mammals via the Internet); 7 Me. Rev. Stat. Ann. § 1344(1-A), 1347 (Supp. 2005) (outlawing remote-control hunting); Mich. Comp. Laws § 750.236a (LEXIS

twenty-four ballot initiatives,[82] including measures to outlaw cockfighting in Arizona,[83] Missouri,[84] and Oklahoma;[85] to stop hound-hunting and baiting of bears in Colorado,[86] Massachusetts,[87] Oregon,[88] and Washington;[89] to halt mountain lion hunting in California;[90] to restrict the use of steel-jawed leghold traps and other body-gripping traps in Arizona,[91] California,[92] Colorado,[93] Massachusetts,[94] and Washington;[95] and to halt the use of gestation crates in Florida.[96]

We have also seen some notable successes in the courts. The Hegins pigeon shoot—which some have used as the poster-child of a cruel practice that could not be stopped within the existing legal framework[97]—was stopped by a litigation campaign to enforce existing law.[98] The Makah whale hunt was twice derailed by a federal court of appeals in Seattle.[99] A federal court in Washington, D.C. put a halt to the indiscriminate killing of more than seven hundred species of mi-

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current through Feb. 2006) (outlawing computer-assisted hunting); Minn. Stat. § 97B.115 (Supp. 2006) (outlawing computer-assisted remote hunting); N.Y. Envtl. Conservation Law § 11-1906 (LEXIS current through 2005 Reg. Sess.) (outlawing the business of on-line shooting); N.C. Gen. Stat. § 113-291.1A (2005) (outlawing computer-assisted remote hunting of animals located in North Carolina); 18 Pa. Consol. Stat. § 7641 (Supp. 2006) (outlawing computer-assisted remote hunting); Tenn. Code Ann. § 70-4-502 to 70-4-504 (Supp. 2005) (outlawing computer-assisted remote hunting); Tex. Parks & Wildlife Code § 62.002 (Supp. 2005) (outlawing computer-assisted remote hunting); Vt. Stat. Ann. tit. 10, § 4715 (Supp. 2005) (outlawing hunting by remote-controlled devices); Va. Code Ann. § 29.1-530.3 (Supp. 2005) (outlawing computer-assisted remote hunting); W. Va. Code § 20-2-5(29) (Supp. 2005) (outlawing hunting for a fee if the hunter not at same location as animal); Wis. Stat. § 95.55(5)(b)(1) (LEXIS current through Aug. 2005) (outlawing shooting of farm-raised deer if not physically possessing the weapon).

82 Humane Socy. U.S., *Past Ballot Initiatives*, http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/ (accessed Mar. 12, 2006).

83 Ariz. Rev. Stat. § 13-2910.03 (2001) (passed 1998).

84 Mo. Rev. Stat. § 578.173 (2003) (passed 1998).

85 Okla. Stat. tit. 21, § 1692.2 (2006) (passed 2002).

86 Colo. Rev. Stat. § 33-4-101.3 (2005) (passed 1992).

87 Mass. Gen. Laws ch. 131, § 21A (2002) (passed 1996).

88 Or. Rev. Stat. Ann. § 498.164 (2003) (passed 1994).

89 Wash. Rev. Code § 77.15.245 (2001) (passed 1996).

90 Cal. Fish & Game Code Ann. § 3950.1(a) (West 1998) (passed 1990).

91 Ariz. Rev. Stat. § 17-301(D) (1996) (passed 1994).

92 Cal. Fish & Game Code Ann. § 3003.1(a) (West 1998 & Supp. 2006) (passed 1998).

93 Colo. Const. art. XVIII, § 12b(1) (passed 1996).

94 Mass. Gen. Laws ch. 131, § 80A (2002) (passed 1996).

95 Wash. Rev. Code § 77.15.194 (2001) (passed 2000).

96 Fla. Const. art. X, § 21 (passed 2002).

97 *See* Gary L. Francione, *Animals, Property, and the Law* xiii–xv (Temple U. Press 1995) (describing the Hegins pigeon shoot); Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721, 723 (1994) (noting continued pigeon shoots as an example of how the property status of animals perpetuates animal cruelty).

98 *Hulsizer v. Labor Day Comm., Inc.*, 734 A.2d 848 (Pa. 1999).

99 *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475, 501–03 (9th Cir. 2004).

gratory birds by federal agencies.[100] A judge in Massachusetts ordered a halt to the stocking and sport shooting of captive-reared pheasants on Cape Cod.[101] And a judge in Washington D.C. has had an order in place for more than seven years blocking sport hunting of bison on the National Elk Refuge in Jackson Hole, Wyoming.[102]

A North Carolina court allowed animal advocates to seize hundreds of abused dogs under that state's private attorney general law.[103] A court in Washington D.C. halted a U.S. Department of Agriculture plan to slaughter white-tailed deer in Iowa.[104] The rescue of the Suarez polar bears from a cruel traveling circus was precipitated by a combined state and federal court litigation campaign, acting in concert with a legislative, media, and regulatory pressure strategy.[105] And just a few months ago the legal campaign to end the use of the misleading "Animal Care Certified" logo on eggs forced the United Egg Producers to remove this logo from its products.[106]

These fights were not won by offering radical, legal-system-changing theories. They were won by hard-working, creative lawyers who squeezed the legal system for every last drop of available protection for their nonhuman clients. Animal-using industries bitterly opposed these judicial and legislative reforms because they know that such reforms not only help animals directly, but also raise public awareness of conditions industry desperately wishes to keep hidden,[107] and set important precedents for additional reforms down the road. For example, after animal advocates succeeded in enacting a state constitutional amendment in Florida to ban cruel confinement of pigs in gestation crates, Neil Dierks, then CEO of the National Pork Producers Council, candidly said, "[i]t was my biggest disappointment in my tenure . . . .

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[100] *See Humane Socy. U.S. v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000) (holding that federal agencies are required to follow the Migratory Bird Treaty Act); 50 C.F.R. § 10.13 (2005) (listing bird species protected by the Migratory Bird Treaty Act).

[101] Memo. & Or. at 2, *Fund for Animals v. Mainella*, No. 02-11855-PBS (D. Mass. Sept. 26, 2003) (copy on file with *Animal L.*).

[102] *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998).

[103] Perm. Inj. 8, *Animal Legal Defense Fund v. Woodley*, No. 04 CVD 1248 (N.C. Gen. Ct. Just., Dist. Ct. Div., Lee County N.C. Apr. 12, 2005) (copy on file with *Animal L.*).

[104] T.R.O. Hrg. Transcr. 55–66, *Fund for Animals v. Glickman*, No. CA 99-245 (D.D.C. recorded Feb. 12, 1999) (copy on file with *Animal L.*).

[105] Docket Rpt., *People for the Ethical Treatment of Animals v. Department of the Interior*, Civ. No. 01-2299 at 7 (Notice of Dismissal without Prejudice June 18, 2003) (copy on file with *Animal L.*) (entered after defendants seized and relocated the polar bears); Humane Socy. U.S., *Remaining Polar Bears Seized from Suarez Circus*, http://www.hsus.org/marine_mammals/marine_mammals_news/remaining_polar_bears_seized_from_suarez_circus.html (Nov. 22, 2002).

[106] Pl.'s Compl., *Compassion Over Killing, Inc. v. Giant of Md., L.L.C.*, No. 05-0001077 (D.C. Super. 2005) (copy on file with *Animal L.*); Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. Times C18 (Oct. 4, 2005).

[107] *See e.g.* Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protection Terrorists*, 22 Pace Envtl. L. Rev. 261 (2005) (discussing industry efforts to enact new state laws to limit access to, and even photography of, animal facilities).

[By failing to stop the measure] we've given the opposition a tremendous amount of oxygen."[108]

Indeed, the industries that routinely abuse animals in our society seem quite content to engage animal advocates in a debate framed around animal rights, and more than a little reluctant to face well-organized and calculated reform campaigns. For example, in a recent article entitled *Training for Animal Rights Litigators*, George Watts of the National Turkey Federation explained:

> So far, animal rights law programs have focused on existing statutes on animal cruelty and animal welfare. . . . Some of the courses [now] focus not on the law itself but on "lawyering"—the skills needed to be an effective advocate.
>
> . . .
>
> I doubt that our country is interested in declaring chickens and other food animals to be persons with rights who are in need of "justice," but *the use of "existing law in creative and novel ways" is well within the grasp of litigators and energetic law students and could cause all sorts of problems for industry*.[109]

As advocates, we owe our clients the good sense to take heed of our opponents' tactical preferences for a debate over animal rights, rather than animal reform. In the words of Sun Tzu, "the clever combatant imposes his will on the enemy, but does not allow the enemy's will to be imposed on him."[110] The billions of animals now suffering in conditions that most Americans overwhelmingly oppose deserve "clever combatants" doing something constructive about this problem, rather than just repeating it over and over again in articles and books, or fighting this battle on the enemy's preferred terms.

I do not doubt that it is far easier to spend one's time theorizing about a society without animal exploitation—or commiserating about the abhorrent state of the nation's animal laws—than doing the hard, un-glamorous work of protecting animals. But as we pine away for a court-imposed silver-bullet for animals, or a paradigm shift in a legal system that has classified animals as property for centuries, billions of animals are enduring suffering that we have the power, and the societal support, to prevent today.

As mentioned previously, each hour of each day, 365 days a year, one million chickens are slaughtered in this country without any legal

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[108] Brian Carnell, *NPPC Says It Needs More Funds to Fight Activists*, http://www.animalrights.net/archives/year/2003/000090.html (Apr. 8, 2003).

[109] George Watts, *Training for Animal Rights Litigators*, Poultry USA 10, 10–11 (Sept. 2005) (emphasis added); *see also* Barbara Duckworth, *New Poultry Standards Fail to Pacify Activists*, The Western Producer 34 (Mar. 9, 2006) (United Egg Producers' vice-president stating "that livestock groups in the United States are facing many lawsuits from animal welfare groups," that "[i]t is going to be a problem because they are going to keep challenging," and that "[t]he major challenges are coming from the Humane Society of the United States").

[110] Sun Tzu, *The Art of War* ch. 6, http://eawc.evansville.edu/anthology/artwar.htm (accessed Mar. 12, 2006).

requirement that they be rendered insensible to pain before they are shackled, cut, and bled out.[111] This does not happen solely because animals are property, nor does it require any radical academic theories to remedy this situation. Instead, it requires hard work in the legislative and judicial branches of our federal government, by large numbers of people, to close a simple loophole in existing law.[112] And every single hour we spend theorizing about an epic legal battle that may never be joined, one million more chickens die a horrible death.

In response to such arguments, it may be tempting to say that there is plenty of room for both academic exploration of animal rights and hard work in the trenches. But I submit that, in fact, these impractical revolutionary legal theories are hurting animals every day. They are the opiate of the animal law masses. The bottom line is that we need foot soldiers, not philosophers, and the handful of scholars who are already devoted to exploring what a future world with animal rights might look like are more than sufficient for that particular task. Far too many of the rest of us are trapped in their seductive web of animal rights theory—unable, or perhaps unwilling, to roll up our sleeves and set to work helping animals the hard way.

I often ask myself, if our voiceless clients languishing in battery cages and gestation crates could speak to us, what would they say to us? What would they ask us to spend our time on? If you were in their place, what would you be saying? Would you be screaming at your lawyer to get you out of a gestation crate now? Or urging them to explore theories for radically reordering our legal system?

But things are starting to change from within the movement itself. In the last year, The Humane Society of the United States has hired more than a half-dozen new lawyers to build and litigate cases to help the billions of animals stuck in the gap between humane attitudes and public policy.[113] Organizations like the Animal Legal Defense Fund, Farm Sanctuary, People for the Ethical Treatment of Animals, and the Physician's Committee for Responsible Medicine are also ramping up their legal efforts, and many of these groups are adding

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111 Natl. Agric. Statistics Serv., *supra* n. 44, at 2. (averaged from 8.89 billion chickens in 2004, divided by 8,760 hours).

112 *Compare* 7 U.S.C. § 1902 (directing that all "cattle, calves, horses, mules, sheep, swine, *and other livestock*" be "rendered insensible to pain" before being processed for slaughter (emphasis added)) *with* 70 Fed. Reg. at 56624–25 (informing slaughterhouses and the public that the HMSA does not require "humane methods" for "handling and slaughter of poultry"); *see also* Pl.'s Compl. 3, *Levine v. Johanns*, No. C 05 4764 (N.D. Cal. filed Nov. 21, 2005) (challenging the exclusion of poultry from the definition of "livestock" because the Webster's Dictionary in use when Congress enacted the HMSA defined "livestock" as "domestic animals used or raised on a farm," and because the U.S. Department of Agriculture's interpretation of the HMSA renders the "'and other livestock' language of the HMSA essentially superfluous") (available at http://www.hsus.org/web-files/PDF/HMSA_complaint.pdf).

113 *See* Humane Socy. U.S., *Animal Protection Litigation Section*, http://www.hsus.org/in_the_courts/ (accessed Mar. 12, 2006) (discussing the Society's litigation efforts).

lawyers every year.[114] These groups are not doing this because lawyers are fun and exciting people to have around the office, but because they know that the legal system is bearing fruit and they need more and more talented fruit pickers.

In conclusion, let me say that although it may come as a surprise from the foregoing discussion, I am actually trying to deliver the optimistic message that the legal system actually works. It may not work as quickly or effectively as some would like, but legal change rarely comes quickly. It is important to remember that the law does not change society, society changes the law.[115] And no one ever said that social change is an easy job.

I do not pretend to suggest we can use the existing legal framework to end all animal suffering. But I also refuse to accept that our hands are tied until and unless we overhaul the system. I think Robert F. Kennedy found eloquent inspiration from Albert Camus on this issue, albeit in a different context, when he recorded in his personal papers:

> We are faced with evil. I feel rather like Augustine did before becoming a Christian when he said, "I tried to find the source of evil and I got nowhere." But it is also true that I and few others know what must be done. . . . Perhaps we cannot prevent this world from being a world in which children are tortured. But we can reduce the number of tortured children. And if you believers don't help us, who else in the world can help us do this?[116]

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[114] E-mail from Lisa Franzetta, Dir. Commun., Animal Leg. Def. Fund, to Robert A. Dell, Assoc. Ed., *Animal L.* (Mar. 16, 2006, 4:29 p.m. PST) (copy on file with *Animal L.*); e-mail from Jeffrey S. Kerr, Gen. Counsel & Vice Pres. Corp. Affairs, Found. Support Animal Protec., to Jonathon R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S. (Mar. 16, 2006, 6:58 p.m. EST) (PETA) (copy on file with *Animal L.*); e-mail from Mindy Kursban, Exec. Dir. & Gen. Counsel, Phys. Comm. Responsible Med., to Jonathon R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S. (Mar. 16, 2006, 8:03 p.m. EST) (copy on file with *Animal L.*); e-mail from Jonathan R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S., to Robert A. Dell, Assoc. Ed., Animal L., *FW: Litigation at Farm Sanctuary* (Mar. 20, 2006, 5:40 p.m. EST) (copy on file with *Animal L.*). In addition, there are a growing number of private, public interest law firms – including Meyer Glitzenstein & Crystal, Egert & Trakinski, Evans & Page, and many others – that are devoted almost exclusively to bringing practical, strategic lawsuits to protect animals using existing state and federal laws. *See* Natl. Ctr. Animal L., *Animal Law Career Guide* 22–29 (Natl. Ctr. Animal L. 2006) (available at http://www.lclark.edu/org/ncal/objects/AnimalLawCareerGuide.pdf) (for a comprehensive listing of animal law attorneys); Meyer Glitzenstein & Crystal, *Home*, http://www.meyerglitz.com/ (accessed Apr. 2, 2006) (for information on a successful Washington, D.C. public interest firm); Satya, *On the Right Side of the Law: The* Satya *Interview with Amy Trakinski and Len Egert*, http://www.satyamag.com/apr05/trakinski.html (accessed Apr. 2, 2006) (for an interview with two successful animal law attorneys).

[115] *See supra* nn. 53–69 and accompanying text (discussing how the enactment of the Thirteenth Amendment was a necessary but not sufficient condition for the legal system's recognition of the rights of African Americans in the United States).

[116] Arthur M. Schlesinger, Jr., *Robert Kennedy and His Times* 619, 988 n. 62 (Houghton Mifflin 1978).

ARTICLES

THINK OR BE DAMNED: THE PROBLEMATIC CASE OF HIGHER COGNITION IN ANIMALS AND LEGISLATION FOR ANIMAL WELFARE

By
Lesley J. Rogers and Gisela Kaplan*

Recent discoveries of higher cognitive abilities in some species of birds and mammals are bringing about radical changes in our attitudes towards animals and will lead to changes in legislation for the protection of animals. We fully support these developments, but at the same time we recognize that the scientific study of higher cognition in animals has touched on only a small number of vertebrate species. Accordingly, we warn that calls to extend rights, or to at least better welfare protection, for the handful of species that have revealed their intelligence to us may be counterproductive. While this would improve the treatment of the selected few, be they birds or mammals, a vast majority of species, even closely related ones, will be left out. This may not be a particular problem if being left out is only a temporary state that can be changed as new information becomes available. But, in practice, those protected and not protected are separated by a barrier that can be more difficult to remove than it was to erect in the first place. We

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 Dr. Lesley J. Rogers and Dr. Gisela Kaplan are both full professors in the Centre for Neuroscience and Animal Behaviour at the University of New England, N.S.W., Australia, and they have published many books and scientific papers both together and separately. Dr. Rogers obtained her first degree from Adelaide University and a Ph.D. in ethology from the University of Sussex, later receiving a Doctor of Science from the University of Sussex. She is a Fellow of the Australian Academy of Science. Dr. Kaplan obtained her first degrees at Monash University, including an M.A. and a Ph.D. in Arts. Her second career in animal behavior began over fifteen years ago. She was awarded a second Ph.D. in Veterinary Science with a focus on avian behavior. Her most recent book, *Australian Magpie* (CSIRO & UNSW Press 2004), has achieved best-seller status in Australia and she is a sought-after speaker on broad topics in animal behavior and welfare. Both authors have received a number of awards for their research and writings in animal behavior. The authors are most grateful to D. Kevin Shipp for his advice on the manuscript and particularly for his excellent assistance in preparing the footnotes.

summarize the recent research on higher cognition from the position of active researchers in animal behavior and neuroscience.

I. INTRODUCTION: STATING THE CASE

The recent expansion of research on the higher cognitive abilities of animals has brought many surprises to scientists trained in the tradition of setting humans well apart from other creatures and following the strict rule of avoiding anthropomorphism.[1] Likewise, many of the new findings have so alerted legislators and the general public to a changing view on animals that we find ourselves on new ground when we consider how society treats animals and how we can protect them from cruelty that we would find intolerable and unacceptable if applied to ourselves.[2]

This article is a response, from the point of view of practicing scientists in the field of higher cognition in animals, to debates on how new findings on animal cognition are to be reflected in the law. Our response to the challenges posed by recent discoveries is several fold. First, we give an overview of what has been achieved in scientific research and what is known about cognitive abilities in animals. Second,

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[1] *See* Lesley J. Rogers, *Minds of Their Own: Thinking and Awareness in Animals* 6–7 (Westview Press 1998) (stating that anthropomorphism has been traditionally frowned upon by scientists); John A. Fisher, *The Myth of Anthropomorphism,* in *Readings in Animal Cognition* 3, 3–16 (Marc Bekoff & Dale Jamieson eds., MIT Press 1999) (discussing one view of anthropomorphism). Trained in ethology (animal behavior) in the 1960s, one of the authors, Lesley J. Rogers, was taught to strictly avoid any hint of anthropomorphism in interpreting results. For example, animals could be said to have mental representations but not ideas and to decide according to pre-set rules but not by thinking.

[2] Steven M. Wise, *Animal Rights: One Step at a Time*, in *Animal Rights: Current Debates and New Directions* 19, 19–50 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004); James Rachels, *Drawing Lines*, in *Animal Rights: Current Debates and New Directions* 162, 162–74 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

we state the limitations of that knowledge. Third, we argue how we see the pitfalls unfolding at the applied and legislative levels if current research findings are misconstrued.

This paper consists of several interlocking theses, some of them seemingly contradictory. The first one states that current avant-guard research in the fields of perception and higher cognition in animals is important and shows that asking new questions, not surprisingly, results in answers that demand changes in attitudes. In addition, our discussion will show that science is not value free and biology not apolitical.[3] The second thesis of this paper confirms that it is important for policy makers and lawmakers to take into consideration the new scientific findings. The third thesis of this paper seemingly contradicts the second by arguing that the conclusions some policy and lawmakers are beginning to draw from research on animal cognition are either flawed or problematic (in terms of the current scientific knowledge). Some of the proposed changes (such as including some species, but not others, into new legislative frameworks for protection) promise to make life even worse for those species not included. We argue that a scale of "value" along some older *Scala Naturae* could become a disaster in terms of protection of animals and animal welfare in general.[4] The fourth thesis is that much more research will be needed, because the animals so far studied for higher cognitive ability represent only a small fraction of vertebrate species.[5] Hence, we are very much in the infancy of this field, even though the theoretical and conceptual shifts have already been overwhelmingly large (as will be described in this paper). The final thesis of the paper states that the search for criteria for better legislation to protect animals must not only include cognitive abilities, often comparable to those of humans, but also recognize that animals may have some capabilities that are more highly developed than in humans and that these capabilities need to find reflection in legislation as *species appropriate legislation.*

II. THE BACKGROUND

The discoveries of higher cognitive abilities in animals in the last two to three decades have been most exciting and groundbreaking.[6] They have occurred because many researchers have chosen to drop the

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[3] *See generally* Gisela Kaplan & Lesley J. Rogers, *Gene Worship: Moving Beyond the Nature/Nurture Debate over Genes, Brain and Gender* 3–45 (Other Press 2003) (developing the argument of the role of biology in politics and the malleability of science within certain belief systems).

[4] *See e.g.* Steven M. Wise, *Drawing the Line*: *Science and the Case for Animal Rights* 43–45 (Perseus Books 2002) (proposing a scale that assigns a cognitive ability score to each species and then drawing a line to divide those who deserve basic liberty rights from those who do not).

[5] *E.g*. Lesley J. Rogers & Gisela Kaplan, *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* (Kluwer Academic/Plenum Publg. 2004).

[6] The revival of interest in research in this field was stimulated by Donald Griffin's book, *Animal Thinking*. Rogers, s*upra* n. 1, at 8.

tacit and implicit assumption that humans are better in everything and that animals, as first described by Descartes, merely exist by responding unconsciously to stimuli in the environment or according to some preset genetic program.[7] The discoveries have shown, starting perhaps with the discovery of echolocation in bats,[8] that humans cannot necessarily hear what animals can hear, see what they can see, smell what they can smell, or feel as they feel.[9]

Over the last twenty years or so, increasingly, a very different and seemingly even more important point has been made: namely, that some animals can actually do what we can do, feel what we can feel, and even plan for the future as humans do. In other words, the horizons are expanding vastly, now admitting that there are aspects to other living organisms that can be described as having *more* capabilities than we have and, even more startling to many people, that higher cognitive abilities in animals, in some aspects or specific tasks, may be *equal* to those of humans.[10] Our own research is centered in this (latter) avant-guard field and this paper will, naturally, report favorably on current advances in our knowledge of sensory perception and higher cognitive abilities of animals.

Once we needed only to take into consideration that animals, or many of them, can feel pain. And, although it was not a simple matter to develop effective legislation to protect animals on the basis of sentience, it could be done, albeit with a few, still debated, grey areas. One such area is a debate about at what stage of development an embryo or fetus can feel pain and another is about whether invertebrates can feel pain.[11] Many countries with laws to protect vertebrate species are considering whether or not at least some invertebrates (e.g. octopuses and

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[7] Rene Descartes, *Animals Are Machines*, in *Animal Rights and Human Obligations* 13, 17 (Tom Regan & Peter Singer eds., 2d ed., Prentice Hall 1989) (arguing that animals are simply automata, acting purely mechanistically without perception of pain or awareness); *e.g.* John Dupré, *The Mental Lives of Nonhuman Animals*, in *Readings in Animal Cognition* 227–33 (Marc Bekoff & Dale Jamieson eds., MIT Press 1999) (suggesting mental consciousness in animals).

[8] Donald R. Griffin, *Listening in the Dark: The Acoustic Orientation of Bats and Men* 57–80 (Yale U. Press 1958); *see also* Lesley J. Rogers & Gisela Kaplan, *Songs, Roars, and Rituals: Communication in Birds, Mammals, and Other Animals* 107–09 (Harvard U. Press 2000) (discussing echolocation in bats).

[9] *See e.g.* Rogers & Kaplan, *supra* n. 8, at 26–47 (comparing sensory perception in humans and nonhuman animals); William C. Stebbins, *The Acoustic Sense of Animals* 1–3 (Harvard U. Press 1983) (comparing the functions and mechanisms of hearing in various species).

[10] Juan D. Delius, *Sapient Sauropsids and Hollering Hominids*, in *Geneses of Language* 1, 2–25 (Walter A. Koch ed., Universitätsverlag Dr. Norbert Brockmeyer 1990) (discussing a task on which pigeons perform better than humans).

[11] Melissa Sowry, *Lawmakers Continue to Promote Fetal-Pain Bills*, http://abcnews.go.com/Health/story?id=1594819&page=1 (Mar. 19, 2006); *e.g.* Richard C. Brusca & Gary J. Brusca, *The Invertebrates* (2d ed., Sinauer Assoc. 2003) (considering whether invertebrates feel pain); *see* David J. Mellor et al., *The Importance of 'Awareness for Understanding Fetal Pain*, 49 Brain Research 455 (2005) (for a recent article on fetal pain).

lobsters) should be included in the rubric enacted to protect vertebrates.[12] Law enactments and law enforcements are, of course, very different things. And all too often cruelties to animals, even at a basic level of care, remain unpunished or even tolerated or condoned,[13] indicating that the "grey areas" do not just extend to our understanding of pain and stress in animals but how we actually put that understanding into practice. At any point in time, if one cared to look, there are likely to be tens of thousands of animals suffering pain and stress that are not being attended to despite legislative frameworks that may have been adopted.[14] To include octopuses and lobsters into legislative frameworks may seem almost extravagant at a time when cattle, pigs, sheep, and poultry, to name a few, still often live and die under appalling conditions.[15] At least we are beginning to gain scientific insight and one would hope that, gradually, such insights will be translated into practice—whatever the species.

But recently the grey areas of existing legislation have become larger because, it seems, quite unexpected species have been found to possess higher cognitive abilities.[16] First came the research on higher cognition in apes. The demonstration that apes could count,[17] make

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[12] *See e.g.* Ministry Research, Sci. & Tech., *Biotech Regulatory Wayfinder: An Interactive Guide to New Zealand's Biotechnology Legislation, Animal Welfare*, "How is Animal Welfare Regulated?" http://www.morst.govt.nz/wayfinder/regulations/welfare.asp (accessed Mar. 19, 2006) (The New Zealand and Australian Animal Research and Animal Welfare Acts include protection of octopuses, lobsters, and some other invertebrates.); The United Kingdom Parliament, *Animal Welfare Bill*, http://www.publications.parliament.uk/pa/cm200506/cmstand/a/st060117/am/60117s02.htm (Mar. 19, 2006) (for more on the debate in the U.K. parliament regarding whether to protect some invertebrates under laws similar to those protecting vertebrates).

[13] This is particularly true of livestock for consumption. *See e.g.* David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production* 10 (Farm Sanctuary, Inc. 1999) (explaining the inadequacies of protection of animals raised for food).

[14] *Id.*; *see also* Jim Mason & Mary Finelli, *Brave New Farm?* in *In Defense of Animals: The Second Wave* 104, 120–22 (Peter Singer ed., Blackwell 2006) (explaining the lack of legal protection for farm animals in the U.S.); Stephanie Edwards, *Class B Dog and Cat Dealers Are No Friends to the Animals*, http://www.hsus.org/animals_in_research/animals_in_research_news/Class_B_Dealers.html (Feb. 15, 2006) (explaining that although Class B dealers are regulated by the Animal Welfare Act, they often subject animals to inhumane conditions).

[15] Mason & Finelli, *supra* n. 14, at 120–22; *see also* Jeffrey Moussaieff Masson, *The Pig Who Sang to the Moon: The Emotional World of Farm Animals* (Ballantine Books 2003) (for a sensitive exploration of the way humans treat pigs and other animals); Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (St. Martin's Press 2002) (describing animal suffering caused by humans).

[16] *See e.g.* Rogers & Kaplan, *supra* n. 5 (for many chapters with examples of higher cognition in vertebrate species).

[17] Sarah T. Boysen & Gary G. Bernston, *Numerical Competence in a Chimpanzee (*Pan troglodytes*)*, 103 J. Comp. Psychol. 23, 23 (1989); Sarah T. Boysen, *Counting in Chimpanzees: Nonhuman Principles and Emergent Properties of Number*, in *The Development of Numerical Competence: Animal and Human Models* 39, 39–59 (Sarah T. Boysen & E. John Capaldi eds., Lawrence Erlbaum Assocs. 1993).

and use tools,[18] learn sign language,[19] and even express desires and emotions has impressed society and stirred some to call for an extension of human rights to encompass our nearest relatives.[20] Many of the arguments in support of inclusion of the great apes in the same genus as currently reserved for humans alone (i.e. *Homo*)[21] have a sound scientific basis and growing support from research.[22] Such a change in the status of apes would be instrumental in changing both attitudes and legislation to treat them as our equals. In fact, to include apes along with us in the same genus should not be an enormous shift in thinking from the biologist's point of view since they are our closest relatives on the evolutionary tree and, over recent years, molecular geneticists have provided evidence that their genetic coding (DNA) differs from ours by no more than 1.2%.[23] On the other hand, in terms of broad social thinking, social practice, and the law, to extend rights to apes and include them in the same genus as humans would be an enormous step, since we would have to dismantle the colossal wall that we have erected between ourselves (humans) and all other species (animals).

Fatefully perhaps, just as we were chipping away at this wall, startling new research has shown that several avian species can perform the higher cognitive abilities that so impressed us about apes. Some species of birds can: manufacture and use tools;[24] "follow the direction of eye gaze,"[25] which shows they may be aware of the thoughts

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[18] Gavin R. Hunt, *Manufacture and Use of Hook-Tools by New Caledonian Crows*, 379 Nature 249, 249–51 (1996).

[19] Roger S. Fouts et al., *Teaching Sign Language to Chimpanzees* 306 (R. Allen Gardner et al. eds., St. U. N.Y. Press 1989); *see also* R. Allen Gardner & Beatrix T. Gardner, *Teaching Sign Language to a Chimpanzee*, 165 *Science* 664, 664–72 (1969) (summarizing sign language studies of chimpanzees).

[20] *See generally The Great Ape Project*: *Equality beyond Humanity* (Paola Cavalieri & Peter Singer eds., St. Martin's Press 1993) (a collection of thirty-one essays to support the call for the immediate extension of our human rights to the great apes).

[21] U. of Mich. Museum of Zoology, *Animal Diversity Web, Homo Sapiens (Human)*, http://animaldiversity.ummz.umich.edu/site/accounts/classification (accessed Mar. 19, 2006).

[22] *See supra* nn. 17–19 and accompanying text (for examples of research demonstrating the high cognitive abilities of apes); s*ee generally "Language" and Intelligence in Monkeys and Apes*: *Comparative Development Perspectives* (Sue Taylor Parker & Kathleen Rita Gibson eds., Cambridge U. Press 1990) (The book focuses on such areas as the nature of culture, intelligence, language, and imitation; the differences among species in mental abilities and developmental patterns; and the evolution of life histories and of mental abilities and their neurological bases.).

[23] Robin Orwant, *What Makes Us Human*, vol. 181, issue 2435 New Scientist 36, 38 (Feb. 21, 2004).

[24] Hunt, *supra* n. 18, at 249–51.

[25] Thomas Bugnyar et al., *Ravens*, Corvus corax, *Follow Gaze Direction of Humans around Obstacles*, 271 *Procs. Royal Socy. London B* 1331, 1331–36 (2004); *see also* Thomas Bugnyar & Bernd Heinrich, *Ravens,* Corvus Corax*, Differentiate between Knowledgeable and Ignorant Competitors*, 272 *Proc. Royal Socy. B* 1641, 1641–45 (2005) (testing whether ravens behave differently when caching and retrieving food if being observed by other ravens).

of another; express numerosity;[26] form abstract concepts;[27] and communicate using referential signals.[28] These new findings lead us to ask whether we should now start to talk about rights for birds, or at least for some avian species. And this debate opens an even more difficult question about all of the species on the evolutionary trajectory between birds and apes. Some researchers think the ape-equivalent cognitive abilities are limited to corvids (*Corvidae*: crows and ravens) and parrots (*Psittacinae*: generally referred to as parrots, but also including cockatoos).[29]

Although we recognize that corvids and parrots may possess special abilities in higher cognition,[30] we are also keenly aware that drawing this conclusion may be merely a reflection of the avian species that have been tested for their cognitive abilities so far. This is not an insignificant point to make, because, if society were to accept that corvids and parrots are a special case among birds, it would need to broaden the protective umbrella just a little more to include these orders of birds along with the apes. On the other hand, society might use what it knows about corvids and parrots as a pointer to finding out more about the cognitive abilities of other avian species, and this could lead to opening the protective umbrella much more widely.

In other words, a range of issues relating to legislation to protect animals would arise if other avian species, so far not tested, show higher cognitive ability. Added to this, scientists may discover that other species of yet another phylogenetic Class show such abilities. For example, we recently watched a monitor lizard (*Varanus varius*) solve a complex problem.[31] It had found a large dog bone that it could not

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[26] Jacky Emmerton & Juan D. Delius, *Beyond Sensation: Visual Cognition in Pigeons*, in *Vision, Brain, and Behavior in Birds* 377, 377–79 (H. Philip Zeigler & Hans-Joachim Bischof eds., MIT Press 1993).

[27] *See* Delius, *supra* n. 10, at 2–25 (discussing the cognitive ability of pigeons and other birds).

[28] Christopher S. Evans, *Referential Signals*, in *Perspectives in Ethology* 99, 99–100 (Owings et al. eds., Plenum Press 1997); Lesley J. Rogers & Gisela Kaplan, *Bird Brain? It May be a Compliment!* 7 Cerebrum 37, 43–44 (2005) [hereinafter Rogers & Kaplan, *Bird Brain*]; Lesley J. Rogers & Gisela Kaplan, *An Eye for a Predator: Lateralization in Birds, with Particular Reference to the Australian Magpie*, *Behavioral and Morphological Asymmetries in Vertebrates*, http://www.eurekah.com/abstract.php?chapid=2715&bookid=196&catid=20 (last updated Sept. 2005) [hereinafter Rogers & Kaplan, *An Eye for a Predator*].

[29] *E.g.* Nathan J. Emery, *Cognitive Ornithology: The Evolution of Avian Intelligence*, 361 Phil. Transactions Royal Socy. 23, 23 (Dec. 7, 2005) (available at http://www.princeton.edu/~asifg/braindiversity/Emery%20-%20Cognitive%20Ornithology.pdf).

[30] Gareth Huw Davies, *Bird Brains*, http://www.pbs.org/lifeofbirds/brain/ (accessed Mar. 19, 2006).

[31] Thirty degrees latitude, in the subtropical rainforest of east coast Australia (hinterland of Coffs Harbour, Mid-north Coast in the state of New South Wales). Lace monitors roam freely in summer in that area, and the authors have a property in these parts maintaining it in its pristine form. It affords observation of wildlife now rarely seen elsewhere. For Genus and species information, see Biocrawler.com, *Monitor Lizard*, "Classification: Genus Varanus," http://www.biocrawler.com/encyclopedia/varanidae (last modified June 11, 2005).

swallow unless it aligned it at a certain angle to its throat.[32] It tried several postures when the bone was on the ground but did not succeed in getting it right.[33] The lizard then picked up the bone and transported it to a tree stump, which it used as an anvil to strike the bone against until it was at the correct alignment.[34] This small anecdotal observation suggests several parameters of higher cognitive ability: problem solving, tool use by using the trunk of the tree to manipulate the food, and even intentionality, because the monitor lizard carried the bone purposefully to the tree trunk. There was no trial and error, no hesitation, and no mistake.[35] Presumably, such findings would throw us into a legislative conundrum that would require us to test the cognitive abilities of every species needing protection from human cruelty.

The demand for proof of cognitive ability in animals has a few pitfalls. Let us presume that scientists would actually be willing to test most avian species based solely on the hypothesis that more avian species than just corvids and parrots, let alone animals of another Class such as reptiles (e.g. crocodiles or monitor lizards),[36] might possess higher cognitive ability. If scientists do set about testing the cognitive abilities of a broad range of avian species, they will be faced with the difficulty of choosing what tests to apply. This is not as easy as it may sound, as may be mistakenly assumed by those not familiar with the scientific study of animal and human behavior. The "fair" view might seem to be to apply the same kind of baseline test to all species. Not only a matter of fairness, there is an implied view in this approach that "intelligence" (or better—higher cognitive ability) involves absolute and fixed criteria and, moreover, that these criteria have something to do with intelligence as we understand it (and which we, as humans, claim to possess). However, one of the distinct assets of the natural world is not only diversity, but also diversity in skills for different ecological niches that a species might occupy. Not all birds have color vision,[37] not all have a sense of smell,[38] not all can fly,[39] not all sing,[40] and some of their extraordinary skills and abilities might get lost in tests that are simply inappropriate for the species.[41]

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[32] *Supra* n. 31.

[33] *Supra* n. 31.

[34] *Supra* n. 31

[35] *Supra* n. 31.

[36] Biocrawler.com, *Reptile*, http://www.biocrawler.com/encyclopedia/Reptile (last modified June 22, 2005).

[37] Gisela Kaplan & Lesley J. Rogers, *Birds: Their Habits and Skills* 112–14 (Allen & Unwin 2001).

[38] *Id*. at 124–29.

[39] *Id*. at 30–34.

[40] *Id*.

[41] Nathan J. Emery & Nicola S. Clayton, *Comparing the Complex Cognition of Birds and Primates*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* 3, 3–55 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic/Plenum Publg. 2003).

Such a demand for proof of cognitive ability creates, we believe, an insoluble dilemma. Scientists would need to take into account species' differences before deciding whether a species fails to meet the criteria set for higher cognitive abilities. Scientists would have to adapt tests to reflect ecologically acceptable criteria for the species, and would then be faced with the difficulty of comparing results between very different tests. Moreover, some species have survived life on this planet for millions of years by being well adapted to their ecological niche.[42] They might, therefore, have very specific cognitive adaptations and, thus, superior cognitive abilities of a very specific type. Even if scientists fix the criteria for a test, this raises the question of how many aspects of higher cognition a species would need to possess before we would consider moving it into a legally protected category.

Finally, let us put humans into this testing arena as well. For instance, when testing the simple spatial ability to discriminate between several figures with one facing a different way than the rest (referred to as "odd-man-out" tests and used widely in human intelligence tests),[43] the birds tested, in this case pigeons, performed substantially better and faster than humans.[44] There are so many tests that could be devised in which humans would be low on the scale of performance, and, to make this quite unambiguous and clear, humans or human infants would often be considerably *poorer* in their performance than birds, including pigeons and chickens.[45] Such simple tests could examine memory, vision, hearing, spatial mapping, and navigation; and many other tests could be applied that would be equally valid to administer, each as a "criterion" fixed test for establishing relative higher cognitive ability. However, we are unable to say at what level of performance on these tests, say on a scale of one to ten, we would decide that a species is worthy of legal protection and additional welfare legislation.

Changes in cognitive ability during development are an added complication since species vary in the rate at which they pass through the various stages of development.[46] Scientists are still debating at

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[42] For example, turtles (Class *Reptilia*, Order *Testudines*) have changed very little from the Triassic on, and crocodiles (Class *Reptilia*, Order *Crocodilia*) have changed little from the early Mesozoic on (about 200 million years). *Integrated Principles of Zoology*, 540, 552 (Cleveland P. Hickman et al. eds., 12th ed., McGraw-Hill 2003).

[43] Pritika Sanghi & David L. Dowe, *A Computer Program Capable of Passing I.Q. Tests*, www.csse.monash.edu.au/~sanghi/CSE3301/Paper.doc (accessed Mar. 19, 2006).

[44] Delius, *supra* n. 10, at 7–8.

[45] *See id.* at 6–18 (comparing the cognitive ability of pigeons to humans); Rogers, s*upra* n. 1, at 68–69, 76–77 (comparing the cognitive ability of humans to chickens and pigeons).

[46] *See e.g.* Peter Marler, *Differences in Behavioural Development in Closely Related Species: Birdsong*, in *The Development and Integration of Behaviour* 41, 41–70 (Patrick Bateson ed., Cambridge U. Press 1991) (reviews of the bird species differences in mechanisms of behavioral development); Andrew N. Iwaniuk & John E. Nelson, *Developmental Differences Are Correlated with Relative Brain Size in Birds: A Comparative Analysis*, 81 Canadian J. of Zoology 1913, 1913–28 (2003).

which stage of development an embryo is able to feel pain,[47] and this has enormous importance to research since embryos prior to that stage could be used without concern for their welfare. The ability to feel pain emerges at some, usually early, stage of development, and higher cognitive abilities will emerge at later stages of development (of the central nervous system), but it remains unclear when exactly they do emerge in species other than humans.[48]

One potential solution to the problem of what to do about specific cognitive specializations versus broader cognitive ability is to consider behavioral flexibility (i.e. cognitive ability across different tasks), also seen as a measure of higher cognition in humans.[49] However, measuring is not simple and encompasses all of the problems that we have mentioned above.

One of the issues referred to above depends largely on arguments and knowledge about evolution, and the other issue depends on knowledge of development. Both ultimately address the question of whether society can, or should, draw a line between those species that can "think" and those that are damned because they cannot do so (at least along the parameters that scientists might have set for them). Furthermore, for a species chosen for protection because of its higher cognitive abilities, there is the question concerning during what stage of development those abilities are manifested. Individual differences within species and experience might also be a consideration.

III. EVALUATING RECENT STUDIES

To further discussion on this topic, we need to summarize the new findings on the cognitive abilities of birds. These are new and important findings in themselves, but they have the added value, for the sake of the debate here, that birds are not our direct predecessors, as are apes, and thus belong to an entirely different Class.[50] A discussion of birds therefore frees us from the implied assumption that the primate line (with humans as an imagined pinnacle) is special and cognitively superior to the rest of the animal kingdom.

A. Neocortex and Higher Cognition

One of the lynch pins of the formerly held opinion that birds have inferior cognitive abilities has always been the fact that they lack a

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[47] Parliamentary Off. of Sci. & Tech., *Fetal Awareness*, 94 POSTnote 1 (Feb. 1997).

[48] *See generally Behavioral Development* (Klaus Immelmann et al. eds., Cambridge U. Press 1981) (providing an overview of cognitive development in all species); *see also* Michael Tomasello & Josep Call, *Primate Cognition* 401–16 (Oxford U. Press 1997) (providing an overview of cognitive development in humans).

[49] Alexander Easton, *Behavioural Flexibility, Social Learning, and the Frontal Cortex*, in *The Cognitive Neuroscience of Social Behaviour* 59, 59–79 (Alexander Easton & Nathan J. Emery eds., Psychol. Press 2005).

[50] Birds belong to Class Aves, and apes, along with all other primates and mammals, to Class Mammalia. Lord Rothschild, *A Classification of Living Animals* 41–44 (John Wiley & Sons Inc. 1961).

neocortex,[51] that part of the brain known in mammals to be used for higher cognitive function.[52] In humans, the neocortex, recently referred to as the isocortex, is the convoluted part of the brain, which can be seen clearly as two cerebral hemispheres.[53] Humans use the neocortex for most higher cognitive processes, including abstract thinking, problem solving, forming memories, and carrying out complex communication.[54]

Part of the cortex, the frontal cortex, is thought to be responsible for flexibility in human behavior.[55] The neocortex also plays a role in the expression of emotions and personality.[56]

All mammals have a neocortex,[57] although not as large or convoluted as ours,[58] and we know that one of its functions in animals is to process and store information responsible for changing behavior as a result of experience (i.e. learning).[59] Not surprisingly, scientists have tended to view the evolution of the neocortex (its becoming larger in comparison to the rest of the brain) as a pre-cursor to the higher cognitive abilities of primates, and the human neocortex, proportionately the largest of them all, as evolution's pinnacle in cognitive function.[60]

Non-mammalian brains, including the brains of birds, were thought to be simpler and of a more ancient form.[61] The neocortex of mammals has a layered structure (six layers of nerve cells), whereas the forebrain of the bird is mainly made of collections of nerve cells

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[51] Emery, *supra* n. 29, at 24.

[52] Shirley A. Bayer & Joseph Altman, *Neocortical Development* ix (Raven Press 1991); John C. Eccles, *Evolution of Consciousness*, 89 Proc. Natl. Acad. Sci. 7320, 7321 (1992).

[53] Rogers, *supra* n. 1, at 153–54; Lesley J. Rogers, *Increasing the Brain's Capacity: Neocortex, New Neurons, and Hemispheric Specialization*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-primates?* 289, 296–98 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic & Plenum Publishers 2004) [hereinafter Rogers, *Increasing the Brain's Capacity*].

[54] Stuart J. Dimond, *Hemisphere Function in the Human Brain: An Introduction*, in *Hemisphere Function in the Human Brain* 1, 1 (Stuart J. Dimond & J. Graham Beaumont eds., Halsted Press 1974).

[55] Easton, *supra* n. 49, at 66.

[56] Mark Solms & Oliver Turnbull, *The Brain and the Inner World* 107–08 (Other Press 2002); Wendy Heller et. al., *Regional Brain Activity in Anxiety and Depression, Cognition/Emotion Interaction, and Emotion Regulation*, in *The Asymmetrical Brain* 532, 534–35 (Kenneth Hugdahl & Richard J. Davidson eds., MIT Press 2003).

[57] Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 107; *see* Bayer & Altman, *supra* n. 52, at ix (stating that "[t]he neocortex is the crown of the mammalian central nervous system").

[58] John K. Rilling & Thomas R. Insel, *The Primate Neocortex in Comparative Perspective Using Magnetic Resonance Imaging*, 37 J. Human Evolution 191, 220 (1999).

[59] *See* Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 38 (explaining that the neocortex is used for higher cognitive processes such as problem solving and abstract thinking).

[60] Bayer & Altman, *supra* n. 52, at ix.

[61] Avian Brain Nomenclature Consortium, *Avian Brains and a New Understanding of Vertebrate Brain Evolution*, 6 Nat. Rev. Neuroscience 151, 151–52 (2005).

(neurons) gathered together into discrete structures called nuclei.[62] These differences in the brain's structure are not too "surprising, because more than two hundred million years ago birds branched from the line of evolution that led to mammals and on to humans via primates."[63] Both the avian forebrain and the mammalian neocortex are derived from the same structure, known as the pallium.[64] Brains following the two separate evolutionary trajectories became quite different in organization and connection, but apparently adapted to achieve many similar functions.[65]

Neuroscientific study of the avian brain has advanced enormously over recent years. Views on its complexity relative to the mammalian brain have changed so greatly that all parts of the forebrain of the bird have been renamed recently to match parts of the mammalian brain.[66] These new names have replaced the older ones and have equated regions of the avian brain to regions of the mammalian brain.[67]

Parallel with this change in opinion on the anatomy of the avian brain, a growing number of studies have shown that birds can perform complex cognitive tasks.[68] These discoveries show that there must be more than one way that a very clever, if not intelligent, brain can be constructed. Moreover, the relatively small size of bird brains, most likely to assist them in their ability to fly, is no longer seen as a mark of an inferior brain. As an analogy, modern, well-designed, smaller computers can perform more functions more rapidly than many older, larger computers.[69] Research has shown us very clearly that, contrary to earlier beliefs, size of the brain is not a reliable indicator of cognitive capacity despite the fact that some anthropologists still make much of brain size with respect to human evolution.[70]

Of course, we recognize that brain size alone is not the main measure to be considered, and it is now common practice to adjust it according to body size because an allowance must be made for the fact that much of the brain is devoted to moving and controlling body musculature.[71] Those species with a higher ratio of brain weight to body

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62 *Id*. at 154.

63 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 38.

64 Avian Brain Nomenclature Consortium, *supra* n. 61, at 151.

65 Kaplan & Rogers, *supra* n. 37, at 27–28.

66 Avian Brain Nomenclature Consortium, *supra* n. 61, at 155.

67 *Id*.

68 Emery, *supra* n. 29, at 27–29; Giorgio Vallortigara, *Visual Cognition and Representation in Birds and Primates*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* 57–94 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic & Plenum Publishers 2004).

69 Steven E. Schoenherr, *The Evolution of the Computer*, http://history.acusd.edu/gen/recording/computer1.html (last updated June 1, 2004).

70 *E.g.* William Noble & Iain Davidson, *Human Evolution, Language and Mind: A Psychological and Archaeological Inquiry* 154–59 (Cambridge U. Press 1996) (These authors build their theory of the evolution of language on the increasing size of the human brain.).

71 Rogers, *Increasing the Brain's Capacity*, supra n. 53, at 289–96.

weight, known as the encephalization quotient (EQ), are considered to have more cognitive capacity.[72]

Avian species fare quite well on such a ratio, but one has to take into account the fact that the bones of birds that fly have special adaptations to make them light: namely, they have an interior lattice of bony supports with many air pockets.[73] This means that their bones are strong but also light. This fact alone influences (increases) the ratio of brain to body weight and makes comparisons between birds and species that do not have this adaptation for flight, such as mammals and reptiles, untenable. Although the brain to body weight ratio may be used to make useful comparisons between avian species,[74] it is invalid to make comparisons of birds with non-birds.[75]

Recognition of the weak association between brain size, as a whole, and cognitive capacity does not, however, mean that the relative sizes of subregions of the brain may not indicate specific cognitive specializations of the species. At this level of size measurement, many believe, relationships between size and function may exist, at least as they vary within a taxonomic order.[76] Some avian species and some mammals, for instance, need to store food (referred to as caching), and there is a corresponding area in the brain, the hippocampus, which is important for storing spatial memory used to carry out this task.[77]

Several researchers have presented evidence that the hippocampus is larger in species that cache their food, and thus need to use spatial memory in order to find it at a later date. Avian species (e.g. nuthatches[78] and marsh tits[79]) and mammalian species (e.g. squirrels and polygynous vole species[80]) that cache have a larger hippocampus volume than their close relatives that do not cache. Although one comprehensive study of the evidence for larger hippocampal size in caching species threw the original claims into doubt, because no such

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[72] *See* Harry J. Jerison, *Evolution of the Brain and Intelligence* 61–62 (Academic Press 1973); Harry J. Jerison, *Brain, Body, and Encephalization in Early Primates*, 8 J. Human Evolution 615, 615–35 (1979).

[73] George Ruppel, *Bird Flight* 30 (Van Nostrand Reinhold 1977).

[74] Rogers, *supra* n. 1, at 93–94.

[75] Rogers, *supra* n. 53, at 289–323.

[76] Willem de Winter & Charles E. Oxnard, *Evolutionary Radiations and Convergences in the Structural Organization of Mammalian Brains*, 409 Nature 710, 713–14 (2001).

[77] Jennifer A. Basil et al., *Differences in Hippocampal Volume among Food Storing Corvids*, 47 Brain, Behaviour & Evolution 156, 156 (1996).

[78] David F. Sherry et al., *The Hippocampal Complex of Food-Storing Birds*, 34 Brain, Behaviour & Evolution 308, 308 (1989).

[79] John R. Krebs et al., *Hippocampal Specialization of Food-Storing Birds,* 86 Proc. Natl. Acad. Sci. 1388, 1388–92 (1989).

[80] Rogers, *supra* n. 1, at 115 ("Mammals that store food (e.g. squirrels) . . . have an enlarged hipppocampal region of the brain."); Basil, *supra* n. 77, at 162 (summarizing a study that found that in polygynous vole species, the males had hippocampi that were of a greater volume than the females).

relationship was found,[81] a later research group found that the relationship did indeed hold, provided one looked at North American and Eurasian species separately.[82] This function-related size of the hippocampus, however, might be little reflected in overall brain size, or in the overall size of the cerebral hemispheres or forebrain, since other regions of the brain might not co-vary, or they may even show the opposite association.

B. Communicating Intentionally

The ability to communicate meaningfully and intentionally is unquestionably a mark of higher cognition. Until just a few decades ago, it was believed that only humans have this capacity, but then Cheney and Seyfarth showed that wild vervet monkeys use different vocalizations to warn conspecifics of different types of approaching predators.[83] These monkeys have a specific call for an eagle, another for a leopard, and yet a third for a snake.[84] When other vervet monkeys hear one of these particular calls, they interpret the meaning of the message and take appropriate evasive action.[85] Since these initial findings, similar abilities have been demonstrated by other primates, including Diana monkeys,[86] other mammals,[87] and two avian species.[88]

Birds use a varied and complex array of vocalizations to communicate a wide variety of messages in specific situations. To name but a few, they use song to advertise their territories or to attract a mate, other vocalizations, such as food calls, either to ask to be fed or to signal to other birds in their flock that they have found food, and alarm calls to warn others of predators.[89]

"Until recently the virtually universal view has been that animal vocalizations are involuntary and that they are dominated by emotion."[90] This would mean that, although other birds might obtain

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[81] Anders Brodin & Ken Linborg, *Is Hippocampal Volume Affected by Specialization for Food Hoarding in Birds?* 270 Procs. Royal Socy. B, London 1555, 1555 (2003).

[82] Jeffrey R. Lucas et al., *Does Hippocampal Size Correlate with the Degree of Caching Specialization?* 271 Procs. Royal Socy. B, London 2423 (2004).

[83] Dorothy L. Cheney & Robert M. Seyfarth, *How Monkeys See the World: Inside the Mind of Another Species* 102 (U. Chi. Press 1990).

[84] *Id.*

[85] *Id.* at 102–03.

[86] Klaus Zuberbühler, *Referential Labeling in Diana Monkeys*, 59 Animal Behaviour 917, 922–23 (2000).

[87] *E.g.* Daniel T. Blumstein & Kenneth B. Armitage, *Alarm Calling in Yellow-Bellied Marmots: I. The Meaning of Situationally Variable Alarm Calls*, 53 Animal Behaviour 143, 166 (1997) (discussing marmots); Marta B. Manser, *The Acoustic Structure of Suricates' Alarm Calls Varies Depending on Predator Type and the Level of Urgency*, 268 Procs. Royal Socy. B, London 2315, 2318–21 (2001) (discussing meerkats).

[88] Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 44.

[89] *Id.* at 63; Rogers & Kaplan, *supra* n. 8, at 70–99.

[90] Peter Marler & Christopher Evans, *Bird calls: Just Emotional Displays or Something More?* 138 Ibis 26, 26 (1996); *see* Rogers & Kaplan, *supra* n. 8, at 48 (discussing the view of some that animals, unlike humans, only make unintentional vocalizations).

meaning from the communication, the bird calling might have no ability to decide what call it makes and when it might be better to remain silent instead of attracting attention to itself.[91] As an example of the latter, it is pointless for a bird to issue an alarm call if it is alone, since it would merely attract the attention of the predator. Further, the bird, hearing and responding to an alarm call, might make the appropriate response without being aware of why it does so.[92]

Experimental evidence, however, indicates that this is not the case.[93] Detailed research on alarm calls in domestic chickens has demonstrated that chickens make entirely different alarm calls to signal the approach of a predator overhead versus the approach of a predator on the ground.[94]

> When recordings of [such] calls are played to a bird in the laboratory, [the bird] takes the appropriate evasive action (crouching if it hears the aerial alarm call, and [in an attempt to drive off or deter the predator] standing straight up and vocalizing loudly if it hears the ground-predator alarm call . . .).[95]

The important discovery showing that the chicken makes alarm calls with the intention of warning other members of its species, rather than doing so simply automatically when it sees the predator, came from experiments which compared the responses given by the chicken on seeing a predator when it was tested alone compared to when another chicken was caged alongside it.[96] The chicken, seeing the aerial predator, emitted "alarm calls only when the other chicken was present."[97] In contrast, "[w]hen [tested] alone, [the chicken] suppress[ed] its alarm call [so as to] avoid drawing attention to itself. In other words, the bird [does not simply call automatically; it] calls only when there is another bird to protect."[98]

Our own research on the Australian magpie (*Gymnorhina tibicen*) looks at referential communication in birds tested in their natural habitat.[99] Magpies vocalize a number of different alarm calls: some

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91 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 43.

92 *Id*. at 43–44.

93 *Id.* at 44.

94 *Id.*

95 *Id.*; *see* Christopher S. Evans et al., *On the Meaning of Alarm Calls: Functional Reference in an Avian Vocal System*, 46 Animal Behaviour 23, 23–28 (1993) (referring to observations involving male chickens that suggest that ground alarm calls are evoked by animals moving on the substrate, while aerial alarm calls are produced in response to objectives moving overhead); Evans, *supra* n. 28, at 107 (discussing laboratory experiments using video-recorded and computer-generated images of predators to confirm the relationship between predator type and the type of alarm call elicited, where responses evoked were those that would facilitate detection of ground predators and aerial predators); Kaplan & Rogers, *supra* n. 37, at 146–47 (summarizing the aforementioned laboratory experiments).

96 Evans, *supra* n. 28, at 116; Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 44.

97 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 44.

98 *Id.*

99 *Id.*

signal alarm in a general sense, while others signal in the presence of a specific predator.[100] For example, magpies produce a very distinct call when they see an eagle circling overhead.[101] These calls were recorded and then played back to groups of magpies.[102] By scoring the magpies' behavior before, during, and after the playback we are able to determine whether the birds interpret the meaning of the calls.[103] When the recording of the "eagle" alarm call is played, the magpies look overhead to scan the sky for a flying predator.[104] This is a specific response that occurs very rarely when the general alarm calls are played back.[105] In fact, the response elicited by the eagle alarm call is even more specific than this. Magpies show a preference to look overhead with their left eye,[106] which means that they are using the right hemisphere to process the information.[107] Input from the left eye mostly goes to the right hemisphere, and previous research in our laboratory has shown that this hemisphere is specialized for detecting predators.[108]

The Australian magpie is a corvid, but the chicken (*Gallus gallus*) is not, although we know that both species use referential alarm calls.[109] In fact, the ancestral stock of the domestic chick ranks amongst the earliest evolved species,[110] and this species is not considered to have the well-developed forebrain typical of corvids and parrots.[111] However, despite these less evolved features and the assumed lesser intelligence of chickens, they communicate referentially and intentionally.[112]

This shows that, on these grounds alone, chickens must be included amongst those avian species that we now consider to exhibit higher cognition. The recent paper by Emery leaves chickens and related species, including quail, out of the category of species showing higher cognition[113] and fails to cite the work of Evans et al. which

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100 *Id.*

101 *Id.*

102 *Id.*

103 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 44.

104 *Id.*

105 *Id.*

106 Rogers & Kaplan, *An Eye for a Predator*, *supra* n. 28, at http://www.eurekah.com/abstract.php?chapid=2715&bookid=196&catid=20.

107 *See* Giuseppe Lippolis et al., *Lateralization of Predator Avoidance Responses in Three Species of Toads*, 7 Laterality 163, 179 (2002) (discussing this in the context of toads responding to a predator stimulus).

108 *Id.*; Giuseppe Lippolis et al., *Lateralization of Escape Responses in the Striped-Faced Dunnart*, Sminthopsis macroura *(Dasyuridae Marsupalia)*, 10 Laterality 457, 457–58 (2005) (demonstrating that "[f]light . . . responses are controlled to a greater extent by the right hemisphere than the left hemisphere").

109 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 10.

110 Kaplan & Rogers, *supra* n. 37, at 185–86.

111 Emery, *supra* n. 29, at 26.

112 Evans et al., *supra* n. 95, at 34–35.

113 Emery, *supra* n. 29, at 23.

demonstrates these species' impressive abilities to communicate referentially and intentionally.[114]

Although it remains to be tested empirically, we suggest that the ability to use alarm calls referentially and intentionally may be widespread across avian species. Recent evidence shows that a species of songbird, the black-capped chickadee, produces different calls to signal the presence of different predators, and the referential nature of these calls was tested by presenting audio playbacks and recording the responses of the bird receiving the calls.[115] The black-capped chickadee signals the size and potential threat of an approaching predator by adding syllables to the end of its alarm call.[116] The birds were tested with thirteen different species of raptors and two mammalian species of predator, and their calls were both recorded and later played back to them.[117] The smaller predators elicited more calls and more "D" syllables at the end of the calls than the larger ones, and the relationship between these two variables was systematic (i.e. in a straight-line relationship).[118]

Smaller raptors are a greater threat to chickadees than larger ones since they are more skillful than larger predators in changing flight direction on attack.[119] Size was not the only information in the signal, however, since the birds did not vocalize when they saw a small, harmless non-predator, such as a quail.[120] Playback of the calls elicited by the smaller, more threatening raptors, in turn, elicited more mobbing calls from the chickadees than did playback of calls elicited by larger raptors,[121] which indicated that the birds interpret the meaning of these calls. As the researchers said, this behavior represents an "unsuspected level of complexity and sophistication in avian alarm calls."[122] A vocalization that seemed to be a simple call has turned out to be remarkably complex, conveying much information.

C. Learning of Vocal Communication

Most study of communication in birds has been on their songs. Scientists know much about the complexity of song in many species and that some species learn their songs from bird tutors.[123] Some species have an enormous capability to form memories of the songs that they have heard during a sensitive period when they are young. For example, marsh wrens (*Acrocephalus palustri*) learn a great many of

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114 Evans et al., *supra* n. 95, at 23–38.

115 Christopher N. Templeton et al., *Allometry of Alarm Calls: Black-Capped Chickadees Encode Information about Predator Size*, 308 Science 1934, 1935 (2005).

116 *Id.*

117 *Id.*

118 *Id*.

119 *Id*. at 1937.

120 *Id.* at 1935, 1935 fig. 2, 1936 fig. 3.

121 Templeton et al., *supra* n. 115, at 1936.

122 *Id*. at 1934.

123 Rogers & Kaplan, *supra* n. 8, at 128–40.

the songs that they hear other members of their species singing during a sensitive period from days twenty-five to fifty-five of life.[124] They have excellent memories, which is an aspect of higher cognition but does not in itself show that they are aware of forming or recalling these memories.

One of the critical abilities of humans is to be able to learn language.[125] The neocortex was once thought to be an indispensable precondition for language and vocal learning.[126] As we know today, humans are not the only ones capable of learning sounds, an attribute that has certainly contributed to notions of higher cognitive ability.[127] The capacity to learn, to remember, and to reproduce certain sequences of vocalizations requires a specific set of nuclei in the brain.[128]

While humans can no longer claim to be the only species with this ability, so far as we know today, this ability to learn vocalizations is limited to only a rather select group of species and phylogenetic orders of birds, cetaceans, and bats.[129] Complex vocal learning has been shown in parrots,[130] Anna's (*Calypte anna*) and Amazilia (*Amazilia amazilia*) hummingbirds,[131] and all songbirds.[132] In addition, songbirds, parrots, and hummingbirds are not closely related taxonomically.[133] According to Gahr, this suggests that vocal learning may have evolved independently at least three times among birds, whereas

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124 Peter J. B. Slater & Alexandra E. Jones, *Lessons in Bird Song*, 44 Biologist 301, 301–03 (1997); *see also* Rogers & Kaplan, *supra* n. 8, at 134 fig. 6.1 (graphing song learning in marsh wrens).

125 *See e.g.* Noble & Iain, *supra* n. 70, at 215–27 (The author suggests that humans formed language and gestures to gain an advantage in information exchange and planning, particularly in getting food.).

126 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 45.

127 Peter J.B. Slater & Robert F. Lachlan, *Is Innovation in Bird Song Adaptive?* in *Animal Innovation* 117, 117–35 (Simon M. Reader & Kevin N. Laland eds., Oxford U. Press 2003); Manfred Gahr, *Neural Song Control System of Hummingbirds: Comparison to Swifts, Vocal Learning (Songbirds) and Nonlearning (Suboscines) Passerines, and Vocal Learning (Budgerigars) and Nonlearning (Dove, Owl, Gull, Quail, Chicken) Nonpasserines*, 426 J. Comp. Neurology 182, 182–83 (2000).

128 Fernando Nottebohm, *From Bird Songs to Neurogenesis*, 260 Sci. Am. 74, 74–77 (1989); Rogers, *supra* n. 1, at 98.

129 Avian Brain Nomenclature Consortium, *supra* n. 61, at 156; Erich D. Jarvis, *Learned Birdsong and the Neuro Biology of Human Language*, 1016 Annals New York Acad. Sci. 749, 751 (2004).

130 Susan M. Farabaugh et al., *Vocal Plasticity in Budgerigars (*Melopsittacus undulatus*): Evidence for Social Factors in the Learning of Contact Calls*, 108 J. Comp. Psychol. 81, 81 (1994); Anthony F. Gramza, *Vocal Mimicry in Captive Budgerigars (*Melopsittacus undulatus*)*, 72 Zeitschrift für Tierpsychologie 971, 971 (1970); Irene M. Pepperberg, *Functional Vocalizations by an African Grey Parrot*, 55 Zeitschrift für Tierpsychologie 139, 139–60 (1981).

131 Luis F. Baptista & Karl L. Schuchmann, *Song Learning in the Anna Hummingbird (*Calypte anna*)*, 84 Ethology 15, 15 (1990) (demonstrating the Anna hummingbird's ability to "learn[ ] syllable types, frequency, rhythm and syntax"); *see* Gahr, *supra* n. 127, at 182–83.

132 Kaplan & Rogers, *supra* n. 37, at 164–69.

133 Gahr, *supra* n. 127, at 183.

among mammals it is a trait present in only a few, including humans.[134]

Scientists have used many aspects and methods to investigate how, when, and to what extent song is learned. Marler's classical study of teaching white-crowned sparrow juveniles (*Zenotrichia leucophrys*) to sing from listening to playback of tape-recorded song established the concept of a sensitive period in song learning, inspiring other researchers into further research on the importance of the sensitive period and on plasticity of learning at different age groups.[135] Other studies have emphasized the quality and extent of social facilitation in song learning. As Bennett Galef has stressed, social learning refers to acquisition of information from conspecifics, and this facilitates development of adaptive patterns of behavior.[136] As has been shown in barn owls, learning ability can be altered by the richness of the social environment.[137] Songbirds are able to transcend simple auditory learning, an ability to recognize specific sounds common among animals.[138] Songbirds also engage in vocal learning or vocal imitation: the sounds they produce match the ones they have heard (within limits imposed by anatomical and other constraints of the vocal apparatus).[139]

More importantly, transmission of such vocal imitation can occur by cultural transmission,[140] as has been observed in some cetaceans.[141] Birds may not be as vocally prolific as humans, but the range of vocalizations expressed by an avian species may extend to

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134 *Id.*

135 Peter Marler, *Birdsong and Speech Development: Could There Be Parallels?* 58 Am. Sci. 669, 671 (1970).

136 Bennett G. Galef, Jr., *Recent Progress in Studies of Imitation and Social Learning in Animals*, in *Advances in Psychological Science: Biological and Cognitive Aspects* vol. 2, 275, 275–99 (Michel Sabourin et al. eds., Psychol. Press Ltd. 1998).

137 Michael S. Brainard & Eric I. Knudsen, *Sensitive Periods for Visual Calibration of the Auditory Space Map in the Barn Owl Optic Tectum*, 18 J. Neuroscience 3929, 3939 (1998).

138 E. Curio, *Cultural Transmission of Enemy Recognition by Birds*, in *Social Learning: Psychological and Biological Perspectives* 75, 75 (Thomas R. Zentall & Bennett G. Galef, Jr. eds., Lawrence Erlbaum Assocs. 1988); Slater & Jones, *supra* n. 124, at 302.

139 Slater & Jones, *supra* n. 124, at 302.

140 Curio, *supra* n. 138, at 75–76, 87–88; Francoise Dowsett-Lemaire, *The Imitative Range of the Song of the Marsh Warbler* Acrocephalus Palustris, *with Special Reference to Imitations of African Birds*, 121 Ibis 453, 465 (1979); *see also* Galef, *supra* n. 136, at 284–85 (detailing studies which demonstrate social learning of song in birds).

141 Luke Rendell & Hal Whitehead, *Culture in Whales and Dolphins*, 24 Behavioral & Brain Sci. 309, 309 (2001); *see also* Luke Rendell & Hal Whitehead, *Cetacean Culture: Still Afloat After the First Naval Engagement of the Culture Wars*, 24 Behavioral & Brain Sci. 360 (2001) (a candid response to criticism and support of their article entitled *Culture in Whales and Dolphins*); Andrew Whiten, *Imitation and Cultural Transmission in Apes and Cetaceans*, 24 Behavioral & Brain Sci. 359 (2001) (a response to the Rendell & Whitehead article entitled *Culture in Whales and Dolphins* supporting the findings asserted there).

thousands of sounds, as may be the case for starlings, certain corvids, some smaller passerines, and parrots.[142]

In other words, the processes of learning vocalizations in birds can be very complex. The ability to learn demonstrates brain plasticity. For at least some species, such as the canary and the Australian magpie, it has been tested and confirmed that such plasticity is maintained well into and even throughout adulthood.[143] Also, parrots are capable of learning human language sounds well into advanced age.[144] Moreover, Pepperberg has shown that learning of human speech by Grey parrots may not be merely "parroting," but may involve comprehension of the meaning of the words, permitting the parrot to answer questions and express desires.[145]

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[142] *See* Donald E. Kroodsma & Linda D. Parker, *Vocal Virtuosity in the Brown Thrasher*, 94 Auk 783, 783–85 (1977) (on repertoire size in small passerines); *see also* S.A. Ince & P.J.B. Slater, *Versitility and Continuity in the Songs of Thrushes* Turdus *ssp.*, 127 Ibis 355, 355 (1985) (showing the large song capacity of various thrushes); C.K. Catchpole & P.J.B. Slater, *Bird Song: Biological Themes and Variations* §§ 8.2, 8.3, 8.7 (Cambridge U. Press 1995) (The authors provide a good general introduction to repertoire size and possible functions.). Note, however, that repertoire size and higher cognition may not necessarily be related. Repertoire size can have ecological functions such as territorial defense and sexual selection without involving "meaning" in the sense of semantic designation of sounds. In some species, however, such as many corvids like ravens, jays, Australian magpies, European magpies, and parrots, sounds can be more than embellishment and vocal learning. Gisela Kaplan, *The Australian Magpie: Biology and Behaviour of an Unusual Songbird* ch. 8, 99–101 (CSIRO Publg. 2004). In songbirds sounds can become a sign of plasticity and advanced abilities. *Id.* at 93 (for Australian magpies; F.M. Campbell et al., *Stimulus Learning and Response Learning by Observation in the European Starling, in a Two-Object/Two Action Test*, 58 Animal Behaviour 151, 151–58 (1999) (for starlings); Irene Maxine Pepperberg, *The Alex Studies: Cognitive and Communicative Abilities of Grey Parrots*, 152, 158, 166–67 (Harvard U. Press 2000) (demonstrating parrots' ability to understand relativity from vocal stimuli).

[143] Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 46; *see also* Kaplan, supra n. 142, at 99–101 (explaining the magpie's ability to learn songs into adulthood).

[144] This is supported by our unpublished observations. We trained a galah, a native cockatoo of Australia, to say a new word. The bird was an abused bird that had been held in captivity for most of its life. Ill-treated galahs become difficult to handle. The bird suffered from mental distress expressed in stereotyped movements, unsolicited screaming, feather pulling, self-mutilation, extreme fearfulness of humans, and signs of hyperventilation often leading to death. On arrival, the bird was, in fact, close to death. Because of its history, however, the age was known. It was seventy-five years of age on arrival (human years) and it took more than two years of medical and behavior modification treatment to restore the bird's health. At the age of seventy-seven, we taught the bird a nonsense word, "cocka-chook," which we could be rather certain that it had not heard before. The bird acquired the word within a week. Hence, this one learning experiment alone shows remarkable plasticity into old age (galahs in captivity are said to have a life-span of about seventy to eighty years). Parrot Haven Aviary, *Galah Cockatoo*, "Life Span," http:www.parrot-haven-aviary.com.au/galah.htm (accessed Mar. 19, 2006). In the case of this bird, it was even more remarkable because, as we know from humans, severe and prolonged abuse has an impact on learning capacity. This took place in Armidale, N.S.W., Australia, in about 2000.

[145] Pepperberg, *supra* n. 142, at 208.

D. Avian Cognition Compared to That of Humans

Birds not only display an astounding array of communicative abilities, on some tasks their cognitive abilities surpass those of humans. For example, newly hatched chicks can recognize an object as a whole even when it is partly hidden behind another object (a cognitive process called amodal completion), whereas human babies are unable to do this until they are four to seven months old.[146] At first the human baby recognizes the partly hidden object only if the visible parts of the object move in a coordinated way (e.g. a dog with its head moving and tail wagging), and then later the object is recognized when it is stationary.[147] Chicks can recognize stationary objects that are partly occluded very soon after they hatch.[148] This difference between chicks and humans is probably due to the precocial nature of young chicks.[149] For example, very soon after hatching, chicks must be able to recognize and follow the hen, even when she moves behind objects; in contrast, newborn humans do not walk or move around their environment independently.[150]

Another study has demonstrated that a bird can perform better than a human on a task requiring matching of rotated objects or symbols. Juan Delius tested pigeons on a task based on a question selected from the Eysenck IQ test for humans.[151] Pigeons were trained to look at three keys in a row.[152] An asymmetrical symbol was projected onto the center key and the same symbol was projected onto one of the side keys.[153] On the other side key was projected a mirror-image reversal of the symbol.[154] The pigeon had to peck the side key matching the one in the center in order to obtain a food reward.[155] Once the pigeon was performing the task accurately, the symbols were rotated at different angles compared to the one on the center key.[156] Humans find this task more and more difficult as the rotation angles increase, just as we have difficulty in recognizing a familiar face when we see it upside down; but pigeons have no difficulties in performing this task regardless of the angle of rotation.[157] This ability to recognize objects at different angles would serve the flying pigeon well since it would need to

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146 Lucia Regolin & Giorgio Vallortigara, *Perception of Partly Occluded Objects in Young Chicks*, 57 Perception & Psychophysics 971, 974–75 (1995); Vallortigara, *supra* n. 68, at 61–62 (summarizing the preceding study, *Perception of Partly Occluded Objects in Young Chicks*).

147 Rogers, *supra* n. 1, at 81.

148 Regolin & Vallortigara, *supra* n. 146, at 972.

149 Vallortigara, *supra* n. 68, at 62.

150 *Id*.

151 Delius, *supra* n. 10, at 6–8.

152 *Id.* at 8.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 Delius, *supra* n. 10, at 8.

recognize objects at different angles, whereas we ground walkers have less cause to do this.

E. Illusions and Biological Motion

Another recently discovered ability of birds similar to that of humans is their ability to see optical illusions and moving images from an array of moving dots.[158] The latter ability is referred to as biological motion.[159] Humans can recognize a moving human by merely seeing a set of moving dots generated by placing the dots on parts of the human body, such as the feet, knees, hand, elbows, shoulder, head, etc.[160] Chicks are able to recognize a hen represented by synchronously moving dots in a similar way.[161]

In one set of experiments, newly hatched chicks were exposed to a computer-generated pattern of moving dots representing a hen so that they became imprinted on this particular pattern, and, when tested later with this pattern and a pattern of dots moving in random (non-biological motion), female chicks approached the one representing the hen.[162] Although it might appear that a computer-like, pre-programmed brain would be able to do this, the ability to recognize biological motion is considered to be an example of higher cognition in humans. It relies on complex processing in the brain.[163]

Another set of experiments has shown that young chicks can see optical illusions, which is an ability said to depend on higher cognition and once thought to be unique to humans, who use the neocortex to do it.[164] The researchers imprinted chicks on a three-dimensional object (a cone or a cylinder) and then tested them with two-dimensional

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158 Lucia Regolin et al., *Visual Perception of Biological Motion in Newly Hatched Chicks as Revealed by an Imprinting Procedure*, 3 Animal Cognition 53, 53 (2000).

159 *Id.*

160 Gunnar Johansson, *Visual Perception of Biological Motion and a Model for its Analysis*, 14 Perception & Psychophysics 201, 201 (1973).

161 Regolin, *supra* n. 158, at 53, 58.

162 *Id.* at 56–58.

163 D.I. Perret et al., *Retrieval of Structure from Biological Motion: An Analysis of the Visual Responses of Neurones in the Macaque Temporal Cortex*, in *AI and the Eye* 181, 193 (Andrew Blake & Tom Troscianko, eds., Wiley & Sons 1990).

164 *See* E. Clara et al., *Domestic Chicks Perceive Stereokinetic Illusions* 2–3 (submitted for publication in Perception in 2006) (copy on file with *Animal L.*) (mentioning the human ability to see optical illusions and concluding that young chicks can do so as well); Rogers, *supra* n. 1, at 55–56, 124 (linking cognition to "the ability to form mental representations of objects" and citing Eccles's view that "consciousness is unique to humans and is a product of our highly developed neocortex"); Paul M. Churchland, *Perceptual Plasticity and Theoretical Neutrality: A Reply to Jerry Fodor*, 55 Phil. Sci. 167, 171–178 (1988) (discussing the author's conclusion that "the great many illusions and visual effects whose character shows that our visual modules are indeed penetrable by higher cognitive assumptions); *but see* Athanassios Raftopoulos, *Is Perception Informationally Encapsulated? The Issue of the Theory-Ladenness of Perception*, 25 Cognitive Sci. 423, 423–51 (2001) (This author believes that nearly all cases of visual illusions reported by Churchland as evidence for the cognitive penetrability of perception can be explained by other means.).

images that can be seen by humans as optical illusions of a cone and cylinder.[165] The illusion of a three-dimensional cone emerges when we look at a flat disc onto which off-center concentric circles have been drawn and this disc is rotated slowly.[166] The cylinder emerges from two flat discs, overlapping but slightly off-center and rotating together as one piece.[167] We call the ability to see these optical illusions stereokinesis.[168] The chicks imprinted on a cone and tested with a choice of these two illusions (at opposite ends of a runway) approached the illusion of the cone, and those imprinted on the cylinder approached the illusion of the cylinder.[169] The chicks could see the optical illusions.[170] Recent research has shown primates, the Rhesus macaque and the common marmoset, can also see these optical illusions.[171]

F. Thinking of Objects Out of Sight

If an object or an animal moves out of sight, we can still think about it and remember where it disappeared, and this is yet another aspect of higher cognition that we used to think of as being unique to humans. The problem has been investigated traditionally within the Piagetian conceptualization of "object permanence."[172]

Very young children do not recognize objects that have disappeared from their sight, but as they grow older, their ability to recognize such objects increases.[173] Experiments with chicks have also shown that birds possess this ability, and likely other species too. Regolin imprinted chicks on small red balls.[174] By being exposed to the balls after hatching, the chicks followed them as they would their mother.[175] The chicks were then tested in an arena with two screens placed a little way apart.[176] The chick had to stand in a small cage with transparent walls and watch the red ball as it was moved behind

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165 E. Clara et al., *supra* n. 164, at 2.

166 *Id.* at 9–10, 17–18.

167 *Id.* at 1–7.

168 *Id.* at 1; *see also* R.B. Mefferd Jr., *Perception of Depth in Rotating Objects: Phenomenal Motion in Stereokinesis*, 27 Perceptual & Motor Skills 903, 903–26 (1968).

169 E. Clara et al., *supra* n. 164, at 20–22.

170 *Id*.

171 E. Clara et al., *Perception of the Stereokinetic Illusion by the Common Marmoset (*Callithrix Jacchus*)* 2 (submitted for publication in the J. Animal Cognition 2006) (copy on file with *Animal L.*) (showing that "the common marmosets behaved as if they could perceive stereokinetic illusions"); R.M. Siegel & R.A. Andersen, *Perception of Three-Dimensional Structure from Motion in Monkey and Man*, Nature 259, 259 (January 21, 1988) (showing "that the Rhesus monkey can detect 3-D structure from motion in the same way as human subjects").

172 *See generally* Vallortigara, *supra* n. 68, at 54 (The psychologist Piaget developed a model for development of the human child, one step of which involves the ability to know that an object still exists even when it has disappeared from view.).

173 Rogers, *supra* n. 1, at 81.

174 Vallortigara, *supra* n. 68, at 76.

175 *Id.*

176 *Id.*

one of the screens.[177] About two or three minutes after the ball had disappeared, the chick was released and the experimenter watched which screen the chick approached.[178] The chick chose the screen behind which the ball had disappeared, indicating that it could hold a memory of the location of the ball even though it had disappeared from sight.[179] This shows that the bird does not simply respond to only those objects and other stimuli that it can see at any one time, but it can hold and use memories of things past.[180] Even though the time that passed was very short for these young chicks, adult birds are likely to be able to do this over a much longer time span. No one has yet tested adult chickens on such a task.

Other researchers have shown that object permanence is an ability shown by the Grey parrot, as well as some other parrots,[181] and ring doves.[182] As yet, no other species have been tested for this ability, but given the broad evolutionary sweep of the species tested, one assumes this ability is widespread among avian species.

G. Hiding Food and Knowing about Being Watched

Some birds hide, or cache, their food at times of plenty and retrieve it later, sometimes after only a few days.[183] Other times, in species living in harsh climates, birds cache their food and retrieve it after months and at a time when it is scarce. The Clarke's nutcracker (*Nucifraga columbiana*) is a case of the latter, and it has an extraordinary capacity for remembering the locations of thousands of seeds that it cached in the season of plenty.[184] It does so using cognitive spatial maps; that is, using geometry rather than simply the details or landmarks surrounding the spot where each seed was cached.[185] Use of the latter strategy would be useless after snow has fallen.

The study of birds caching their food in the laboratory and retrieving it after short delays allows close observation of their strategies. Western scrub-jays (*Aphelocoma californica*) remember not only *where* they have cached the food items, but also *what* food items they have cached.[186] Researchers gave the birds two types of food, one relatively

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177 *Id.*

178 *Id.*

179 *Id*.

180 Vallortigara, *supra* n. 68, at 76–77.

181 Irene M. Pepperberg & Mildred S. Funk, *Object Permanence in Four Species of Psittacine Birds: An African Grey Parrot (*Psittacus erithacus*), an Illiger Mini Macaw (*Ara maracana*), a Parakeet (*Melopsittacus undulatus*), and a Cockatiel (*Nymphicus hollandicus*)*, 18 Animal Learning & Behavior 97, 97 (1990).

182 Claude Dumas & Donald M. Wilkie, *Object Permanence in Ring Doves (*Streptopelia risoria*)*, 109 J. Comp. Psychol. 142, 142 (1995).

183 Emery & Clayton, *supra* n. 41, at 17; Kaplan & Rogers, *supra* n. 37, at 173.

184 Kaplan & Rogers, *supra* n. 37, at 173.

185 Sara J. Shettleworth, *Spatial Memory in Food-Storing Birds*, 329 Phil. Transactions Royal Socy., London B 143, 143–45 (1990).

186 Emery & Clayton, *supra* n. 41, at 32, 36.

imperishable and the other perishable.[187] The birds cached both types in plastic, sand-filled ice-cube trays attached to a wooden board, surrounded by a Lego Duplo structure.[188] Then the birds were taken to another location for some time before they were again released into the room where they had made the caches.[189] They retrieved the perishable food items first and then the imperishable ones.[190] In humans, scientists give this kind of memory the special name of episodic memory, and we believe that it is typical of higher order cognitive ability.[191]

Because scrub-jays, like ravens, pilfer cached food from each other, one would expect the bird engaged in caching food to avoid being seen by another bird.[192] In fact, a bird that has been observed by another when it cached food items later, when alone, retrieves the food items and caches them again in a new location.[193] In another experiment, researchers allowed the bird to cache in two trays, only one of which the observing bird could see.[194] When the bird that had carried out the caching returned to its caches, this time alone, it retrieved and re-cached more food items from the tray that the observer had been able to see than from the tray that it had been unable to see.[195] These results suggest that birds are not only aware of being watched at the time they make a cache, but also that they have some concept of what the observer's intention may be. Of a human, we would say that he or she knows what is on the observer's mind. Primatologists refer to the primate equivalent of the caching bird as having a theory of mind, which they see as evidence of a very high level of cognition.[196]

H. Following the Direction of Gaze

Another behavior suggesting that one individual knows something about what another is thinking is following the direction of gaze. If someone looks in a certain direction, a second person might think that the first sees something interesting and may be thinking about something different than he or she is. In response, the second person would look in the same direction as the first. These cognitive steps that would lead the second person to follow the direction of the first's eyes may take place so rapidly that the second would be barely aware of them, but we consider such action to involve higher cognition.

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187 Nicola S. Clayton, et al., *Elements of Episodic-Like Memory in Animals*, 356 Phil. Transactions Royal Socy., London B, 1483, 1485 (2001).

188 *Id.*

189 *Id.*

190 *Id.* at 1485–86.

191 *Id.* at 1483–84.

192 Emery & Clayton, *supra* n. 41, at 18–20.

193 *Id.* at 18.

194 *Id.* at 18–20.

195 *Id.*

196 Daniel J. Povinelli & Todd M. Preuss, *Theory of Mind: Evolutionary History of a Cognitive Specialization*, 18 Trends in Neurosciences 418, 418–24 (1995).

Sometimes, when a human's view is obstructed, or if one cannot see anything of interest when one follows another person's direction of gaze, she may ask, "What are you looking at?" This suggests that following the direction of gaze is an aspect of higher cognition, and one that scientists might be able to see in animals, if it occurs. Some recent studies have shown that chimpanzees will follow a human's gaze direction.[197] While this might be a measure of their intelligence, we would not be particularly convinced if it were the only one we had. The animal could be responding to straight-forward behavioral cues to orient its direction of gaze, rather than being capable of understanding that the human can see something that it cannot see. Nevertheless, it is indisputable that gaze following is valuable to social life. For example, it might be a guide to the location of predators, food, and many other resources important for survival.

No one thought that a bird might be able to follow the direction of a human gaze, especially those species with eyes on the sides of their head and no clear pupil or white of the eye that would make it easy to tell in what direction they are looking.[198] When hand-raised ravens (*Corvus corax*) were tested to see whether they could follow the direction of a human's eye gaze,

> not only did the ravens look up when a human looked up, but when the human was looking at something hidden from the raven's immediate view . . . the raven would . . . come over to the barrier and peer around it. If the raven was responding only to simple . . . cues and not using higher cognition, [one would expect the bird to merely] stay where it is, look at the barrier, find it uninteresting, and go on with whatever it was doing before. Instead, the raven behaved as if it were aware that something interesting was located behind the barrier.[199]

Of course, when it comes to one bird following the direction of gaze of another, the bird might follow the direction in which the other's head, particularly the beak, is pointing. But it is not quite that simple because many birds have two regions (fovea) of the retina specialized for detailed vision—one looking in front and one to the side.[200] Therefore, the beak may be pointing in one direction, but the bird may be looking sideways in another direction, or to both places at once. But it seems that birds do know when animals with two eyes placed frontally, facing forward, are looking at them.[201] They might have evolved

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197 Joseph Call, *The Use of Social Information in Chimpanzees and Dogs*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* 263, 272 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic/Plenum Publishers 2004). Some experiments show that dogs can follow human gaze direction when looking for food. *Id.* at 272–73.

198 Kaplan & Rogers, supra n. 37, 99–101.

199 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 43.

200 Onur Güntürkün et al., *Neural Asymmetries and Visual Behaviour in Birds*, in *Biological Signal Processing* 122, 131 (Hans Christoph Lüttgau & Reinhold Necker eds., VCH 1989).

201 Rogers & Kaplan, *Bird Brain*, *supra* n. 28, at 43.

this ability because many of their predators have frontal eyes (e.g. birds of prey—owls, and other raptors—as well as predatory mammals),[202] and this ability can be generalized to apply to humans. Ravens also cache food items and might use the ability to recognize direction of gaze to decide when they are being observed as they cache food.[203] These clever behaviors of ravens and other corvid species, as well as their abilities to solve complex problems and to use tools, discussed *infra* part I, indicate that they have complex cognitive abilities related to social behavior and finding food.

I. Making and Using Tools

Making tools and using them has long been considered the hallmark of human superiority over other species, but we now know that some animals do this too.[204] Chimpanzees select twigs and break them to lengths suitable for inserting into termite nests to fish out the insects.[205] This finding, as well as other examples of tool using in apes,[206] was surprising until an even more surprising discovery was made. New Caledonian crows make and use tools to probe insects from holes in trees.[207] To manufacture one type of jagged-edged tool, the crow uses its beak to cut pieces from the leaves of pandanus palms.[208] Others they fashion from twigs.[209] Moreover, the crows have been seen to store their tools in notch holes in trees and retrieve them to use at a later time.[210]

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[202] *Id.*; Kaplan & Rogers, *supra* n. 37, at 100–01.

[203] Thomas Bugnyar & Kurt Kotrschal, *Leading a Conspecific Away from Food in Ravens (*Corvus corax*)?* 7 Animal Cognition 69, 69–76 (2004).

[204] Sue Taylor Parker & Kathleen R. Gibson, *Object Manipulation, Tool Use and Sensorimotor Intelligence as Feeding Adaptations in Cebus Monkeys and Great Apes*, 6 J. Human Evolution 623, 623 (1977); Louis Lefebvre et al., *Tools and Brains in Birds*, 139 Behaviour 939, 939 (2002).

[205] Hilary O. Box & Anne E. Russon, *Socially Mediated Learning among Monkeys and Apes: Some Comparative Perspectives*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* 97, 122 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic 2004); *see* W.C. McGrew, *Culture in Nonhuman Primates?* 27 Annual Revs. in Anthropology 301, 315 (1998) (discussing chimpanzee tool use).

[206] Other examples of tool use in apes include cracking open nuts by placing them on an anvil stone or tree root and hitting them with a hammer stone. W.C. McGrew, *The Material of Culture*, in *Chimpanzee Cultures* 25, 25–39 (Richard W. Wrangham et al. eds., Harvard U. Press 1994).

[207] Hunt, *supra* n. 18, at 249.

[208] Gavin R. Hunt & Russell D. Gray, *Direct Observations of Pandanus-Tool Manufacture and Use by New Caledonian Crow (*Corvus moneduloides*)*, 7 Animal Cognition 114, 116–18 (Nov. 28, 2003).

[209] Hunt, *supra* n. 18, at 250; *see also* Alex A.S. Weir et al., *Shaping of Hooks in New Caledonian Crows*, 297 Sci. 981, 981 (2002) (for a study on New Caledonian crows' ability to shape hooks from wire).

[210] Gavin Raymond Hunt, *Human-Like, Population-Level Specialization in the Manufacture of Pandanus Tools by New Caledonian Crows* Corvus moneduloides, 267 Procs. Royal Socy. B 403, 404 (2000); Gavin R. Hunt & Russell D. Gray, *Diversification and Cumulative Evolution in New Caledonian Crow Tool Manufacture*, 270 Procs. Royal Socy. B 867 (2003).

This research suggests that the crows have some notion of what the function of tools is and that they can plan ahead for a future event. Such foresight is considered to be one of the mainstays of higher cognition.[211] Not only can birds plan ahead by caching food, as discussed above, but they are also able to plan the means by which they will obtain food in the future.[212]

There are many other examples of avian species using tools, but not ones that they themselves have manufactured. A comprehensive analysis of tool use in birds by Lefebvre et al. concludes that tool use is more common in corvids and passerines than in other avian orders, but that this trait may have evolved several times over rather than being passed on from a common ancestor.[213] Additionally, this study demonstrated that using tools correlates with having a larger brain,[214] but see *infra* notes 260 to 268 and accompanying text for more discussion of this.

J. Forming Abstract Concepts

To form abstract concepts requires highly complex cognition, and at least one study on pigeons tested in controlled laboratory conditions has shown that they can form abstract concepts.[215] Testing pigeons pecking at keys onto which photographs had been projected showed that they could form abstract concepts of "oddity" (pecking the odd picture out of a group) and "sphericity" (pecking the image of any rounded shape).[216] They even formed the abstract concept of "water" and would peck at any image with water in it, regardless of whether the water was in a glass, a lake, or a droplet on a leaf.[217] Moreover, pigeons can learn to discriminate between photographs containing and not containing a human, or humans.[218]

The ability to discriminate between objects that are the same or different has also been shown by pigeons using operant techniques,[219] and by the Grey parrot, Alex, using his ability to communicate using human speech.[220] It is not known, however, whether these two very different species use the same cognitive processes to make these deci-

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211 McGrew, *supra* n. 206, at 25–39.

212 Hunt & Gray, *supra* n. 208, at 116–18.

213 Lefebvre et al., *supra* n. 204, at 939–73.

214 *Id*.

215 Delius, *supra* n. 10, at 1–29.

216 *Id*.

217 *Id*.

218 R. J. Herrnstein & D. H. Loveland, *Complex Visual Concept in the Pigeon*, 146 Sci. 549, 549 (1964).

219 Delius, *supra* n. 10, at 7–8; Shigeru Watanabe, *Van Gogh, Chagall and Pigeons: Picture Discrimination in Pigeons and Humans*, 4 Animal Cognition 147, 148–49 (2001).

220 Irene M. Pepperberg, *Acquisition of the Same/Different Concept by an African Grey Parrot (*Psittacus erithacus*): Learning with Respect to Categories of Color, Shape, and Material*, 15 Animal Learning & Behavior 423, 423 (1987).

sions.[221] Yet, the contention that pigeons use higher cognition to do so has been strongly questioned.[222]

Even young chicks have some abilities to form abstract concepts, as Giorgio Vallortigara has found.[223] The chick can learn to find food buried exactly at the center of arenas of different geometrical shapes (squares, triangles, circles).[224] They do not simply measure the distance from the walls, as shown by testing them in arenas of different sizes as well as shapes, but find the center using geometrical cues.[225] This ability in a bird, and a young one at that, is quite unexpected and takes us well away from the traditional view of birds being out on an evolutionary limb with small and not very complex brains.[226]

K. A Concept of Self

The abilities to abstract and to think of past and future events are considered to be highly complex forms of cognition.[227] But to some scientists the idea of self-awareness is even more indicative of higher cognition.[228] We can conduct verbal tests on humans to establish whether an individual is capable of perceiving himself or herself as a separate entity in the world.[229] Non-verbal tests of self-awareness may involve the use of a mirror.[230] In a mirror humans can recognize themselves, make poses, and thus consciously alter the image in the mirror.[231] Chimpanzees also adopt postures like us when they look at their image in a mirror.[232] Monkeys, as far as we know, commonly do not recognize themselves in a mirror.[233]

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221 More detailed testing would be needed to find out exactly what cognitive steps the two species make in arriving at such decisions.

222 Euan M. Macphail, *Brain and Intelligence in Vertebrates* 168–237 (Clarendon Press 1982).

223 Vallortigara, *supra* n. 68, at 81.

224 L. Tommasi et al., *Young Chickens Learn to Localize the Centre of a Spatial Environment*, 180 J. Comp. Physiology A 567, 567–69 (1997) (Chicks trained to find food in center of square subsequently searched near centers of circles, triangles, and rectangles.).

225 Luca Tommasi & Giorgio Vallortigara, *Searching for the Center: Spatial Cognition in the Domestic Chick (*Gallus gallus*)*, 26 J. Experimental Psychol.: Animal Behavior Processes 477, 480–81 (2000).

226 Rogers, *supra* n. 1, at 58, 72.

227 *See id.* at 61–81 (discussing research on animal insight, concept formation, memory, and mental representations).

228 *See id.* at 15 ("Awareness of self is a central aspect of consciousness.").

229 *See* Povinelli & Preuss, *supra* n. 196, at 422 (noting that evidence of self-awareness in children includes comments made by the children about their plans and mental states).

230 *Id.*

231 *See id.* at 421 fig. 3, 422 (noting the behavior in chimpanzees and likening it to that of humans).

232 *Id.*

233 Gordon G. Gallup, Jr., *Chimpanzees: Self-Recognition*, 167 Sci. 86, 86–87 (1970); Rogers, *supra* n. 1, at 27.

According to studies by Gordon G. Gallup, Jr., chimpanzees are able to recognize their mirror images.[234] Here, researchers placed a red dot on the foreheads of anaesthetized chimpanzees, and, after the chimpanzees regained consciousness, they were presented with a mirror.[235] If a chimpanzee were to merely point at the dot in the mirror, it would indicate that the chimpanzee did not recognize itself in the image.[236] However, in this test, the chimpanzees (and orangutans in a subsequent test) started wiping their own foreheads, suggesting that they were able to recognize the images in the mirrors as their own.[237] These tests have been criticized by some,[238] and there are many complications to these experiments and ways in which they must be controlled.[239] In general, though, the tests show that an ape is aware that its image in a mirror is itself. The results of these tests led to a perception that such cognitive ability is unique to the most highly advanced primates, great apes and humans, and therefore is linked to the increased size of the neocortex. However, a recent experiment has radically changed this view.

Prior and fellow researchers tested whether or not a bird could recognize itself in the mirror.[240] They chose hand-raised European magpies (*Pica pica*)[241] and exposed them to a series of tests.[242] The crucial test involved placing a red dot on the bird's throat in a spot where the bird could not see it directly, then watching the bird's behavior when facing a mirror.[243] They found convincing evidence that the bird directed its attention to its own body and attempted to reach the spot where the red paint had been placed, rather than pecking at the reflection of the red dot in the mirror.[244] So far, this is the only test of its kind showing self recognition in mirrors, but the rigorous research protocol would suggest that, at least in this one avian species, something akin to self-awareness is present. Other tests with birds

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234 Gallup, Jr., *supra* n. 233, at 86–87.

235 *Id*.

236 Rogers, *supra* n. 1, at 24–26.

237 *Id.* at 26–27.

238 *See* C. M. Heyes, *Self-Recognition in Primates: Further Reflections Create a Hall of Mirrors*, 50 Animal Behaviour 1533 (1995) (criticizing the Gallup experiment's design, noting unreliable effects, flawed analysis and reliance on circumstantial evidence); C. M. Heyes, *Theory of Mind in Nonhuman Primates*, 21 Behavioral & Brain Scis. 101, 104 (1998) (arguing that the evidence of self-recognition is not reliable).

239 *See* Rogers, *supra* n. 1, at 26–28 (describing the methods and controls used in Gallup's mirror tests and the need for more rigorously controlled experiments).

240 H. Prior et al., *Sich Selbst Vis-à-vis: Was Elstern Wahrnehmen*, 2 Rubin 26, 26–30 (2000).

241 *Id.* at 26–30; Biocrawler.com, *European Magpie*, http://www.biocrawler.com/encyclopedia/Pica_pica (last modified May 5, 2005).

242 Prior et al., *supra* n. 240, at 28–30.

243 *Id.* at 28–29.

244 *Id.* at 29–30.

and mirrors have failed to show that the birds recognize their image as self.[245]

IV. CONCLUSION

A. The Theses Summarized—A Road Map for the Future?

The above is not intended to be an exhaustive account of the cognitive abilities of birds, but it is intended to point out that the latest research presents society with a need to change our traditional thinking on birds. We believe, therefore, that this research opens up debate on legislation to protect birds. Moreover, our first thesis argued that biology is not value free.[246]

Here, this point has been demonstrated in just two specific theoretical developments: the overturning of the Cartesian model and the supremacist, simplistic evolutionary views. Decades of research into the abilities of great apes, while valuable and conducted under strict scientific conditions, have generally maintained what Emery and Clayton rightly describe as "primocentrism."[247] Primocentrism focuses on the primate line, because it is allegedly the only branch in the animal kingdom in which it is worthwhile to search for higher cognitive abilities.[248] We have shown here that primocentrism is an ideology rather than scientific fact. Findings of higher cognitive abilities in birds overturn old assumptions that higher cognition followed a steady and superior evolution along just one evolutionary trajectory. In addition, challenges to these old assumptions have come from new discoveries about the complex cognition of octopuses and fish.[249] Hence, the research on avian species has been extremely important in breaking the nexus between cognitive ability and the primate line. It has also undermined assumptions about the importance of the neocortex as a precondition for any cognitive development.

Research outside the primate line has thus caused a conceptual shift away from dearly held assumptions about evolution. Many scientists have known for a long time that evolution can work in homolo-

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245 Emery & Clayton, *supra* n. 41, at 41–44 (discussing the variety of mirror guided self-recognition tests conducted on crows, parakeets, western scrub-jays, and parrots). Note, however, that Grey parrots possess significant object permanence ability. Prior et al., *supra* n. 240, at 27.

246 *See e.g.* R.C. Lewontin et al., *Not in Our Genes: Biology, Ideology, and Human Nature* (Pantheon Books 1985) (arguing that certain interpretations of biology are guided by political, social, and religious beliefs and, in extreme cases, by ideology). The book offers a very useful introduction to the susceptibility of biology to being distorted by political arguments and general belief systems. *Id.* at 5–36.

247 Emery & Clayton, *supra* n. 41, at 4–5.

248 *Id.*

249 *See* Yfke van Bergen et al., *Social Learning, Innovation, and Intelligence in Fish*, in *Comparative Vertebrate Cognition: Are Primates Superior to Non-Primates?* 141–68 (Lesley J. Rogers & Gisela Kaplan eds., Kluwer Academic/Plenum Publishers 2004) (for discussion of complex cognition in fish).

gous and analogous ways.[250] Traits can emerge, disappear, and reemerge in one species, one order, and across orders with no direct links between them.[251] Clearly, in support of our second thesis, it is of considerable importance that policy and lawmakers are beginning to understand these conceptual shifts and to distinguish fact (science) from ideology (dressed as science).

Our third thesis, that the conclusions some policy and law makers are beginning to draw from research on animal cognition are either flawed or problematic, has been discussed in several ways. First, the inclusion of great apes in legislation designed for humans (giving apes modified additional rights) may not only *not* free society from primocentrism, but may have serious implications for other species not included.

The international primatology community debated such issues at length at its 2004 meeting in Turin.[252] A core group of attendees wished to proceed with lobbying politicians and the legal profession for including great apes in new rights legislation. We were present at that meeting and noticed the reservations by a significant number of primatologists, especially by those working with lesser apes (gibbons) and monkeys. Supporters of the motion based their arguments largely on cognitive ability and the view that a start had to be made. Supporters felt that the great apes were just pioneers in a long road of new legislative measures that could follow for improved protection of other animals. However, since such action retains primocentrist positions, it is equally conceivable that great apes could become the exception among animals and that no further legislative changes would follow.

Second, still pertaining to our third thesis, there are conceptual and scientific problems to consider if new legislation were to be based on a blanket set of criteria that the *animals*, not we as legislators or scientists, must fulfill. The philosopher Regan grappled with species differences in cognitive ability and suggested that rights be extended to those with desires, a sense of the future, feelings of pleasure and pain, and other aspects of higher cognition.[253] However, as Bateson pointed out so clearly, the problem confronting those of us who study the behavior of animals is how to identify those species that have these abilities.[254] We have addressed this problem before and found it

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[250] *See e.g.* Stephen Jay Gould, *The Structure of Evolutionary Theory* (Harvard U. Press 2002) (discussing analogy in evolution); Ernst Mayr, *What Evolution Is* 25–27 (Basic/Perseus Books 2001) (for discussion on homology in evolution).

[251] *See* Gould, *supra* n. 250 (discussing analogy in evolution); Mayr, *supra* n. 250, at 25–27 (for discussion on homology in evolution).

[252] Both authors have served as members of the scientific committee of the International Primatological Society (IPS), Turin, Italy, 2004, and have written extensively on orangutans. *See IPS 2004 – Torino*, http://www.ips2004.unito.it/index.html (for information about the meeting); *see also* Gisela Kaplan & Lesley J. Rogers, *The Orangutans* (Perseus Publg. 2000) (for a book on orangutans by the authors).

[253] Tom Regan, *The Case for Animal Rights* (U. of Cal. Press 1983).

[254] Patrick Bateson, *Ethics and Behavioral Biology*, 35 Advs. Study Behavior 211, 211–33 (2005).

largely insoluble on the basis of current knowledge of animal behavior.[255] We have also cautioned against creating a new *Scala Naturae* based on cognitive ability.[256] Similarly, Emery and Clayton have pointed out the perils of re-erecting a *Scala Naturae*.[257]

As we hope the above discussion shows, cognitive ability is not a simple linear continuum from the lower, "less intelligent," to the higher, "more intelligent," species. The evolution of higher cognitive abilities may be influenced by many selective forces, including those of habitat and social system, the latter being a rather generally held view among primatologists and, more recently, ornithologists.[258] As shown here, whatever the reason for one species displaying "more intelligent" behavior than another, there is no simple formula for testing relative cognitive ability. Indeed, the failure of any one species to meet the criteria scientists have set on any given task may merely reflect the limits of our own human intelligence. In other words, species vary in their cognitive abilities and, were humans creative and knowledgeable enough about the species, we might be able to design a task on which that species would excel, such as pigeons performing better than humans on the rotation matching-to-sample task.[259] Clearly, performance on a single task would be insufficient evidence on which to base ethical and legal decisions.

Moreover, society tends to rate more highly those species that behave more similarly to ourselves by using cognitive processing that equates to ours. At one level this view is a form of "speciesism" because it fails to recognize equality in species' differences in cognitive type. To species known to use tools, an ability we humans value greatly, we afford the rank of the highest intelligence.[260] This is the case for primates, the highest rank being originally reserved for apes, chimpanzees in particular, but recently extended to capuchin monkeys, since the discovery that they use tools in the wild.[261] A reflection of the same attitude is manifested when the intelligence of avian species is discussed, the tool-using species being ranked at the top.[262] However, tool use to obtain food is a useful behavior in only some habitats and is irrelevant in others: there is no value in using a tool when a beak, mouth, or hand will do. In fact, a study of the Galapagos woodpecker

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255 Lesley J. Rogers & Gisela Kaplan, *All Animals Are* Not *Equal: The Interface between Scientific Knowledge and Legislation for Animal Rights*, in *Animal Rights: Current Debates and New Directions* 175, 175–202 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

256 *Id*.

257 Emery & Clayton, *supra* n. 41, at 3.

258 Emery, *supra* n. 29, at 30.

259 Delius, *supra* n. 10, at 6–18.

260 Rogers, s*upra* n. 1, at 81–89.

261 Dorothy Fragaszy et al., *Wild Capuchin Monkeys (*Cebus libidinosus*) Use Anvils and Stone Pounding Tools*, 64 Am. J. Primatology 359, 361 (2004).

262 Hunt & Gray, *supra* n. 210, at 873–74; S. Tebbich & R. Bshary, *Cognitive Abilities Related to Tool Use in the Woodpecker Finch*, Cactospiza pallida, 67 Animal Behaviour 689, 689–90 (2004).

finch (*Cactospiza pallida*) found that use of cactus spines to probe insects from holes occurs seasonally and only in those birds living in dry habitats, where other food is less abundant.[263]

We might rank this species highly on our scale of "intelligence," but this would leave out the species' close relatives living in habitats where food is more abundant, or those specialized to eat different types of food. Some have argued that higher cognitive abilities emerge only when the habitat demands it,[264] and in a general sense they could be correct. However, we are not of the opinion that science could back such distinctions between closely related species.

We do not disagree with the concept that tool using requires higher cognitive abilities, and special ones as well since it involves making causal connections between objects external to the animal's own body.[265] But society should not assume that a species ranks lower down the scale merely because it has not been observed to use tools. A broader filter such as species variations in innovative behavior, as used by Lefebvre et al., would be preferable.[266] Such an approach would encompass tool using, but not exclusively.[267] In fact, there is some evidence that innovation in one area may be traded off against innovation in another, since Lefebvre and Bolhuis found a negative association between tool using and food caching.[268] Different regions of the brain appear to be involved in each case, since food caching correlates with the size of the hippocampus[269] and tool using with the size of an adjacent region of the forebrain, the nidopallium.[270] A tradeoff between these two regions of the forebrain could mean that overall size of the forebrain remains stable.

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263 Sabine Tebbich et al., *The Ecology of Tool-Use in the Woodpecker Finch (*Cactospiza pallida*)*, 5 Ecology Ltrs. 656, 656 (2002).

264 *See e.g.* Reuven Dukas, *Evolutionary Ecology of Learning*, in *Cognitive Ecology: The Evolutionary Ecology of Information Processing and Decision Making* 129, 135 (Reuven Dukas ed., U. Chi. Press 1998) (stating that "[a]ll types of phenotypic plasticity, including learning, can be seen as adaptations to some pattern of environmental variation"); Phyllis C. Lee, *Innovation as a Behavioural Response to Environmental Challenges: A Cost and Benefit Approach*, in *Animal Innovation* 262, 262, 272 (Simon M. Reader & Kevin N. Laland eds., Oxford U. Press 2003) (discussing innovation in nonhuman primates due to environmental changes and concluding that such innovation occurs when the benefits outweigh the costs of changing old behaviors); Simon M. Reader & Kevin N. Laland, *Animal Innovation: An Introduction*, in *Animal Innovation* 3, 25–26 (Simon M. Reader & Kevin N. Laland eds., Oxford U. Press 2003) (discussing studies that indicate that animal innovation may be a product of its environment).

265 Parker & Gibson, *supra* n. 204, at 623–41.

266 Louis Lefebvre et al., *Brains, Innovations and Evolution in Birds and Primates*, 63 Brain, Behavior & Evolution 233, 233–46 (2004).

267 *Id.*

268 Louis Lefebvre & Johan J. Bolhuis, *Positive and Negative Correlates of Feeding Innovations in Birds: Evidence for Limited Modularity*, in *Animal Innovation* 39, 55 (Simon M. Reader & Kevin N. Laland eds., Oxford U. Press 2003).

269 *See supra* nn. 77–82 and accompanying text (discussing the relationship between size of the hippocampus and species that cache their food).

270 Lefebvre et al., *supra* n. 204, at 939–73.

Without laboring these points further, we stress the difficulty in ranking animals according to any scale that might translate with ease into legal or ethical guidelines. However, society needs to make changes to the current animal welfare guidelines and legislation.

Legislation in the United Kingdom gives special protection to those species that we keep commonly as pets (cats and dogs) and use for special sports (horses).[271] On scientific grounds, protecting these species and not primates is clearly unacceptable. Society can now see that the widespread disregard of any protection for birds is based on false attitudes. Although society may be faced with a daunting task of deciding which species to protect, the point stands that some species deserve to be protected because they can "think," regardless of the problem that others fall outside this category at present. Following the new discoveries of higher cognition in some avian species, the grey area of where we could draw a line between those species deserving special protection and those that do not has broadened. While some have argued that understanding our evolutionary origins should help us to decide whom to protect, and how to deal with moral questions surrounding the use of animals in research,[272] new discoveries about birds have rather muddied the waters since similar cognitive horizons might be reached by analogous, rather than homologous, routes.

The final thesis of this paper has implied that *species specificity* would require *species-appropriate* legislation, and that runs very much counter to a simple rule that all animals be afforded the *same* rights to be seen as equal before the law. Species-appropriate legislation, taking into account not only needs and perceptual capabilities but cognitive ones as well, strongly implies degrees of *differences* in legislative protection. We are not lawmakers and admit that this may be a difficult task, but lawyers assure us that differences among humans (in terms of class, status, power, sex, religion, ethnicity, etc.) have largely been addressed by blanket rules of equal rights of procedure and representation before the law.[273] Of course, we might simply afford all vertebrate species equal basic protection regardless of their cognitive abilities, which is essentially the present situation in several countries.[274] But these legislative protections often do not go far enough to

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[271] *See e.g. Animals (Scientific Procedures) Act 1986*, § 5(6), http://www.archive.official-documents.co.uk/document/hoc/321/321-xa.htm (May 15, 2000) (only allowing special licenses for use of "cats, dogs, primates or equidæ" where "no other species are suitable for the purposes of the programme . . . or . . . it is not practicable to obtain animals of any other species that are suitable for those purposes").

[272] *See e.g*. Lewis Petrinovitch, *Darwinian Dominion: Animal Welfare and Human Interests* (MIT Press 1999) (taking an evolutionary basis for deciding on animal welfare).

[273] *E.g. A Universal Declaration of Human Rights*, U.N. Gen.Assembly Res. 217 A (III) (Dec. 10, 1948) (available at http://www.un.org/Overview/rights.html) (setting out the basic human rights of all humans); Kaplan & Rogers, *supra* n. 3, at 96–99.

[274] *See e.g. Code of Practice for the Housing of Animals in Designated Breeding and Supplying Establishments* §§ 3.19(6), 3.21, 3.28, 3.37 (U.K. 1995) (available at http://scienceandresearch.homeoffice.gov.uk/animal-research/publications/publications/code-

encompass special perceptual needs. To give just two examples: computer or other electronic equipment emits sounds in the ultrasound range that rodents, particularly rats, can hear as noise.[275] This noise

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of-practice/housing-of-animals-breeding/hadcb31.pdf?view=Binary) (mentioning species appropriate protections and those based on "biological" or "physiological and behavioural needs of the animals" but not varying protections based on cognitive ability); *European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes*, pt. I, art. 1, §§ 1, 2a (Mar. 18, 1986), http://conventions.coe.int/Treaty/en/Treaties/Html/123.htm (applying to "any animal used or intended for use in any experimental or other scientific procedure where that procedure may cause pain, suffering, distress or lasting harm," defining "animal" as "any live non-human vertebrate," and not varying protections based on cognitive ability of species); Animal Welfare Advisory Comm. (N.Z.), *Code of Recommendations and Minimum Standards for the Care and Use of Animals for Scientific Purposes*, http://www.biosecurity.govt.nz/animal-welfare/codes/scientific-purposes/index.htm (Aug. 1995) (website no longer available) (copy on file with *Animal L.*) (The code covers "all live non-human vertebrates" and contains many species-specific considerations. *Id.* at §§ 4(e), 4(p), 6.1, 6.2, 6.3.1, 6.3.2, 6.3.5, 6.3.10, 7.1, 7.3, 7.5, 7.5.1, 7.5.2, 7.5.3, 7.5.4, 7.5.5, app. I(5)(d)(iv), app. I(6)(b)(iii), app. III(4)(c). But while generally ignoring cognitive ability as a factor for protection, the code uses "cognitive development" as a factor for choosing the appropriate species for projects. *Id.* at § 6.2.); Natl. Health & Med. Research Council Austrl. et al., *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* (7th ed., Australian Govt. 2004) (available at http://www.nhmrc.gov.au/publications/_files/ea16.pdf) (While providing protections to "all non-human vertebrates," the code contains many species-specific considerations. *Id.* at 1, §§ 1.15, 1.16, 3.1.8, 3.1.10, 3.2.1(iii), 3.3.1, 3.3.3, 3.3.7, 3.3.16, 3.3.25, 3.3.28, 3.3.74, 4.1.4, 4.1.5, 4.4.3, 4.4.4, 4.4.14, 4.4.19, 4.4.20(vii), 4.4.20(viii), 4.4.21, 4.4.22, 4.4.25, 4.4.26, 4.5.3, 5.1.1, 5.2.1(iii), 5.2.3, 5.3.1, 5.4.2, 5.4.6, 5.5.2(iii), 5.5.2(iv), 5.7.1(v), 5.9.1, 5.9.4, apps. 2, 3, 4. Additionally, this code is not void of consideration of cognitive capacity. The code uses "cognitive development" as a factor in choosing animals for studies. *Id.* at § 3.2.2. Also, the code provides for special considerations for "use of non-human primates." *Id.* at § 3.3.79. The policy for these considerations listed in appendix three of the code makes clear that the considerations are due to non-human primates' special cognitive abilities. *Id.* at § 3.3.79, app. 3, 57; Animal Welfare Comm., Natl. Health & Med. Research Council, Austrl., *Policy on the Care and Use of Non-Human Primates for Scientific Purposes*, "Introduction," http://www.nhmrc.gov.au/ethics/animal/issues/nonhuman.htm (June 6, 2003).); Ministry Research, Sci. & Tech., *supra* n. 12, at "What is regulated?" http://www.morst.govt.nz/wayfinder/regulations/welfare.asp#what (stating that New Zealand's Animal Welfare Act of 1999 regulates all animals with backbones as well as other selected species); *Animals (Scientific Procedures) Act 1986*, *supra* n. 271, at §1(1), http://www.archive.official-documents.co.uk/document/hoc/321/321-xa.htm (defining "protected animal" as any living vertebrate other than man and any species of octopus).

[275] The typical most sensitive range of hearing in rats lies exclusively in the ultrasonic range (20-40 kHz). G. Clough, *Environmental Effects on Animals Used in Biomedical Research*, 57 Biological Rev. 487, 487–523 (1982). Rats use the ultrasonic range to convey information about potential threats to other conspecies. S.M. Brudzynski & D. Ociepa, *Ultrasonic Vocalization of Laboratory Rats in Response to Handling and Touch,* 52 Physiology & Behavior 655, 655–60 (1992). In facilities with many singly housed rats, the din could be substantial (at 22-32 kHz) but is inaudible to the human ear. S. R. Milligan et al., *Sound Levels in Rooms Housing Laboratory Animals: An Uncontrolled Daily Variable*, 53 Physiology & Behavior 1067, 1067–76 (1993). The fact that human ears cannot detect these sounds easily leads to neglect of this welfare concern. *Id.* The U.S. *Animal Welfare Act*, 7 U.S.C. § 2131 et seq. (2000) (as amended), does not mention protections for these types of sounds. Additionally, neither the United Kingdom nor New Zealand seem to offer such protections. Alan Bates, *Detailed Discussion of*

happens to fall into the same frequency range as rat pup distress calls.[276] Hence, adult rats being exposed to such ultrasound range (that humans cannot hear) suffer ongoing and serious stress.[277] Another example might be the use of strong cleaning fluids in the immediate environment of animals, such as dogs, with a sense of smell at least a hundred fold better than that of humans.[278]

Alternatively, it might be possible to think of special legislative protections concerning mental suffering. To our knowledge, no such clause exists in any welfare legislation. Once society has acknowledged that an animal is aware, it must accept that the animal can suffer mentally. For example, it is common practice to do adverse things to animals in the presence of conspecifics (dogs on operating tables watched by other dogs, or animals being slaughtered in abattoirs and elsewhere in the presence of other animals).[279] Mental suffering can also be experienced by animals that are deprived of a rich and stimulating environment.[280] It is of course well known that barren housing and poor social environments lead to substantial deterioration in well-being, and the literature on this topic runs into tens of thousands of papers covering most animals held in research facilities.[281] Current legislative frameworks tend not to address this directly but by implication. The Animal Welfare Act (U.S.) provides an example of the typical language of animal welfare legislation. It states that the policy of the

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the Offences of Cruelty to Domestic and Captive Animals, http://animallaw.info/nonus/articles/ddukukocdca.htm (Animal Legal & Historical Center 2002) (Although New Zealand's *Protection of Animals Act of 1911* prohibits causing an animal "unnecessary suffering;" suffering is not deemed unnecessary if a legitimate purpose for the activity exists. Seemingly, use of computer or electronic devices would qualify as having a legitimate purpose.); Ministry Research, Sci. & Tech., *supra* n. 12, at http://www.morst.govt.nz/wayfinder/regulations/welfare.asp (specifically including mice within its protective scope, but failing to address exposure to noise levels).

276 M. Dimitrijevic et al., *Neonatal Sound Stress and Development of Experimental Allergic Encephalomyelitis in Lewis and Da Rats*, 78 Intl. J. Neuroscience 135, 135–43 (1994).

277 A paper on rodent hearing and on the complex and severe physiological harm (of noise) has attracted a large body of research and resulted in many research papers. C. Fernandes & S. E. File, *Beware the Builders: Construction Noise Changes, [14C]GABA Release and Uptake from Amygdaloid and Hippocampal Slices in the Rat*, 32 Neuropharmacology 1333, 1333–36 (1993); Dimitrijevic et al., *supra* n. 276, at 135–43.

278 Cf. Lesley J. Rogers & Gisela Kaplan, *Spirit of the Wild Dog: The World of Wolves, Coyotes, Foxes, Jackals and Dingoes* 49–54 (Allen & Unwin Sydney 2003) (especially Chapter 3 (Sensory abilities), on the sense of smell). Again, as with the rodents mentioned above, animal welfare legislation in at least three countries seems void of such protections. 7 U.S.C. § 2131 et seq.; Alan Bates, *supra* n. 275, at http://animallaw.info/nonus/articles/ddukukocdca.htm; Ministry Research, Sci. & Tech., *supra* n. 12, at "What is regulated?" http://www.morst.govt.nz/wayfinder/regulations/welfare.asp (only regulating chemical exposure "which is unusual or abnormal when compared with normal management or practice").

279 Karen S. Strange, et al., *Psychosocial Stressors and Mammary Tumor Growth: An Animal Model*, 22 Neurotoxicology & Teratology 89, 89–102 (2000).

280 Bennet G. Galef, *Environmental Enrichment for Laboratory Rodents: Animal Welfare and the Methods of Science*, 2 J. Applied Animal Welfare Sci. 267, 267–80 (1999).

281 *Id*.

Act is, "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[282] The Act directs the Secretary of Agriculture to promulgate standards for "the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."[283] These standards must include "minimum requirements . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals."[284]

"Humane handling and treatment" only appears to be all-encompassing, but welfare practice is, in fact, still largely confined to physical wellbeing. Animal welfare legislation is chiefly concerned with preventing the suffering of animals, and that is centered mainly on physical pain.[285] Housing conditions for animals are taken into consideration, and increasingly so, but mostly in terms of providing basic needs for survival and preventing physical pain.[286]

It is not commonly acknowledged that animals have something like a "psyche."[287] Those in favor of legislation for animal rights, by contrast, tend to take note of the perceived cognitive abilities of animals. In fact, the latter has been one of the main arguments for extending rights to the great apes.

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[282] 7 U.S.C. § 2131(1).

[283] *Id*. at § 2143(a)(1).

[284] *Id*. at § 2143(a)(2)–(2)(A).

[285] *See e.g. id.* at §§ 2143(a)(2)–2143(a)(2)(A) (The Secretary of Agriculture must promulgate standards for the physical well-being of the covered animals but not the emotional well-being.); Stephan K. Otto, *State Animal Protection Laws-The Next Generation*, 11 Animal L. 131, 131–64 (discussing criminal laws of various states which focus almost exclusively on culpability for inflicting physical pain on covered animals); Animal Legal & Historical Center, *Statutes/Laws, Portugal, Protection of Animals Law, Statute in Full*, "Chapter I General Principles of Protection, Article 1st General measures of protection," http://www.animallaw.info/nonus/statutes/stpt92_95_en.htm (accessed Mar. 23, 2006) (forbidding all unjustified violence against animals which includes acts of unnecessarily inflicting death, cruel and prolonged suffering, or severe lesions); *Republic Act No. 8485,* Republic of Philippines, The Animal Welfare Act of 1998, § 2, http://www.internationalwildlifelaw.org/phil_animal_act.html (accessed Mar. 23, 2006) (not specifying psychological protection, although one might argue this falls within protections from "pain and/or suffering").

[286] *See e.g.* Animals (Scientific Procedures) Act, 1986, § 10(6B)(a) (Eng.) (available at http://www.archive.official-documents.co.uk/document/hoc/321/321-xa.htm) (stating that to get a certificate, a person must show "that the environment, housing, freedom of movement, food, water and care provided for each such animal are appropriate for the animal's health and well-being"); *but see Animal Welfare Institute Policy on the Use of Vertebrate Animals for Experimentation and Testing*, https://labanimalissues.org/usepolicy.htm (accessed Mar. 19, 2006) ("Enclosures or cages must be sufficiently large and well constructed to permit burrowing, climbing, perching, swinging, walking, stretching, rolling, or other normal actions ordinarily seen in the species when not confined.").

[287] *See* Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* xiii (Delacorte Press 1995) (explaining that most scientists do not acknowledge that animals are capable of feeling).

B. Realities in Animal Welfare

Debate on the issues that we have discussed will continue, but meanwhile attitudes and legislation must change in ways that will allow flexibility for future change as science provides new knowledge. Positive strides have been made to protect animals used in research, and to a lesser extent in agriculture. But strategies to avoid change are common. Many scientists have retreated behind closed doors, where they continue to conduct the same procedures on animals—but further away from public scrutiny. Animal houses at universities and research institutions now lock their doors, and species that need sunlight and mental stimulation have been moved to basement areas where they are held in confined housing and impoverished in many ways.[288] In some countries, pharmaceutical laboratories are looking to relocate to countries lacking legislative protection for animals, like Singapore.[289]

Moreover, in practice, some vertebrate species receive better protection than others.[290] Within many western countries, welfare provisions for animals in the agricultural sectors tend to be undercontrolled (varying according to state and country).[291] The rules allow, either by lack of appropriate legal provisions or too little will in enforcement of existing legislation, unspeakable and ongoing cruelties to animals to occur and to continue unchecked and uncriticized. Indeed, there are often no real mechanisms to check and investigate allegations of cruelty.[292] Very basic welfare measures are not always applied

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[288] Personal observations by authors on recent visits to laboratories in United States universities.

[289] Bateson, *supra* n. 254, at 211–33.

[290] *See e.g. Farmed Animal Watch*, http://www.farmedanimal.net/faw/faw5-35.htm (Sept. 14, 2005) ("Data from the [U.S.] National Animal and Health Monitoring Service show that the mortality of calves on feedlots has increased from 1.4% in 1997 to 1.8% in 2003 . . . (based on rounded numbers). According to Dan Thompson with Kansas State University's College of Veterinary Medicine, 'I think a lot of producers would be amazed to know 5-10% of the cattle they ship wind up dead before leaving the feedlot.' Reasons for the increase in mortality are unclear, but Thompson cites respiratory disease, lower weights when coming to the feedlot, and a lack of qualified animal handlers as key suspects. The distance calves are transported is also a major factor; according to Thompson, while an 8-hour trip used to be considered a long haul, 'now it's 20 hours.' . . . 'It's always bothered me that the death of a calf in our industry is often viewed as a statistic on a piece of paper or as an economic driver of how we buy cattle. We assume we're going to have a high percentage of sickness and death loss and price them accordingly. . . That's an economic and animal welfare tragedy.'" In other words, a certain percentage of loss of livestock is an accepted industry risk and prices are adjusted accordingly.)

[291] For further discussion, see e.g. Gail Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect, and Inhumane Treatment Inside the U.S. Meat Industry* (Prometheus 1997); Paige M. Tomaselli, *International Comparative Animal Cruelty Laws*, http://www.animallaw.info/articles/ddusicacl.htm# (2003).

[292] *See* Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 Animal L. 243 (discussing the insufficient enforcement of animal cruelty laws in the United States due to prosecutorial discretion, elaborating on already present self-help mechanisms, most of which are likely provide little relief or

in practice and across all species. For instance, in contrast to the treatment of companion animals,[293] conditions in intensive farming are often appalling and animals suffer neglect, injuries, and serious basic deprivations.[294] Their pain and suffering in those instances tends not to find appropriate treatment or duty of care—tens of thousands of animals die daily as a result.[295] In those instances, even the lowest level of "welfare" for animals is not observed.[296]

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are not available in most jurisdictions, and suggesting model self-help legislation in an attempt to remedy the problem); s*ee e.g*. Arizonans for Humane Farms Coalition, http://www.yesforhumanefarms.org/ (last updated Mar. 18, 2006) (for information on a campaign to ban cruel farming practices in Arizona); East Bay Animal Advocates, *Fostering Cruelty in Chicken Production*, http://www.fosterfacts.net (accessed Mar. 19, 2006) (for information on the cruel treatment of chickens by one company).

293 James Serpell, *In the Company of Animals: A Study of Human-Animal Relationships* (Cambridge U. Press 1996).

294 Cf. Miyun Park, *Opening Cages, Opening Eyes: An Investigation and Open Rescue at an Egg Factory Farm, In Defense of Animals: The Second Wave* 174–80 (Peter Singer ed., Blackwell Publg. 2006) (describing the horrors that occur in egg producing facilities); Temple Grandin, *Euthanasia and Slaughter of Livestock*, 204 J. Am. Veterinary Med. Assn. 1354, 1354–60 (1994) (describing the horrible conditions that exist for animals processed by the slaughther industry); Stan Cox, *Fowl Play in the Slaughterhouse*, http://www.alternet.org/story/30348/ (accessed Mar. 19, 2006) (on chickens).

295 *See* Dr. Jacky Turner et. al, *The Welfare of Broiler Chickens in the European Union* (Compassion in World Farming Trust 2005) (for an analysis of the European Union's Scientific Committee on Animal Health and Animal Welfare's Report of March 2000) (available at http://www.ciwf.org/publications/reports/Welfare_of_Broiler_Chickens_in_the_EU_2005.pdf).

296 Farm Sanctuary Campaigns, Cruelty Investigations & Actions, http://www.farmsanctuary.org/adopt/index_cruelty.htm (accessed Mar. 16, 2006); Sean Poulter, *Birds' Factory-Farming Plight*, Daily Mail (Apr. 9, 2003) (available at http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=175912&in_page_id=1770) (Poulter details information on a legal challenge by Compassion in World Farming (CIWF) against using fast-growing chickens in the U.K. The organization "is basing its case on the EU's 1998 General Farm Animal Directive that states that: 'No animal shall be kept for farming purposes unless it can be reasonably expected, on the basis of its genotype . . . that it can be kept without detrimental effect on its health and welfare.'" *Id*. CIWF says modern, broiler chicken breeds grow up to four times as fast as traditional ones, now reaching adult weight in a third to a quarter of the time it takes the "traditional chicken breed." *Id.* Of the eight hundred million chickens raised in the U.K. each year, "birds frequently develop painful leg deformities, together with heart and lung problems." *Id.* CIWF also notes that the birds used for breeding purposes are kept on restricted rations, causing them great hunger. *Id*. The action "follows repeat warnings about the cruelty involved from the Government's own advisers on the Farm Animal Welfare Council . . . ." *Id*. The British Poultry Council says CIWF's charges are "unfounded." *Id.* It contends the incidence of leg problems is "very low," and that it is not a case of starving but controlling the feed of breeding flocks. *Id*. The agency named in the case, the Department for Environment, Food & Rural Affairs, "said that farms were subject to regular veterinary inspection and it was possible to [prosecute] farmers if chickens are found to be suffering." *Id*.). Similar conflicts are occurring in other countries, including Australia. Animals Austrl., *Meat Poultry*, http://www.animalsaustralia.org/default2.asp?idL1=1273&idL2=1293 (accessed Apr. 5, 2006) (Australia); Farm Sanctuary, *Birds Exploited for Meat*, http://www.poultry.org/suffering.htm (accessed Apr. 5, 2006) (United States).

In light of this, and the substantial work that remains to be done in changing popular attitudes and in legislative activity and law enforcement, our observations and scientific details of cognitive abilities and debates as to their validity must appear academic. However, research is often substantially ahead of legislative responses to new knowledge.[297] Moreover, it takes a good while for the new knowledge to be understood as having a bearing on existing ethical frameworks and even longer to see such new knowledge incorporated into animal welfare frameworks and to reach the level of enactment and enforcement.[298] Against these negative reactions, we have seen a widespread improvement in the welfare of animals used at least in research in many western countries, even though progress seems frustratingly slow.[299] It is important, however, to extend debates so that welfare legislation to protect animals in research as well as in industries will eventually be improved and strengthened.

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[297] David J. Wolfson & Marriann Sullivan, *Foxes in the Hen House*, in *Animal Rights: Current Debates and New Directions* 205, 205–33 (Cass R. Sunstein & Martha C. Nusssbaum eds., Oxford U. Press 2004).

[298] Richard Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *Animal Rights: Current Debates and New Directions* 51–77 (Cass R. Sunstein & Martha C. Nusssbaum, eds, Oxford U. Press 2004); *see* Wise, *supra* n. 2, at 19–41(pointing out the obstacles to legal rights for non-human animals).

[299] *Cf*. Paolo Cavalieri, *The Animal Debate*: *A Reexamination*, in *In Defense of Animals*: *The Second Wave* 54–68 (Peter Singer ed., Blackwell Publg. 2006).

JUST SAY NEIGH: A CALL FOR FEDERAL REGULATION OF BY-PRODUCT DISPOSAL BY THE EQUINE INDUSTRY

By
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This article discusses the thousands of foals born each year that are bred for industrial purposes. These foals must then be disposed of as unwanted by-products of the equine industry. PMU mares are bred to collect urine rich with hormones used in the production of a drug to treat menopausal symptoms. Nurse mares are bred to produce milk to feed foals other than their own. If adoptive homes cannot be found quickly, both industries dispose of their equine by-products by slaughtering the foals, and sometimes the mares, for profit or convenience. This paper calls for an amendment to the Animal Welfare Act enabling the Department of Agriculture to regulate the PMU and nurse mare farms, and requiring both industries to responsibly dispose of these horses.

I. INTRODUCTION

The equine industry is an economic giant that contributes over $110 billion each year to the U.S. economy, provides 1.4 million full-

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time jobs, includes 6.9 million horses, involves 7.1 million Americans, and accounts for $1.9 billion in tax revenue each year.[1] The industry is largely self-regulated by the more than fifty breed and color associations active in North America.[2] Common among association bylaws and regulations is humane treatment of horses.[3]

For several decades, the United States Government has attempted to protect horses and other animals, chiefly by passing three statutes: the Animal Welfare Act,[4] the Wild Free-Roaming Horses and Burros Act,[5] and the Horse Protection Act.[6]

The several states also have animal anti-cruelty statutes, many of which specifically protect horses, and some of which define horses as either livestock or pets.[7]

The Animal Welfare Act (AWA or "the Act") originally only protected laboratory animals.[8] Several amendments broadened the scope of this Act by adding protection for other types of animals and specifically preventing dog fighting.[9] However, the Act does not protect horses used for anything other than research purposes.[10] This article calls for further amendments to the Act to provide two additional protections: first, direct the United States Department of Agriculture (USDA) supervision over PMU and nurse mare farms, and second, protection for the mares used by the industries and the foals they produce.

In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act to protect American wild horses and burros regulated by the Department of the Interior (Interior).[11] For several years, Interior banned slaughter of these animals, but in 2004 one enterprising legislator slipped in an amendment to a general spending bill and lifted the

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[1] *The Economic Impact of the Horse Industry in the United States* vol. 1, i (Am. Horse Council Found. 1996).

[2] M.E. Ensminger, *Horses and Horsemanship* 486 (6th ed., Interstate Publishers, Inc. 1990).

[3] *See e.g.* Am. Paint Horse Assn., *2006 Official APHA Rule Book* 2 (Am. Paint Horse Assn. 2006) (establishing a position statement supporting the humane treatment of all animals); Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations* 9 (54th ed., Am. Quarter Horse Assn. 2006) (establishing a statement of policy that all animals shall be humanely treated); Appaloosa Horse Club, *2006 Official Handbook* 1 (Appaloosa Horse Club 2006) (committing to humane and responsible treatment of all animals).

[4] 7 U.S.C. §§ 2131–2159 (2000); *see* 9 C.F.R. §§ 1.1–4.11 (2005) (for regulations promulgated by the Secretary of Agriculture pertaining to the AWA).

[5] 16 U.S.C. §§ 1331–1340 (2000); *see* 36 C.F.R. §§ 222.20–222.36 (2005) (for regulations promulgated by the Secretary of Agriculture pertaining to the Act).

[6] 15 U.S.C. §§ 1821–1831 (2000); *see* 9 C.F.R. §§ 11.1–12.10 (for regulations promulgated by the Secretary of Agriculture pertaining to the AWA).

[7] *See* Pamela D. Frasch et al., *Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999) (for a state-by-state comparison of animal cruelty laws).

[8] 7 U.S.C. §§ 2131–2159.

[9] *See e.g.* Pub. L. No. 94-279, § 2, 90 Stat. 417 (1976) (prohibiting using animals that were moved in interstate commerce in fighting ventures).

[10] 7 U.S.C. § 2132(g)(2).

[11] 16 U.S.C. §§ 1331–1340, 1331.

moratorium on slaughter.[12] As a result, scores of wild horses went to slaughter.[13] The resulting public outcry and response by Congress not only reinstated the ban against slaughter of wild horses, but also banned equine slaughter in the United States altogether for a limited amount of time.[14] Once the ban expires, horses not protected by any statute will again be slaughtered for human consumption.

The Horse Protection Act is specific to gaited horses that are "sored" by chemicals in order to give them an advantage in the show ring.[15] The Act provides penalties for owners and trainers who participate in the practice.[16] However, the Act does not protect horses other than gaited show horses.[17]

Yet, with all these protections in place, two sectors of the equine industry manage to gallop through a giant loophole in federal and state regulations and produce thousands of foals[18] each year as unwanted by-products. These foals, and the mares which produce them, are the subject of this article.

This article first discuses the Animal Welfare Act and subsequent amendments thereto, with a focus on the treatment of horses. Next, the article examines the Wild Free-Roaming Horses and Burros Act and analyzes its impact on saving wild horses from slaughter. Third, the article studies the Horse Protection Act and how it has attempted to put an end to the practice of soring gaited horses. Efforts currently before Congress to make horse protections more permanent are also noted, followed by a look into the two main industries that rely on by-product foals for profit. The decline of these industries and the resulting horse overpopulation is also given great attention. Finally, the article offers recommendations for amending various animal protection statutes to better protect horses used in industry in the United States.

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12 James R. Carroll, *House Approves Measure Banning Wild Horse Sales; Program in West Is under Scrutiny*, The Courier-Journal (Louisville, Ky.) 1B (May 20, 2005) (available at http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050520/NEWS0104/505200421).

13 *Id.*

14 Pub. L. No. 109-97, § 798 (Jan. 7, 2005), 2006 U.S.C.C.A.N. 2166.

15 15 U.S.C. §§ 1821–1831. For a more detailed description of the Horse Protection Act, see *infra* part II(C). For details on recent proposed amendments which would effectively ban the slaughter of horses for human consumption, see *infra* part II(D). A gait is the way or rhythm in which a horse moves its feet, such as a walk, trot, or canter. *Webster's Third New International Dictionary of the English Language Unabridged* 929 (Phillip Babcock Gove, Ph. D. ed., G. & C. Merriam Company 1971). There is a history of soring of Tennessee Walking Horses, in particular, to exaggerate their already unusual gait, producing more show and flash in the show ring. *See* Lafcadio H. Darling, *Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect*, 6 Animal L. 105, 116–21, pt. IV(B) (2000) (discussing the HPA and the history of soring Tennessee Walking Horses).

16 15 U.S.C. § 1825.

17 15 U.S.C. § 1824(1).

18 Foals are baby horses. *Webster's Third New International Dictionary of the English Language Unabridged*, supra n. 15, at 880. Fillies are female foals, and stud colts or colts are male foals. *Id*. at 450, 850.

II. HISTORY OF FEDERAL EQUINE PROTECTION

Over the past few decades, Congress has attempted to protect wild horses and burros, gaited show horses, and most recently, horses slaughtered for human consumption. However, it has intentionally excluded all other horses used for any other purpose. The result is a loophole which allows mistreatment and slaughter of thousands of horses employed by two discreet equine industries in an effort to quickly and economically dispose of by-products of these industries. This section discusses the Animal Welfare Act, the Wild Free-Roaming Horses and Burros Act, the Horse Protection Act, and pending legislation.

A. The Animal Welfare Act

In 1966, the United States enacted what is commonly called the Animal Welfare Act (AWA).[19] The stated purpose of the AWA was:

> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.[20]

It authorized the Secretary of Agriculture "to regulate the transportation, sale, and handling of dogs, cats, [monkeys (nonhuman primate animals), guinea pigs, hamsters and rabbits] intended to be used in research or . . . for other purposes" and required licensing and inspection of dog and cat dealers and humane handling at auction sales.[21]

The statute underwent various amendments. The 1970 amendments expanded the list of animals covered by the AWA to include all warm-blooded animals intended for use in experimentation or exhibition, except horses not used in research and farm animals raised for food.[22] The amended Act defined research facilities and exhibitors.[23] It exempted pet stores, purebred dog and cat shows, and agricultural exhibitions.[24] The amended Act further charged the Secretary of Agriculture with developing regulations for recordkeeping and humane care and treatment of animals in or during commerce, exhibition, experimentation, and transport.[25]

In 1976, the House considered, but rejected an amendment that would have afforded humane treatment to horses destined for slaughter.[26] Congress amended the AWA, primarily refining previous regula-

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[19] 7 U.S.C. §§ 2131–5219.
[20] 7 U.S.C. § 2131.
[21] Pub. L. No. 89-544, §§ 1, 2(g), 4, 16, 12, 80 Stat. 350, 350–52 (1966).
[22] Pub. L. No. 91-579, § 3(g), 84 Stat. 1560, 1561 (1970).
[23] 84 Stat. at 1560–61.
[24] *Id.* at 1561.
[25] Darling, *supra* n. 15, at 1562.
[26] H.R. Rpt. 94-801 (April 6, 1976).

tions on animal transport and commerce[27] and defining "carrier" and "intermediate handler."[28] The amendment required health certification by a veterinarian prior to transport or sale.[29] The amendment also introduced and defined "animal fighting ventures" but exempted animals used in hunting waterfowl, foxes, and other game animals.[30]

Congress amended the AWA again when it passed the Food Security Act of 1985 (FSA).[31] Section 1752 clarified "humane care" by specifying standards for sanitation, housing, and ventilation; and directed the Secretary of Agriculture to establish regulations to provide exercise for dogs and an adequate physical environment "to promote the psychological well-being of primates."[32] The FSA concentrated on operative procedures during experimentation and established the Institutional Animal Care and Use Committee, describing its roles, composition, and responsibilities to the Animal and Plant Health Inspection Service (APHIS).[33]

In 1990, Congress again amended the AWA with the Food, Agriculture, Conservation and Trade Act of 1990, protecting dogs and cats at shelters and other holding facilities before sale to dealers.[34] However, the 1990 amendment did not affect horses.

At no time has the statute protected horses used for anything besides research purposes. In fact, the statute specifically excludes horses used for anything but research purposes.[35] The AWA protects a dead hamster but not a live horse used for anything except research purposes. Horse owners may find that offensive, especially those owners who regard their horses as pets.[36]

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[27] Pub. L. No. 94-279, §§ 2(c)–12, 90 Stat. 417, 417–20 (1976).

[28] 90 Stat. at 418.

[29] *Id.* at 419.

[30] *Id.* at 422.

[31] Pub. L. No. 99-198, § 1, 99 Stat. 1354, 1354 (1985).

[32] 99 Stat. at 1645.

[33] *Id.* at 1645–48.

[34] Pub. L. No. 101-624, 104 Stat. 3359, 4930 (1990).

[35] The definitions section states:

> The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes . . . .

7 U.S.C. § 2132(g) (2000).

[36] *See* Bill Maxwell, *Americans Squeamish over Horse Meat*, St. Petersburg Times (St. Petersburg, Fla.) 17A (Sept. 4, 2002) ("Most of us see horses as pets, companions, playmates and beasts of burden."); Megan Twohey, *Horse Owners Often Unaware of Cost, Care*, Lawrence Journal-World (Lawrence, Kan.) (May 23, 2004) (available at

B. The Wild Free-Roaming Horses and Burros Act

In 1959, Congress passed the so-called Wild Horse Annie Act,[37] which prohibited horse hunters from using aircraft and motor vehicles.[38] The Act was generally ineffective in preventing slaughter of these wild animals, and Congress later yielded to public pressure by passing the Wild Free-Roaming Horses and Burro Act (WFRHBA).[39] The WFRHBA was designed to protect wild horses and burros because they typify the national spirit.[40]

Since 1971, the WFRHBA and its predecessor have attempted to protect wild horses and burros from slaughter.[41] In 2004, however, Senator Conrad Burns (R-Mont.) sponsored and attached to a catch-all spending measure a legislative provision lifting a ban against selling these wild animals for slaughter.[42] The measure allowed the government to sell "for slaughter some older and unwanted horses . . . captured during the periodic government roundups aimed at reducing the wild population."[43] When the government resumed sales in March 2005, forty-one wild horses went to slaughterhouses.[44]

In response to public outcry, the Bureau of Land Management (BLM) suspended sales, but decided after some consideration that sales should continue with what the BLM considers sufficient safeguards.[45] BLM allowed sales if buyers signed statements pledging to provide humane care for the animals and promising not to sell them for slaughter.[46]

Several congressional representatives responded to Senator Burns' legislation by introducing legislation of their own. They inserted an amendment to the agriculture appropriations bill that pre-

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http://www2.ljworld.com/news/2004/may/23/horse_owners_often/) ("[M]any former urban dwellers . . . are buying horses because they view them as pets that look good in their new surroundings.").

37 Wild Horse Annie was a Nevada native who was dedicated to saving wild horses and burros. *See* Intl. Socy. for the Protec. of Horses & Burros, *Wild Horse Annie*, http://www.ispmb.org/annie.shtml (accessed Feb. 18, 2006).

38 18 U.S.C. § 47 (1959).

39 16 U.S.C. §§ 1331–1340; *see also* Darling, *supra* n. 15, at 109.

40 Darling, *supra* n. 15, at 109 ("The wild and free-roaming horses and burros . . . belong to no one individual. They belong to all the American people. The spirit which has kept them alive and free against almost insurmountable odds typifies the national spirit which led to the growth of our Nation. They are living symbols of the rugged independence and tireless energy of our pioneer heritage.") (quoting Sen. Rpt. 92-242 at 1 (June 21, 1971)).

41 16 U.S.C. §§ 1331–1340.

42 Carroll, *supra* n. 12, at 1B.

43 The population of wild horses and burros was estimated to be 33,000 across 10 Western states at the time the ban was lifted. Scott Sonner, *Horse-Slaughtering Law Alarms Activists: Lifting of 34-Year-Old Ban on Slaughter of Wild Horses in U.S. Concerns Conservationists*, http://abcnews.go.com/US/wireStory?id=530694&CMP=OTC-RSSFeeds0312 (Feb. 25, 2005) (no longer available).

44 Carroll, *supra* n. 12, at 1B.

45 *Id.*

46 *Id*.

vented the USDA from using federal funds to pay for inspections of equine slaughterhouses or equines scheduled for slaughter for human consumption.[47] The measure passed the U.S. House of Representatives in June 2005 by a vote of 269-158 and passed the Senate by a 68-29 vote.[48] Since the slaughterhouses could not slaughter or sell uninspected meat, the measure effectively banned equine slaughter for human consumption.[49]

The legislation was an amendment to a spending bill and, therefore, scheduled to begin October 2005, effective only for one fiscal year.[50] In committee, the ban was delayed by 120 days, reducing the already temporary ban to only eight months.[51] President George W. Bush signed the bill into law November 10, 2005.[52]

The U.S. hosts three equine slaughterhouses—two in Texas and one in Illinois.[53] According to the USDA, 58,736 horses were slaughtered for human consumption in the U.S. in 2004, resulting in approximately 13.6 million pounds of horse meat which was exported to Switzerland, Mexico, Japan, and the European Union.[54] The rider to the agriculture appropriations bill makes the future of the three U.S. equine slaughterhouses less certain, at least for the next few months. According to one authority, however, horse slaughter facilities can stay in business by paying for inspection services out of their own pockets.[55] The USDA has, in fact, announced that it will inspect the plants if the plant owners pay the inspection costs—effectively gutting the

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[47] The amendment provided,

> None of the funds appropriated or otherwise made available by this Act shall be used to pay salaries and expenses of personnel who implement or administer section 508(e)(3) of the Federal Crop Insurance Act (7 U.S.C. 1508(e)(3)) or any regulation, bulletin, policy or agency guidance issued pursuant to section 508(e)(3) of such Act for the 2007 reinsurance year. Effective 120 days after the date of enactment of this Act, none of the funds made available in this Act may be used to pay the salaries or expenses of personnel to inspect horses under section 3 of the Federal Meat Inspection Act (21 U.S.C. 603) or under the guidelines issued under section 903 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note; Public Law 104-127).

H.R. Conf. Rpt. 109-255, §§ 793–794 (Oct. 26, 2005).

[48] Humane Socy. of the U.S., *Victory for American Horses!* https://community.hsus.org/humane/notice-description.tcl?newsletter_id=3628842 (Sept. 20, 2005) (discussing the Senate's passage of the amendment); Humane Socy. of the U.S., *Horse Slaughter Amendment Passes U.S. House!* https://community.hsus.org/humane/notice-description.tcl?newsletter_id=3374815 (June 8, 2005) (discussing the House's passage of the amendment).

[49] 21 U.S.C. § 603 (2000).

[50] U.S. Federal News, *Rep. Spratt Hails Senate Passage of Amendment to End Horse Slaughter* (Sept. 23, 2005) (available at 2005 WLNR 15549462).

[51] 151 Cong. Rec. H9391 (daily ed. Oct. 28, 2005).

[52] Pub. L. No. 109-97, 119 Stat. 2120 (2005).

[53] Mary Jacoby, *Why Belgians Shoot Horses in Texas for Dining in Europe*, Wall St. J. A1 (Sept. 21, 2005).

[54] *Id*.

[55] Karen Ogden, *Horse Slaughter Ban*, Great Falls Trib. (Great Falls, Mont.) A1 (Oct. 29, 2005).

legislation.[56] If the plants do stay open, they will pass the costs of inspection along to the horse sellers.[57] Even if the U.S. plants were to close, horse owners could still ship their horses to Canada or Mexico for slaughter.[58]

C. The Horse Protection Act

Congress came to the aid of gaited[59] show horses in 1970 by passing the Horse Protection Act (HPA).[60] Although its name is generic, the HPA addresses the issue of "soring," a practice used on gaited horses to make their already unusual gait more pronounced.[61] Owners, trainers, and exhibitors who participate in soring lacerate, burn, apply chemicals to, or insert screws into a horse's legs or feet.[62] Promulgation of necessary regulations and enforcement of the Act are delegated to the USDA.[63]

The Animal Care division of the USDA enforces the HPA by overseeing the Designated Qualified Person (DQP) program.[64] USDA-certified horse industry organizations or associations train DQPs to detect sored horses.[65] The DQPs are responsible for barring from shows any horse that does not meet HPA regulations.[66] Animal Care personnel also conduct random, unannounced inspections at horse shows and sales.[67] Punishment for violating the HPA includes criminal or civil penalties such as: up to two years in prison, fines of up to five thousand dollars, and disqualification for one or more years from showing or exhibiting horses or selling them through auction sales.[68] A trainer who violates the HPA can also be disqualified for life.[69]

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56 National Geographic News, *Horse Slaughter Continues in U.S., Despite Recent Law*, http://news.nationalgeographic.com/news/2006/02/0208_060208_horse_meat.html (Feb. 8, 2006).

57 Ogden, *supra* n. 55, at A1.

58 *See* Socy. for Animal Protective Legis., *Frequently Asked Questions about Horse Slaughter*, http://www.saplonline.org/Legislation/ahspa/faq.htm (accessed Jan. 31, 2006) (details on horse slaughter); Animal Welfare Inst., *Betraying Our Equine Ally*, http://www.awionline.org/othercampaigns/horse_slaughter.htm (accessed Jan. 31, 2006) (more details on horse slaughter).

59 *See supra* n. 15 (for information on gaits and soring).

60 15 U.S.C. §§ 1821–1831.

61 15 U.S.C. § 1821(3)(A)–1821(3)(D).

62 *Id*.; Darling, *supra* n. 15, at 111.

63 15 U.S.C. §§ 1821–1831.

64 USDA, *Horse Protection Act Information*, http://www.aphis.usda.gov/ac/hpainfo.html (accessed Jan. 28, 2006).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id*.

D. Pending Legislation

On February 1, 2005, Representative John Sweeney (R-NY) introduced H.R. 503, an amendment to HPA, "to prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption, and for other purposes."[70] On February 25, 2005, the bill was referred to the House Subcommittee on Commerce, Trade and Consumer Protection.[71]

On October 25, 2005, Senator John Ensign (R-NV) introduced S.1915, an amendment to the Horse Protection Act,[72] titled the Virgie S. Arden American Horse Slaughter Prevention Act,[73] and having an identical purpose to the amendment proposed by Representative Sweeney in February of 2005. On the same day, the measure was referred to the Committee on Commerce, Science, and Transportation.[74] These two bills propose a permanent ban on horse slaughter, rather than the temporary and ineffective measure affected by the appropriations bill amendment.

III. SOURCES OF BY-PRODUCT FOALS

Two commercial endeavors in particular create thousands of by-product foals. The PMU mare industry and the nurse mare farm industry produce cast-off foals with dubious benefits other than increased profits for participants. This section provides a background of these industries.

A. History of the PMU Mare Industry

Around 1940, pharmaceutical companies began looking for ways to assist menopausal women with the normal symptoms of menopause—hot flashes, night sweats, and progressing osteoporosis.[75] Wyeth Pharmaceuticals placed itself at the top of the ladder when it discovered conjugated estrogen.[76] In 1942, Wyeth began selling Premarin to treat menopausal symptoms and remains the sole seller of this drug, even though its patent expired years ago.[77] The drug derives its name from its main ingredient, *pre*gnant *mar*e's ur*in*e, and is a

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[70] The Library of Congress, *H.R.503*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00503:@@@X (accessed Jan. 30, 2005).

[71] *Id.*

[72] 151 Cong. Rec. S11823-01 (daily ed. Oct. 25, 2005).

[73] The Library of Congress, *S.1915*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01915:@@@L&summ2=m& (accessed Jan. 30, 2005).

[74] *Id.*

[75] Leila Abboud, *Raging Hormones: How Drug Giant Keeps a Monopoly on 60-Year-Old Pill*, Wall St. J. A1 (Sept. 9, 2004).

[76] *Id.*

[77] *Id.*

major money-maker for Wyeth.[78] In the twelve months prior to June 30, 2004, Premarin made Wyeth $841 million,[79] down some from its billion dollar gross profit just a few years before.[80] Between 2000 and 2003, sales of Premarin and its related products topped $2 billion.[81] The Premarin brand includes Prempro, Premphase, Prempac, and Premelle, and is made from conjugated estrogens extracted from urine produced by pregnant mares.[82] Wyeth contracts with PMU farmers in Canada and the United States who operate farms for the specific purpose of extracting the urine.[83]

Detractors of Premarin assert that the PMU mares are bred each summer, and for the last six months of the pregnancy[84] the mares are kept in stalls and wear a device "that resembles a rubber diaper crossed with a drain hose."[85] The mares remain in fixed positions and get little exercise.[86] The urine-collection bags strapped over the mares' urethras are bulky and may lead to infected sores and leg chafing.[87] According to the Massachusetts Society for the Prevention of Cruelty to Animals, the PMU farmers limit the mares' water intake to make the urine more concentrated.[88] The practice leads to widespread renal

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[78] *Premarin.org: The Beginning of the End?* "What is Premarin(e)?" http://www.premarin.org (updated Nov. 9, 2003).

[79] Abboud, *supra* n. 75, at A1.

[80] *Id.* at A1 chart.

[81] *Id*.

[82] *Premarin.org: The Beginning of the End? supra* n. 78, at "What is Premarin(e)?" http://www.premarin.org.

[83] Humane Socy. of the U.S., *The Facts About Premarin*, http://www.hsus.org/pets/issues_affecting_our_pets/equine_protection/the_facts_about_premarin.html (accessed Jan. 29, 2006).

[84] Ensminger, *supra* n. 2 at 156. The average gestation period for a foal is 336 days. *Id.*

[85] M.R. Montgomery, *Horses Pay a High Price in the Making of Premarin, the Hormone Treatment for Women*, Boston Globe D1 (Jan. 8, 1997).

[86] Kinship Circle, *The "P" in Premarin Stands For*, http://www.kinshipcircle.org/fact_sheets/PInPremarinStandsFor.pdf (accessed January 29, 2006).

[87] *Id*.

[88] *Id.* Ten states and the District of Columbia classify water deprivation as cruelty to animals, including North Dakota, the location of most of the United States' PMU farms. *See* Conn. Gen. Stat. Ann. § 53-247(a) (West 2001) (stating that "any person who . . . fails to supply any such animal with . . . water . . . shall be fined"); D.C. Code Ann. § 22-1001(a) (LEXIS 2001) (stating that "whoever . . . unnecessarily fails to provide the same [animal] with proper food, drink . . . shall . . . be punished"); Kan. Stat. Ann. § 21-4310(a)(3) (1995) (stating that "cruelty to animals is . . . having physical custody of any animal and failing to provide potable water . . . as is needed for the health or well-being of such kind of animal"); Mont. Code Ann. § 45-8-211(1)(c)(i) (2005) (stating that "a person commits the offense of cruelty to animals . . . by failing to provide an animal in the person's custody with food and water"); N.D. Cent. Code § 36-21.1-02(2) (2004) (stating that "no person may deprive any animal . . . of necessary food, water, or shelter"); Ohio Rev. Code Ann. § 959.13(A)(1) (West 1993) (stating that "no person shall . . . confine an animal without supplying it . . . with a sufficient quantity of good wholesome food and water"); Tenn. Code Ann. § 39-14-202(a)(2) (2003) (stating that "a person commits an offense [of cruelty to animals] who intentionally or knowingly fails unreasonably to provide necessary food, water"); Vt. Stat. Ann. tit. 13, § 352(4) (1998) (stating that "a

and liver disorders.[89]

Even though the drug is effective for millions of women,[90] even Wyeth does not know exactly what it contains.[91] Despite the mystery, "Premarin is the most frequently prescribed estrogen replacement drug today. Prescribing Premarin for estrogen deficiency has evolved over the years as a Pavlovian response without any thought to individual treatment."[92] Most of the compounds in Premarin are foreign to a human female's body and are not produced by the human ovary.[93]

Wyeth has successfully fought efforts of rival drug companies to make an equivalent generic drug. Nearly two decades ago, Barr Laboratories began its attempt to market a generic equivalent which has yet to reach the marketplace.[94] The Food and Drug Administration (FDA) apparently yielded to heavy lobbying by Wyeth and ruled that any company wishing to manufacture a generic equivalent would have to start with pregnant mare urine to insure actual equivalency.[95] Barr Laboratories found several suppliers of mare urine, none of which could answer the critical question of how to extract the conjugated estrogen from the urine and convert it into powder, a procedure Wyeth calls the Brandon Process.[96] Barr finally discovered Natural Biologics, Inc., a small Minnesota company, which claimed to have discovered the secret of turning urine into powder.[97] Barr Laboratories tested the powder and found it acceptable.[98]

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person commits the crime of cruelty to animals if the person deprives an animal . . . of adequate food, water"); Wash. Rev. Code Ann. § 16.52.205(2) (West Supp. 2006) (stating that "a person is guilty of animal cruelty . . . when . . . he or she . . . dehydrates . . . an animal"); W.Va. Code § 61-8-19(a) (2005) (stating that "if any person cruelly . . . withholds . . . water . . . he or she is guilty of a misdemeanor"); Wyo. Stat. Ann. § 6-3-203(b) (2005) (stating that "a person commits cruelty to animals if he . . . unnecessarily fails to provide it with the proper food, drink"); Christine Davis, *Women Work Together to Help Rescue Horses*, Palm Beach Post (Palm Beach, Fla.) NP6 (May 12, 2004) ("The horse breeders, called PMU ranchers, are located in the Prairie Provinces of Canada and in North Dakota close to the Wyeth-Ayerst plant.").

89 Kinship Circle, *supra* n. 86, at http://www.kinshipcircle.org/fact_sheets/PInPremarinStandsFor.pdf.

90 Abboud, *supra*, n. 75, at A1.

91 *Id.*

92 Phillip O. Warner, M.D., *Estrogen Substitutes Aren't All the Same*, 143 N.Y. Times A14 (Nov. 21, 1994).

93 *Id.* Warner includes the contention by People for the Ethical Treatment of Animals (PETA) that 65,000 foals born to the impregnated mares are slaughtered each year as a by-product of the pregnancies. *Id*.

94 Abboud, *supra* n. 75, at A1.

95 *Id.*

96 This process is called the Brandon Process because all extraction and conversion is done by Ayerst Organics, Ltd., a Wyeth subsidiary, at its plant in Brandon, Manitoba, Canada. *See Wyeth v. Natural Biologics, Inc.*, 395 F.3d 897, 899 (8th Cir. 2005) (providing that Wyeth manufactures natural conjugated estrogens using the Brandon Process); *Premarin.org: The Beginning of the End? supra* n. 78, at "What is Premarin(e)?" http://www.premarin.org., (noting that Ayerst Organics Ltd., a subsidiary of Wyeth Inc., is "the world's *only* producer of PMU") (emphasis in original).

97 Abboud, *supra* n. 75, at A1.

98 *Id.*

Barr then ran into a major legal glitch. Wyeth had already sued Natural Biologics, claiming that Natural Biologics stole trade secrets.[99] According to Wyeth, Natural Biologics' president, David Saveraid, enlisted a former Wyeth chemist who was critical to the Brandon Process.[100] The trial court entered 146 non-confidential findings of fact and 55 non-confidential conclusions of law, the crux of which was that Saveraid had obtained his information illegally.[101] The court permanently enjoined Natural Biologics from making or selling estrogens extracted from urine.[102] On appeal, Natural Biologics argued that the trial court erred in finding that the Brandon Process was a legitimate trade secret.[103] The court held that, under the totality of the circumstances, the trial court did not err in finding that the Brandon Process was a trade secret[104] and upheld the permanent injunction.[105]

In addition to instituting cases in federal court to protect its trade secrets and successfully defending anti-trust actions,[106] Wyeth found itself fighting on another battlefront.[107] In the late 1990s, healthcare providers began questioning the use of hormone replacement therapy (HRT).[108] Decades earlier the pharmaceutical industry and the healthcare profession had redefined menopause—a natural part of every woman's life once she reaches middle age—and clinically termed it estrogen deficiency disease.[109]

To treat the "disease," doctors ordered hormone replacement therapy. Short-term use was effective and safe, and women could taper off the treatment after three to five years.[110] Since short-term use was effective and profitable, pharmaceutical companies took the treatment to new lengths and launched what they called an educational campaign (which manifested in an advertising campaign) targeted at women and the healthcare profession.[111] Jumping onto the band-

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99 *Id*.; *Wyeth v. Natural Biologics, Inc.*, 2003 U.S. Dist. LEXIS 17713 at ¶ 2 (D. Minn. Oct. 2, 2003).

100 Abboud, *supra* n. 75, at A1.

101 *Wyeth*, 2003 U.S. Dist. LEXIS 17713 at ¶¶ 1–79, 33.

102 *Id*. at 74; *see also* Abboud, *supra* n. 75, at A1.

103 *Wyeth*, 395 F.3d at 899.

104 *Id*. at 900.

105 *Id*. at 903.

106 *See e.g. J.B.D.L. Corp. v. Wyeth*, 2005 U.S. Dist. LEXIS 11676 (June 13, 2005) (Wyeth's success at limiting a competitor's market share in the hormone replacement therapy market and resultant ability to raise prices of its own products was not a violation of the Sherman Act.). Of note, the competitor was Duramed Pharmaceuticals, manufacturer of Cenestin, another conjugated estrogen product. *Id.*; *but see Ferrell v. Wyeth-Ayerst, Labs., Inc.*, 2004 U.S. Dist. LEXIS 15127 (D. Ohio 2004) (Wyeth's ability to limit a competitor's market share did not preclude an unjust enrichment action.).

107 Susan Love, *Sometimes Mother Nature Knows Best*, 146 N.Y. Times A25 (Mar. 20, 1997).

108 *Id*.

109 *Id.*

110 *Id.*

111 *Id.*

wagon, the American College of Obstetrics and Gynecology recommended that "every postmenopausal woman should be on 'replacement' hormones for the rest of her life unless she [had] a compelling medical reason not to be."[112] Susan Love, M.D. argued, however, that the recommendation was based on inadequate scientific evidence and that synthetic hormones do not replace anything; they merely add something to a woman's body that would not be there naturally.[113]

Once the drug industry focused on menopause, it employed celebrities such as Julie Andrews and Lauren Hutton to advertise its products.[114] Unfortunately for consumers, long-term HRT increases a woman's risk of breast cancer.[115] To combat the risk of cancer that its product created, Wyeth added Prempro, a combination of estrogen and progestin (progestigen), to its lineup.[116] While combining estrogen and progestin can reduce the risk of endometrial cancer, failure to add progestin to HRT increases the risk of endometrial cancer.[117] Together Prempro and Premarin constitute about two-thirds of the U.S. HRT market.[118] In addition to studies showing hormones heightened the risk of breast cancer came studies showing that Premarin did less to fight osteoporosis than Wyeth first promised, and might raise a woman's short-term risk of a heart attack.[119]

The Women's Health Initiative clinically studied Prempro, but halted the study in 2002 when it found the medication increased the risk of breast cancer, heart disease, stroke, and pulmonary embolism.[120] Later results showed twice the rate of dementia in older users as in non-users.[121] As a result of the bad publicity, Premarin sales fell thirty-one percent in 2003.[122]

The lessened demand for urine was both good and bad news for the horses. Faced with the equivalent of a corporate reduction in force, thousands of mares needed new homes.[123] Rescue organizations scrambled to place the mares and their foals to prevent them from go-

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[112] *Id.*

[113] Love, s*upra* n. 107, at A25.

[114] Pamela Sherrid, *Will Boomer Women Defy Menopause*, 129 U.S. News & World Rpt. (D.C.) 70 (Sept. 11, 2000).

[115] WebMD, *Hormone Therapy and the Risks of Breast and Endometrial Cancers*, "Weighing cancer risks for women who still have a uterus," http://www.webmd.com/hw/health_guide_atoz/hw227955.asp?navbar=hw228619 (last updated April 07, 2005).

[116] Sherrid, *supra* n. 114, at 70.

[117] WebMD, *supra* n. 115, at http://www.webmd.com/hw/health_guide_atoz/hw227955.asp?navbar=hw228619.

[118] Sherrid, *supra* n. 114, at 70.

[119] Geoffrey Cowley & Karen Springen, *Reconsidering HRT*, Newsweek 71 (April 29, 2002).

[120] Adair Lara, *The Risks of Relief*, San Francisco Chronicle E1 (Jan. 18, 2004).

[121] *Id.*

[122] Barry Shlachter, *Fate of Mares Sparks Equine Controversy*, Ft. Worth Star-Telegram 1C (Feb. 17, 2004).

[123] *Id*.

ing to slaughter.[124] Many ranchers think of horses as productive livestock rather than pets or companion animals, and when the ranchers involved in the PMU slowdown could not sell the urine they simply sold the horses to the highest bidder.[125] Often, that was the slaughterhouses.[126]

Rescue organizations received some help from Wyeth itself, which set aside $3.7 million to subsidize transport.[127] However, transport is not the only issue. The horses needed feed, farrier services,[128] a place to live, and possibly veterinary care. In a market where 35,000 foals are produced per year, and the recreational market absorbs only 7,000 to 8,000,[129] rescue organizations face an uphill battle. Foster families can sponsor horses by contributing money to the rescue farms to pay for care and feeding.[130] Adoptive families usually pay several hundred dollars for a horse.[131] That helps cover some of the costs,[132] but if Premarin use continues to decline, more horses will go to slaughter if they cannot find homes.[133]

B. The Nurse Mare Farm Industry

At nurse mare farms, the future is just as bleak for the thousands of nurse mare foals born each year.[134] A nurse mare foal is a foal which

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124 *Id.*

125 *Id.*

126 *Id.* Further, negative publicity affecting ranchers in North Dakota prompted the state to pass an anti-disparagement law, largely to protect the PMU ranchers. *See* Jennifer J. Mattson, *North Dakota Jumps on the Agricultural Disparagement Law Bandwagon by Enacting Legislation to Meet a Concern Already Actionable under State Defamation Law and Failing to Heed Constitutionality Concerns*, 74 N.D. L. Rev. 89, 106 (1998) (noting that the North Dakota Equine Ranching Association was responsible for getting the law passed).

127 Shlachter, *supra* n. 122, at 1C. The North American Equine Ranching Information Council exists to diffuse some of the controversies involved in PMU ranching. *See generally* North American Equine Ranching Information Council, *North American Equine Ranching Council*, http://www.naeric.org (accessed Feb. 19, 2006) (The NAERIC website contains information espousing the humaneness of the PMU mare industry.).

128 A farrier cares for horses' feet. *Webster's Third New International Dictionary of the English Language Unabridged*, *supra* n. 15, at 824.

129 Carolyn Battista, *Rescuing Foals (and Earning Wings)*, 153 N.Y. Times 14CN (Mar. 7, 2004).

130 *Id.* Foster families do not take the horses home, choosing instead to contribute to the rescue farms. Last Chance Corral, *Ways to Help*, http://www.lastchancecorral.org/foal_rescue/WaystoHelp.htm (accessed Feb. 19, 2006). Adoptive families actually adopt the horses and care for them on their own property or pay board at a stable or facility other than the rescue farm. *Id.*

131 *See e.g.* Spring Hill Horse Rescue, *PMU Foals*, http://www.springhillrescue.com/pmu.shtml (accessed Feb. 19, 2006) (The fee is $550 to $650 for pre-registered adopters.); Indiana Horse Rescue, *Adoption*, http://www.indianahorserescue.com/Adoption/adoption.htm (accessed Feb. 19, 2006) (The fee is $250, $550, or $750, depending on the horse's size, condition, and ability.).

132 Battista, *supra* n. 129, at 14CN.

133 *Id.*

134 *See* James Walker, *Horse Savior*, Norwich Bulletin (Norwich, Conn.) A1 (July 9, 2004) (stating that "[t]here are about 2,000 orphans produced every year," referring to

is born so that its mother comes into milk so the mare can nurse another mare's baby.[135] The foals are a by-product of the mare milk industry.[136] The concept is simple. An owner or trainer of a money-making racing mare wants to breed the mare for a foal.[137] However, he does not want the mare off the track for the four months it takes to nurse a foal to weaning age so he breeds a second mare for the use of its milk only.[138] As soon as the racing mare's foal is born, the foal is taken from its mother and put on the nurse mare, leaving the nurse mare's foal as an unwanted by-product.[139] If nurse mare foals cannot be promptly adopted, they are killed.[140]

This practice is a direct result of the rules and requirements promulgated by The Jockey Club, the organization which keeps the registry of Thoroughbred horses and sets the rules that determine which horses may be registered.[141] According to The Jockey Club rules, an owner cannot register a foal unless the stallion physically bred with the mare, and the foal was gestated in and delivered from the body of the same broodmare in which the foal was conceived.[142] No foal produced by artificial insemination, embryo transfer, or transplant can be registered.[143] However, the rules do not require the broodmare to nurse the foal.[144] The consequence of these rules is that thousands of nurse mare foals are constructively orphaned each year when they are weaned from their mothers at only one or two days of age so that the racing mares can either get back onto the track or be rebred to a stallion under the Jockey Club rules.[145]

Detractors call the practice the "dirty little secret" of the racing industry.[146] Nurse mare owners not only make money when they lease mares to the racing industry, they also sell the foals to rescue organi-

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nurse mare foals) (quoting the owner of the nonprofit horse rescue The Last Chance Corral, Victoria Gross).

135 Last Chance Corral, *What are Nurse Mare Foals?* http://www.lastchancecorral.org/foal_rescue/foal_rescue.html (accessed Jan. 29, 2006).

136 *Id*.

137 *Id*.

138 *Id*.

139 *Id*.

140 *Id.*

141 Ensminger, *supra* n. 2, at 421.

142 The Jockey Club, *Principal Rules and Requirements of the American Stud Book*, "Section V: Rules for Registration, Genetic Typing and Parentage Verification," § 1.D, http://www.jockeyclub.com/registry.asp?section=3; *select* Rules for Registration, Genetic Typing and Parentage Verification (accessed Jan. 28, 2006) ("A natural gestation must take place in, and delivery must be from, the body of the same broodmare in which the foal was conceived.").

143 *Id*.

144 *Id*.

145 Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

146 Walker, *supra* n. 134, at A1.

zations.[147] The foals cost the rescue organizations about four hundred dollars each, and the organizations then charge adoptive families an adoption fee to cover the purchase fee, but not the other costs involved.[148] In particular, the industry does not take into account the significant emotional costs of early weaning to the mares and foals.[149]

IV. JUDICIAL TREATMENT OF SELF-REGULATED INDUSTRIES

Self-regulation in the nurse mare farm industry has resulted in the deaths of innumerable horses[150] since the Jockey Club rules prohibiting the transfer of embryos to a surrogate mare create the demand for the industry. Nurse mares might benefit from judicial intervention, but courts have refrained from interfering with self-regulated voluntary associations.[151] Two cases brought against the American Quarter Horse Association (AQHA) in Texas illustrate the bounds of voluntary associations' autonomy.

In 1990, Ken Burge sued the AQHA because it cancelled his horse's registration certificate.[152] After Burge purchased Just A Freckle from the previous registered owner, the AQHA investigated a complaint concerning illegal white markings on the animal.[153] The AQHA requested photographs then conducted a physical examination of the stallion.[154] The Executive Committee found that the depiction of white markings on the registration application was inaccurate and that the horse's white markings extended beyond those allowable for registration.[155] The court refused to order the AQHA to reinstate the

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147 Amy Bauer, *Orphan Foal Adopted*, Topeka Capital-Journal (Topeka, Kan.) 1–2 (June 19, 2003) (available at 2003 WLNR 6903311).

148 *Id*.

149 *See* Heather Smith Thomas, *Emotional Pain of Separation*, http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=54461 (accessed Oct. 12, 2005) (no longer available) (advising against weaning before the foal is at least four months old).

150 Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

151 *See Burge v. Am. Quarter Horse Assn.*, 782 S.W.2d 353, 355 (Tex. App. 7th Dist. 1990) (refusing to interfere with AQHA's policies); *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59 (Tex. App. 2d Dist. 1982) ("[I]t is the right of a private, non-profit organization to manage, within legal limits, its own affairs without interference from the courts."); *Hoey v. San Antonio Real Estate Board*, 297 S.W.2d 214, 217 (Tex. App. 4th Dist. 1956) ("So long as such governing bodies do not substitute legislation for interpretation, do not transgress the bounds of reason, common sense, fairness, do not contravene public policy, or the laws of the land in such interpretation and administration, the courts cannot interfere.") (quoting *Bhd. of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. App. 1st Dist. 1937)); *Bhd. of R.R. Trainmen*, 108 S.W.2d at 241 ("Courts are not disposed to interfere with the internal management of a voluntary association.").

152 *Burge*, 782 S.W.2d at 354.

153 *Id.*

154 *Id.*

155 *Id.*

registration certificate because the court would not interfere with the AQHA's internal decisions.[156]

It is well established that the Texas courts will not interfere with the internal management of voluntary associations so long as the governing bodies of such associations do not substitute legislation for interpretation and do not overstep the bounds of reason or violate public policy or the laws of this state while doing so.[157]

The law remained well established in Texas until Kay Floyd filed her lawsuit,[158] handed the AQHA a rare legal defeat,[159] and effected a substantive change in the AQHA rules.

Floyd owned a 1977 AQHA mare named Havealena and a 1973 AQHA stallion named Freckles Playboy.[160] Floyd bred the two during the 1995 breeding season, resulting in an embryo in Havealena which was transferred to a recipient mare.[161] The breeding produced a bay colt named Hummer, born February 21, 1996.[162] At no time during 1996 did Floyd attempt to register Hummer with the AQHA, because she believed that Hummer would suffer from cryptorchidism,[163] as did five other colts from the same pairing.[164] During the same 1995 breeding season, Floyd bred Havealena and Freckles Playboy again, and Havealena carried the foal herself.[165] Mini Play, a bay filly, was born May 15, 1996, and Floyd registered the filly with the AQHA on August 1, 1996.[166]

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156 *Id.* ("The AQHA, we believe, has the right to manage, within the legal limits, its own affairs without interference from the courts.").

157 *Id.* at 355.

158 *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002). Six individuals filed the lawsuit in their individual capacities as horse owners, and some filed also doing business as other entities. Pl. Sec. Amend. Original Pet., 11, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*). Each plaintiff was an AQHA member and each had "either produced, acquired, sold, or traded at least one horse which is the result of a second embryo transfer and which horse [was] refused registration by the American Quarter Horse Association solely because the horse was the result of a second embryo transfer." *Id*.

159 *See e.g. Hatley v. Am. Quarter Horse Assn.*, 552 F.2d 646, 649 (5th Cir. 1977) (Plaintiffs had no claim under the Sherman Act where reasonable rules of the registering association were not misused.); *Adams v. Am. Quarter Horse Assn.*, 583 S.W.2d 828, 831 (Tex. App. 7th Dist. 1979) (Owners are bound by AQHA's interpretation of its own rules.).

160 Pl.'s Second Amend. Original Pet. ¶ 11.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

161 *Id*.

162 *Id*.

163 *Id*. Cryptorchidism is a medical condition where one or both of a stallion's testicles are retained in his flank or the belly. Ruth B. James, *How to Be Your Own Veterinarian (Sometimes)* 100 (Alpine Press 1990). Removing the testicles requires major surgery. *Id.* The problem is hereditary and should absolutely rule out the stallion as a breeding prospect. *Id.*

164 Pl.'s Second Amend. Original Pet. ¶ 11.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

165 *Id*.

166 *Id*.

More than a year later, Floyd discovered that Hummer was not cryptorchid, and Floyd attempted to register Hummer with the AQHA. She offered to surrender Mini Play's registration papers in return.[167] The AQHA refused, even though Floyd was willing to pay a late registration fee of one thousand dollars per the AQHA rules and withdraw Mini Play's registration.[168] Floyd filed suit to force the AQHA to comply with her request.[169]

Plaintiffs alleged that the embryo transfer rule was a violation of the Texas Free Enterprise and Antitrust Act[170] because it was a horizontal restraint of trade, had an adverse economic effect on consumers, was facially anti-competitive in that it unreasonably limited the production of horses out of mares, and there was no reasonable or justifiable purpose or basis for the rule.[171] On October 9, 2000, the court heard arguments in support of Plaintiffs' Motion for Partial Summary Judgment and the AQHA's Motion for Summary Judgment to consider:

> (1) [whether AQHA] Rule 212(a) [was] anti-competitive . . . . (2) If so, [whether] the effect . . . of the Rule [was] so pernicious, and the lack of any redeeming virtue so conclusively presumed that the restraint [was] unreasonable *per se*, thereby obviating the necessity for inquiry as to the precise harm . . . or the reasons for . . . the rule. (3) And if the Rule [was] not *per se* unreasonable, [whether] after application of the "Rule of Reason" test . . . the Rule constitute[d] an unreasonable restraint of trade.[172]

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[167] *Id*. at ¶ 11.02. Ms. Floyd offered this because, at the time, the AQHA Rules only allowed one registration per year per stallion-mare pairing, including only one registration for an embryo transfer foal. Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations*, § 212(a), 54 (Am. Quarter Horse Assn. 2002) (on file with *Animal L.*).

[168] Pl.'s Second Amend. Original Pet. ¶ 11.02, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.; Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations*, 63 (Am. Quarter Horse Assn. 2006) (available at http://www.aqha.com/association/registration/pdf/06registrationrules.pdf).

[169] Pl.'s Second Amend. Original Pet. ¶ 6.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002).

[170] Tex. Bus. & Commerce Code Ann. § 15.05 (2002).

[171] Pl.'s Second Amend. Original Pet. ¶¶ 6.01–6.03, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

[172] Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., & D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C*; Kay Floyd, et al. v. American Quarter Horse Association; *In the 251st District Court; Potter County, Texas*, 2 (Dec. 15, 2000) (copy on file with *Animal L.*) (emphasis in original). *Standard Oil of N.J. v. U.S.*, 221 U.S. 1, 66 (1911), interprets the Sherman Act to require a "rule of reason." The "rule of reason" requires assessment of facts particular to the business:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant

The AQHA argued at the hearing that the Rule protected smaller breeders by placing them in the same position as larger breeders with greater financial resources.[173] The Court found that argument "disingenuous" because "the *effect* of the rule is to limit the number of registered quarter horses, thereby reducing the competition of supply, thereby keeping prices high for the protection of producers."[174] The court held the Rule was "an anti-competitive restraint adopted for purposes of limiting the supply of registered quarter horses."[175]

On January 19, 2001, the court entered an Interlocutory Order granting Plaintiffs' Motion for Partial Summary Judgment, holding that Rule 212(a) was an anti-competitive restraint of trade, but that the Rule was not per se a violation under the Texas Free Enterprise and Antitrust Act.[176] After the AQHA moved for reconsideration, the court withdrew in part the Interlocutory Judgment because it had based its ruling on summary judgment evidence rather than "a full and complete analysis of all relevant factors . . . ."[177] Plaintiffs deposed the people identified by the AQHA as having knowledge of relevant facts[178] and then filed their Second Motion for Partial Summary Judgment, arguing that the AQHA had failed to raise any genuine issue of material fact.[179] The court heard oral argument in November of 2001 and reinstated its ruling that the embryo transfer rule was an unreasonable restraint of trade violating the Texas Free Enterprise and Antitrust Act.[180]

As a result of the ruling, the AQHA settled with Kay Floyd and amended its rule to allow registration of all embryo transfer foals.[181] The court entered an order of dismissal with prejudice, vacating all previous orders.[182] Even though the case has no precedential value, it

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> facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1918).

173 Ltr., *supra* n. 172, at 2.

174 *Id*. (emphasis in original).

175 *Id.* at 3.

176 Interlocutory Judm., ¶¶ 2–4, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

177 Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., and D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C*; Kay Floyd, et al. v. American Quarter Horse Association; *In the 251st District Court*; *Potter County, Texas*, 2 (Sept. 14, 2001) (copy on file with *Animal L.*).

178 Pl.'s Sec. Mot. for P.S.J., *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

179 *Id.*

180 Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., and D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C*; Kay Floyd, et al. v. American Quarter Horse Association; *In the 251st District Court; Potter County, Texas*, 2 (May 16, 2002) (copy on file with *Animal L.*).

181 Or. of Dismissal with Prejudice, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

182 *Id*.

does signal the willingness of at least one Texas court to look past the sanctity of self-regulation and force a rule change when the rule directly conflicts with state law.

From the beginning of the litigation, the AQHA had relied on *Hatley v. Am. Quarter Horse Assn.* for the proposition that an industry trade association rule is not an unreasonable restraint of trade.[183] The court distinguished *Hatley* from the case before it on the grounds that the rule "sought to define the breeding process" rather than to "define the breed."[184]

Similarly, the Jockey Club is seeking to define the breeding process through its regulations against artificial insemination and embryo transplant or transfer that give rise to the nurse mare farm industry. Research reveals no case against the Jockey Club making the same arguments that Floyd made against the AQHA, and whether a Jockey Club member is willing to navigate these choppy legal waters is a mystery. Therefore, it is unlikely that the nurse mare industry will be curtailed by judicial means.

V. LEGISLATION AND FUNDING

Since courts are painfully reluctant to interfere with self-regulated industries, and self-regulation results in inhumane practices against animals, legislation is an obvious solution. Because several states already have PMU mare or nurse mare farm industries, a patchwork of state regulations would result in incomplete mitigation. The federal government is no stranger to regulation and is the logical choice to enact the needed legislation. Indeed, the USDA already inspects and regulates facilities covered by the Animal Welfare Act[185] and monitors and inspects facilities and organizations covered by the Horse Protection Act.[186]

Fixing the PMU and nurse mare farm problem does not require a mass of additional legislation. Instead, the Animal Welfare Act could be amended by simply deleting the phrase "horses not used for research purposes"[187] to include within the AWA all horses employed or produced by the PMU and nurse mare farm industries.

If Congress protects these mares and foals, the question becomes who should provide money to care for the mares and foals until ranches or rescue organizations can locate adoptive homes. Regarding PMU horses, a rancher who has lost his livelihood because he can no longer sell urine to Wyeth will have no funds with which to care for the animals. Rescue organizations are already strapped for funds.[188] One

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183 Ltr., *supra* n. 172, at 2.

184 *Id.* at 3.

185 7 C.F.R. § 1.131 (2005); 9 C.F.R. § 1.1 *et seq*.

186 9 C.F.R. § 11.1 *et seq*.

187 *Id*.

188 *See e.g.* Last Chance Corral, *Wish List*, http://www.lastchancecorral.org/donations/WishList.htm (accessed Feb. 19, 2006) ("Now more than ever, we need your help.

source of money could be Wyeth itself. However, requiring Wyeth to provide all funding might cause it to move all of its operations to Canada, bypassing the regulations altogether and completely defeating the purpose behind amending the Act.

The racing industry could bear the cost of caring for the nurse mare foals until the farms or rescue organizations can find homes for them.[189] Nurse mare farm operators who make their livings leasing out mares to the race horse owners could argue that since they derive a part of their livelihood from selling by-product foals to rescue organizations,[190] the new government regulations requiring them to pay for the upkeep of the foals rather than selling them are unfair. This might cause them to ship the foals to Mexico or Canada for slaughter without ever contacting the rescue organizations. Unless the USDA keeps close tabs on these nurse mare farms, the farms might bypass the intent of the legislation and ensure a violent and senseless end to the lives of the foals produced by the industry. Instead, to ensure that the horses are protected, Congress should set aside monies to aid rescue organizations to provide for food, farrier care, and veterinary services until adoptive homes can be located, and to assist in transporting the foals to their new homes.

Should the USDA argue that it has insufficient funding to take on the initial responsibility, proponents of the amended Act might point out that agriculture is one of the largest beneficiaries of pork-barrel politics each year.[191] According to Citizens Against Government Waste, in 2005 the USDA requested $3 million for special research grants through the Cooperative State Research Education and Extension Service (CSREES), but by the time Congress was through, it had added $121 million for CSREES projects, or 3,933% more than the budget request.[192] Millions of dollars in pork barrel earmarks were included in the final appropriations.[193] In its *Prime Cuts* feature, Citizens Against Government Waste identified billions of dollars the USDA could save annually including over a billion dollars that the De-

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The economy is down, and so are donations and grants. Foundations keep their money invested and like many individuals, have been dramatically affected. Most have cut back on giving and many limited [their] previously national considerations to local ones.").

189 The economic reach of the horse racing industry is great. In 2004, over $1 billion in thoroughbred horses were sold at auction. National Thoroughbred Racing Association, *NTRA Annual Report to Membership* 2 (National Thoroughbred Racing Association 2005) (available at http://www.ntra.com/content/AnnualReport04_05.pdf).

190 Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

191 *See* Ernest C. Pasour, Jr. & Randall R. Rucker, *Plowshares & Pork Barrels: The Political Economy of Agriculture* (Independent Institute 2005) (providing an in depth look at how the USDA has taken advantage of pork barrel spending since 1860 and is arguably the most entrenched of all federal agencies).

192 Citizens Against Government Waste, *2005 Pig Book Summary*, http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005 (accessed Jan. 31, 2006).

193 *Id*.

partment could save by reforming milk marketing orders and deregulating milk prices.[194]

The inadequate funding argument has already failed the USDA in court and resulted in greater protection for species under the Animal Welfare Act.[195] In 1992, several plaintiffs, including individuals and animal welfare groups, sued the USDA alleging violations of the Animal Welfare Act.[196] The groups wanted the USDA to amend its regulations implementing the AWA in order to define rats, mice, and birds as "animals" under the AWA.[197] The AWA charged the Secretary of Agriculture "with promulgating regulations prescribing standards for the proper treatment of animals."[198] The AWA and the regulations explicitly excluded rats, mice, and birds from the AWA's reach.[199] In 1985, Congress amended the AWA to remove the restrictions, and several groups suggested that the USDA should drop the exclusion of rats, mice, and birds, but the agency refused to make the change.[200] Two animal welfare organizations petitioned the USDA for a rulemaking to amend the regulation, but the USDA denied the petition.[201]

Plaintiffs then filed suit seeking a declaratory judgment and an injunction preventing USDA from excluding rats, mice, and birds by regulation when the AWA itself did not make such exclusion.[202] The Secretary of Agriculture argued that Congress provided absolute discretion to the USDA to define "animal" any way it chose, but the court disagreed.[203] "[T]his provision limits the Secretary's discretion to determining whether a warm-blooded animal is used, or intended for use for those purposes specified in the definition," but not to determine whether the fauna used for those purposes are "animals" within the AWA.[204]

After reviewing the three purposes of the AWA,[205] the Court held that exclusion of rats, mice, and birds served none of the AWA's purposes, but their inclusion in the definition of "animal" ensured that those species would be humanely cared for during research.[206] The Secretary argued that the department "considered the number of animals involved, the resources available, and the approximate cost of

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194 Citizens Against Government Waste, *Prime Cuts Agriculture Section*, http://www.cagw.org/site/FrameSet?style=User&url=http://publications.cagw.org/prime/primecuts.php3; *select* Department of Agriculture, *click on* Submit (accessed Jan. 31, 2006).

195 *Animal Leg. Def. Fund v. Madigan*, 781 F.Supp. 797, 802, 805–06 (D.D.C. 1992).

196 7 U.S.C §§ 2131–2159.

197 *Animal Leg. Def. Fund*, 781 F. Supp. at 797.

198 *Id.* at 799.

199 *Id.*

200 *Id.* (citing 54 Fed. Reg. 10,823 to 10,824 (1989)).

201 *Id*. at 799.

202 *Id*.

203 *Animal Leg. Def. Fund*, 781 F. Supp. at 800.

204 *Id.*

205 *Id.* at 801.

206 *Id.*

regulation."[207] The Court found that including rats, mice, and birds in the definition of "animal" under the AWA would "impose affirmative obligations on researchers and others to treat the animals humanely without requiring any action from the agency."[208]

The Secretary also argued that the USDA Animal and Plant Health Inspection Service (APHIS) had insufficient funds and personnel to implement enforcement of regulations covering the rats, mice, and birds.[209] The court found that argument unpersuasive.[210] APHIS failed to consider that the regulations would benefit researchers by insuring that the animals were humanely treated, "avoid[ing] duplication of research experiments, and consider[ing] alternatives to animal usage."[211] More important to the court, however, was APHIS's failure to request more resources with which to do its job.[212]

While the district court's decision was overturned on appeal due to lack of standing,[213] the district court ruled that the agency's monetary decision to exclude rats, mice, and birds by regulation when Congress did not exclude them by statute was "arbitrary and capricious."[214] Congress's intentional statutory exclusion of horses used for anything other than research is similarly arbitrary and capricious. If Congress is truly interested in animal welfare, then it must protect foals born as unwanted by-products.

VI. CONCLUSION

Congress should amend the Animal Welfare Act and omit the phrase "excluding horses not used for research purposes" or, at the least, include horses operated by or born to the PMU and nurse mare farm industries. The Secretary of Agriculture should then promulgate regulations governing disposal of the foals born to the PMU and nurse mare farm industries.

Congress has stopped funding USDA inspections of horse slaughterhouses,[215] and slaughter of wild horses for human consumption is

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[207] *Id.* at 803 (citing Def.'s Mot. S.J., Ex. A, Crawford Decl. at ¶ 4–12).

[208] *Animal Leg. Def. Fund*, 781 F.Supp.at 803.

[209] *Id.* at 804.

[210] *Id.*

[211] *Id.* at 805.

[212] *Id.* at 805 n. 5 ("The agency's argument that it lacks the resources to implement these regulations might be more convincing if the agency sought more resources to pursue its mandate. In fact, the plaintiffs have shown that the agency intentionally sought funding decreases and one year requested that its Animal Welfare Program be eliminated. This evidence suggests that the agency may have lost sight of its Congressional mandate under the Act. A member of the President's Cabinet charged with executing the law should not be a prisoner of his own bureaucracy and allowed to argue that his own failure to request funding to comply with an Act of Congress is a proper excuse for his failure to pursue his statutory obligations.") (citation omitted).

[213] *Animal Leg. Def. Fund v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994).

[214] *Animal Leg. Def. Fund*, 781 F.Supp. at 804.

[215] Pub. L. No. 109-97 at § 794, 119 Stat. at 2164.

illegal.[216] Foal slaughter as by-product disposal is legal and will remain so until Congress changes the law. Preventing that slaughter through protective legislation is the humane and decent thing to do.

[216] 16 U.S.C. § 1338(a)(4).

DOG-FOCUSED LAW'S IMPACT ON DISABILITY RIGHTS: ONTARIO'S PIT BULL LEGISLATION AS A CASE IN POINT

By
Barbara Hanson*

Legislation that affects dogs also affects persons with disabilities to some extent. This link shows up in statutory definitions, is justified by social construction theory, and has been reified in case law. Thus, it is important to examine statutes like Ontario's pit bull legislation in terms of their potential impact on persons with disabilities. Upon close examination, it appears that the legislation suffers from vague definitions, conflicting onus of proof, absence of fair process, and severe penalties, including imprisonment. Further, it contains no reference to dogs used by persons with disabilities. This means that there is potential for persons with disabilities to suffer negative consequences and a need to consider disability rights in dog-focused legislation.

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I. INTRODUCTION

Dogs are linked to legal constructs of disability. This shows up in a series of cases where courts have been asked to grapple with legal issues regarding guide/assistive dogs or animals and definitions of disability.[1] There is a discernible trend toward expanding the legal meaning of guide/assistive dog to include more animals and more types of relationships between humans and animals.[2] Via this process, the definition of disability and the meaning of the term guide/assistive dog are becoming a single legal entity on some fronts.

In this vein, dog-focused legislation that imposes penalties for dog ownership and increases negative public perception of dogs affects persons with disabilities who rely on guide/assistive dogs. Canadian legal definitions of disability and the role of dogs in the social construction of disability support this thesis. Thus, in this context, regulating dogs is to some extent regulating disability.

It is therefore important to scrutinize dog-focused legislation in terms of its ripple effects into disability rights. To this end, this article examines the Ontario pit bull legislation (OPBL) that came into effect in 2005.[3] Noticeably absent from the debate that led up to the enactment of this legislation was consideration of disability issues.[4] The goal of this article is to provide justification for adding disability issues to debates about this and other dog-focused legislation.

The argument rests upon several pillars that are presented in detail below. Persons with disabilities may be stigmatized because of the visible cultural symbol of a guide/assistive dog, to the point that they may forgo use of a guide/assistive dog when this could be helpful in increasing their ability to function. If public perceptions of dogs generally become more negative as a result of dog-focused legislation, then the negative value of the stigma will increase. Worries about the possibility of penalties for harboring a dog add a negative dimension.

Negative attitudes toward guide/assistive dogs are already evident in case law.[5] The legal definition of guide/assistive dog is expanding to include more types of animals and relationships, like support, rather than just instrumental roles.[6] So a person with a disability who owns a companion animal, including any dog, may suffer penalties—even jail time.[7] This means that an animal need not be a

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[1] *Infra* pt. III. This article uses the term "guide/assistive" animals to refer to the broad, expanding category of assistive animals recognized in case law.

[2] *See infra* n. 56 (citing cases to this effect).

[3] *The Dog Owners' Liability Act*, R.S.O., ch. D.16 (1990) (Can.) (amended by ch. 26, 2000 Sched. A, s. 6; 2005, c. 2, s. 1).

[4] Legis. Assembly of Ontario, *Off. Rpt. of Debates*, 1st Sess., 38th Parliament (Feb. 10, 2005).

[5] *Infra* nn. 92–97 and accompanying text.

[6] *Infra* n. 58 and accompanying text.

[7] R.S.O., ch. D.16 at § 18(1).

traditional guide dog in a harness to evoke negative reactions that could be detrimental to persons with disabilities.

Since the OPBL only came into full effect in fall 2005,[8] at present there is no empirical evidence available to support this argument. It will only be confirmed after an empirical study or when there is a case where disability rights come into conflict with a push to have a dog destroyed and/or owner penalized where a dog has allegedly menaced. The importance of the argument is that it suggests something about the issue of disability. Even if disagreed with, or ultimately proven wrong empirically, it shows that disability issues have been given consideration. The legislation should have included exemptions for guide/assistive dogs. Even with such exemptions, it would still have potentially negative indirect effects on disability issues.

The article begins in part II by setting out the rationale for why it is worthwhile to see dog-focused legislation in terms of its impact on disability rights, including statutory definitions and theory on the social construction of disability. This leads to a review of common law relevant to questions of disability and dogs in part III. With the rationale for a dog/disability connection and a review of common law on the subject in place, the article moves on to consider the specifics of the OPBL in part IV. This part sets out several aspects of the legislation that suggest there will be a negative impact on dogs and their owners. Part V concludes with observations about the relevance of seeing a dog/disability link.

II. THE LINK BETWEEN DOGS AND DISABILITY

The OPBL emerged from a highly charged political climate in Ontario that focused on stricter regulation of dog ownership, including criminalization. For several months, there were impassioned pleas in the media and to the provincial government from people who had been attacked by dogs, were close to someone who had been attacked, or knew of an animal being attacked by a dog.[9] Various experts on animals and animal welfare organizations lined up against the legislation and, in particular, the utility of focusing on a specific breed.[10] It became clear that the government was going to cede to the appeals of parties wanting greater regulation.[11] However, it was not clear whether the government considered what this legislation would mean to persons with disabilities given the relation of guide/assistive dogs to some forms of disabilities.

The OPBL has legal implications for persons with disabilities. Review of secondary analysis, case law, and statutes suggests that there

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[8] R.S.O., ch. D.16.

[9] Bob MacDonald, *Ontarians Bite Back; Pass Pit Bull Ban Fast, Says Bob MacDonald*, Toronto Sun 7 (Oct. 2, 2004).

[10] Sandy Naiman, *Ban on the Run; Controversial Pit Bull Hearings Have Dog Owners Howling in Protest, Sandy Naiman Reports*, Toronto Sun 40 (Jan. 23, 2005).

[11] *Id.*

are grounds for a connection between dogs and disability on two fronts: statutory definitions and the social construction of disability. Statutory definitions point out that dogs are directly legislated into the formal terms that impact various forms of disability rights. Social construction enters into both the lived experience of disability and recent recognition by the courts that such social constructions are a relevant part of disability. Part II considers each of these areas.

A. Statutory Definitions of Disability

The inclusion of guide/assistive dogs in definitions of disability in Canadian provincial legislation reflects guide/assistive dogs as a fundamental part of disability issues. Human rights legislation for Newfoundland, Alberta, Manitoba, Nova Scotia, New Brunswick, and Prince Edward Island include reliance on a guide/assistive dog in the definition of disability.[12] More specific definitions of animal reliance are also found in Saskatchewan (service animal) and Manitoba (guide dog) legislation.[13] The *Ontarians with Disabilities Act* includes "physical reliance on a guide dog or other animal."[14] This exact phrase is also part of the Ontario *Human Rights Code* definition of disability,[15] giving use of, or reliance on, guide/assistive dogs or other animals a particular legal meaning in key human rights legislation.

The inclusion of guide/assistive dogs in statutory disability definitions also shows up in Canadian income tax legislation that provides for medical expenses tax credits associated with getting and maintaining an animal that has assistance training.[16] The tax credit is specifically for the cost of an animals assisting with blindness, deafness, or restricted use of arms and legs.[17] There has been a tendency to give liberal interpretation to medical expenses.[18] However, the wording of the income tax legislation has several effects on persons with disabilities, such as imposing a medical definition on disability and restricting expenses to a narrow group of persons with disabilities.[19] On a positive note, it also allows for the broader term "animals," guide/assistive dogs being just one example.[20]

Evidence from U.S. law shows that guide/assistive dog use is becoming an increasingly important aspect of the legal definition of disa-

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[12] *Human Rights Code*, R.S.N.L., ch. H-14, § 2(l) (1990) (Can.); *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., ch. H-14, § 44(1)(l) (2000) (Can.); *Human Rights Code,* S.M., ch. HI 75, § 9(2) (1987) (Can.); *Human Rights Act,* R.S.N.S., ch. 214, § 9(l) (1989) (Can.); *Human Rights Act* S.N.B., ch.30, § 2 (1985) (Can.); *Human Rights Act,* S.P.E.I., ch. H-12, § 1(1)(l) (1988) (Can.).

[13] *Human Rights Code,* S.S., ch. S-24.1, § 2(1)(d.1) (1979) (Can.); *Human Rights Code,* S.M., ch. HI 75, § 1 (1987) (Can.).

[14] *Ontarians with Disabilities Act*, S.O., ch. 32, § 2.1(a) (2001) (Can.).

[15] *Human Rights Code*, R.S.O., ch. H.19, § 10.1(a) (1990) (Can.).

[16] David G. Duff, *Disability and the Income Tax*, 45 McGill L.J. 797, 810 (2000).

[17] *Id.*

[18] *Id.* at 812.

[19] *Id.* at 842.

[20] *Id.* at 810.

bility and that the term "guide dog" is becoming more inclusive.[21] Indeed, state quarantine laws have come under attack for being discriminatory when they prohibit interstate travel by persons with disabilities and their guide/assistive dogs.[22] Likewise, California's requirement that guide/assistive dogs have official tags before a dog will be allowed access to public buildings may expose to liability those business owners and other parties who rely on this requirement to deny access to disabled persons and their guide/assistive dogs.[23] A paradox exists in the definition of disability in U.S. law involving guide/assistive dogs. If a person is no longer substantially limited in a life activity because of a guide/assistive dog's services, the person may no longer fit the statutory definition of disability and may lose the right to be accompanied by the dog.[24] This issue also arises in Canadian case law, as will be discussed in detail below in part III.

Dog use can be seen as a relevant feature of the definition of disability within the meaning of relevant Canadian and American laws. Therefore, dog use is an important aspect of analysis of the definition of disability. It adds to consideration of how legislation that impacts dog ownership and use impacts the rights of persons with disabilities.

B. Social Construction of Disability

Guide/assistive dogs are common cultural symbols that identify or label someone as a person with a disability.[25] Dogs are therefore a key part of the social construction of disability.[26] When a person with a disability interacts in various forms of social life such as work, family, neighborhood, or school, the presence of a guide/assistive dog forms a particular social identity for the person with the dog.[27] This means that attitudes toward dogs affect attitudes toward persons with disabilities. That is, if legislation fuels the idea that dogs and their behav-

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[21] Susan D. Semmel, Student Author, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L. Rev. 39, 43–44 (2002).

[22] Sande Buhai Pond, *No Dogs Allowed: Hawaii's Quarantine Law Violates the Rights of People with Disabilities*, 29 Loy. L.A. L. 00Rev. 145, 149–51 (1995).

[23] Joshua M. Dickey, *Disabled Access and Dog Tags: "Cleaning Up" Equal Access for Disabled Individuals*, 28 P. L.J. 883, 889–91 (1997).

[24] Dawn Capp & Joan G. Esnayra, *It's All in Your Head–Defining Psychiatric Disabilities as Physical Disabilities*, 23 Thomas Jefferson L. Rev. 97, 104–05 (2000).

[25] Sandra D. Dawson, *Protecting a Special Class of Animal: An Examination of and Recommendations for Enacting Dog Guide Protection Statutes*, 37 Conn. L. Rev. 569, 599 (2004).

[26] *See* Janet Radcliffe Richards, *How Not to End Disability*, 39 San Diego L. Rev. 693 (2002) (describing disability as a function of an impaired person's interaction with the environment).

[27] *See e.g.* Elizabeth Dickson, *Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in Its Interpretation and Application*, 8 Australia & New Zealand J.L. & Educ. 45, 46 (2003) (noting reliance on a guide dog in the definition of "impairment" and disability defined as "the social restriction experienced by a person with an impairment").

ior are dangerous, negative ripple effects pertaining to the social constructions of disability may result.

The potential effect of negative social constructions, or labeling, has gained attention in sociology in the areas of mental illness and disabilities.[28] These theories and empirical observations demonstrate that negative social constructions can magnify problems of marginalization and lower self esteem, thereby setting people into life career patterns that limit the realization of their potential in various spheres of social life.[29] Disability social construction is also linked with conceptions of stigma that point out the importance of human interaction with non-human animals in the development and maintenance of human social identity.[30] The negative effects of stigma are demonstrated specifically in terms of disabilities in a study showing that where a disability is stigmatized, mothers of children with the disability have more stress, and the children are less likely to engage in informal interaction.[31]

Social science research findings suggest that persons with disabilities are discredited socially, and experience heightened discrimination by virtue of the presence of mobility aids such as canes and guide/assistive dogs.[32] Because of this, blind persons tend to have ambiguous attitudes toward such mobility aids.[33] Guide/assistive dogs culturally signify disability.[34] Disability is often socially constructed as negative.[35] Negative views of dogs may increase this negative association and thus have a detrimental effect on persons with disabilities.

If an additional stigma is created by a heightened fear of dogs, it is likely that social discrediting of persons with disabilities will increase. People may even forego or abandon guide/assistive dogs that would im-

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[28] Edwin Lemert, *Social Pathology* 51 (McGraw-Hill Book Co. Inc. 1951); Bruce G. Link et al., *A Modified Labelling Theory Approach to Mental Disorders: An Empirical Assessment*, 54 Am. Sociological Rev. 400, 400 (1989); Thomas J. Scheff, *The Role of the Mentally Ill and the Dynamics of Mental Disorder: A Research Framework*, 26 Sociometry 436, 437–38 (1963); Carl A. Maida, *Campaign Against Stigma: Patients and the Ongoing Therapeutic Revolution*, http://baywood.metapress.com/link.asp?id=2kjdqlr9y66q2v29 (accessed Apr. 25, 2006).

[29] Lemert, *supra* n. 28, at 51; Link et al., *supra* n. 28, at 400; Scheff, *supra* n. 28, at 437–38; Maida, *supra* n. 28, at http://baywood.metapress.com/link.asp?id=2kjdqlr9y66q2v29.

[30] Clinton R. Sanders, *Actions Speak Louder than Words: Close Relationships between Humans and Nonhuman Animals*, 26 Symbolic Interaction, 405, 405–26 (Summer 2003) (available at http://caliber.ucpress.net/doi/abs/10.1525/si.2003.26.3.405;jsessionid=iuolTyne2Uc70CohoN?journalCode=si).

[31] Sara E. Green, *What Do You Mean "What's Wrong with Her?": Stigma and the Lives of Families of Children with Disabilities*, 57 Soc. Sci. & Med. 1361, 1361–74 (2003); *see generally* Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, Inc. 1963) (analyzing socialization strategies of persons with disabilities).

[32] Shlomo Deshen & Hilda Deshen, *On Social Aspects of the Usage of Guide-Dogs and Long-Canes*, 37 Sociological Rev. 89, 89–90 (1989).

[33] *Id*.

[34] *Id.* at 96.

[35] *Id.* at 89.

prove their levels of physical and social participation in order to avoid the social stigma or legal liability. This may undermine the free and comfortable use of guide/assistive dogs by persons with disabilities and thus increase levels of marginalization.

Statutory definitions of disability and social constructions are two complementary rationales for the link between dogs and disability in law. Social constructions of disability, as indicated by guide/assistive dogs, may enter into the lived experiences of persons with disabilities in a negative way when laws regulate dogs. As will be discussed in detail in the next section, courts have come to recognize the importance of social constructions as an aspect of discrimination.

III. COMMON LAW INTEGRATING DOGS AND DISABILITY

Courts have been grappling with concepts of disability, dogs, and their relationship.[36] This forms an interesting history in the development of law on disability. The history is relatively short, in that the cases begin in the 1980s.[37] It is also diverse, in that issues encompass work, divorce settlements, housing, immigration, social access, and health care.[38] In total, it reflects an expanding interpretation of the relationship between animals and persons with disabilities. Courts have shown greater willingness to affirm the rights of persons with disabilities who rely on animals as they have defined disability and guide/assistive dogs.

A. Disability

Definitions of disability have been contentious in case law. Various cases have shown that courts are taking the definition of disability seriously and that the definition has been tested on a variety of aspects.[39] Courts have taken a broad and liberal interpretation of disability that is amenable to the inclusion of guide/assistive dogs and other animals, and have acknowledged an expanding set of relationships between persons with disabilities and animals.[40]

The Supreme Court of Canada has made a significant statement on the nature of disability. In a 2000 case interpreting the equality provisions of the *Canadian Charter of Rights and Freedom* (*Charter*), Justice Binnie offered:

> It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not lo-

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[36] *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (Hawaii's quarantine requirement for guide dogs violated the Americans with Disabilities Act.).

[37] *Majors v. Hous. Auth. of DeKalb County Ga.*, 652 F.2d 454, 454 (5th Cir. 1981).

[38] *Id.* at 455.

[39] *Bragdon v. Abbott*, 524 U.S. 624, 624 (1998).

[40] *Id.* at 631 (expanding "disability" to include HIV carriers).

> cated in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.[41]

This establishes that social construction is one aspect of disability. It also makes a direct link to the social theories of stigma and labeling discussed above. The Supreme Court of Canada has effectively imported the sociological notion of social construction into its legal definitions of disability.

This same principle is reiterated by the Supreme Court of Canada in another 2000 case, *City of Montreal*, with Justice L'Heureux-Dubé writing:

> Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the Charter.
>
> Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience "the loss or limitation of opportunities to take part in the life of the community on an equal level with others." . . . The fact remains that a "handicap" also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground . . . .[42]

This suggests that the Supreme Court of Canada has affirmed the idea that social constructions of disability may be as—or more—important than physical or mental conditions. However, the picture at the lower courts is not as clear.

A 2003 Newfoundland court of appeal case, *Evans v. Health Care Corp. of St. John's*, demonstrates how definitions of disability have been contentious in legal proceedings and how human rights codes definitions have been used to draw distinctions.[43] Ms. Evans did not define herself as having a disability; neither did her employer.[44] However, Ms. Evans' prior excessive use of sick leave over a twenty-year period was used to determine whether she or another employee received a promotion.[45] The other employee received the promotion, while Ms. Evans complained that she was denied the promotion based

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[41] *Granovsky v. Canada (Minister of Empl. and Immig.)*, [2000] 1 S.C.R. 703, 724 (interpreting the *Charter of Rights and Freedom*, Part I of the *Constitution Act* (1982) being Schedule B to the *Canada Act* (1982)).

[42] *City of Montreal & Communauté Urbaine de Montréal v. Commission des Droits de la Personne et des Droits de la Jeunesse*, [2000] 1 S.C.R. 665, 185 D.L.R. (4th) 385, ¶ 79–80.

[43] *Evans v. Health Care Corp. of St. John's*, N.J. No. 61, ¶ 13 (NLCA 13 2003) (available at 2003 NL. C. LEXIS 196).

[44] *Id.* at ¶ 14.

[45] *Id*. at ¶ 3.

on disability.[46] Her complaint was dismissed by an adjudicator appointed pursuant to the provincial human rights code.[47] Her subsequent appeal was denied by both the trial court and the Court of Appeal with costs awarded to the employer.[48]

What is interesting about the case, for the focus of this article, is how contentious definitions of disability are in practice. This recent case reviews, summarizes, and reifies various judgments on the definition of disability. In so doing, it establishes several things. Issues of disability have a "special status" and should be given "liberal" interpretation.[49] Further, there is a recognition of the importance of the social construction of disability.[50] However, courts appear to be setting boundaries in terms of what qualifies as disability.

Definitions of disability are contentious and under revision, as illustrated again in the 1993 case, *St. Paul.*[51] Here a woman filed a complaint under the *Saskatchewan Human Rights Code*, alleging that an employer's failure to hire her because of her obesity constituted discrimination based on disability.[52] The court offered comment that it thought the behavior of the employer was wrong.[53] However, it held that this did not constitute discrimination under the meaning of the Act, since it had not been proved that the obesity resulted from bodily injury, birth defect, or illness.[54] The court observed that the cause of obesity was difficult to know in any given person.[55]

This raises an interesting and perhaps disquieting note. It focuses disability back on physical issues and away from the experience of disability as a social construction. In so doing, it would seem to be a step backward from the view of disability as encompassing social construction that was outlined in *Evans*, *City of Montreal*, and *Granovsky*.[56] While *St. Paul* came before these decisions, it deals with a form of disability that may be on the boundaries of courts' legal definition of disability.[57] Therefore, it may be relevant if the specific example of obesity is revisited by the courts, or if the issue of the relationship of dogs to disability becomes contentious. Broad and liberal Supreme Court definitions may become narrowed or be given stricter definitions as more

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[46] *Id*. at ¶ 4.

[47] *Id*. at ¶ 14.

[48] *Id*. at ¶¶ 5–6.

[49] *Evans,* 2003 N.J. No. 61 at ¶ 23.

[50] *Id.* at ¶¶ 24–25.

[51] *Saskatchewan (Human Rights Commn.) v. St. Paul Lutheran Home of Melville,* [1993] S.J. No. 591, 108 D.L.R. (4th) 671, [1994] 2 W.W.R. 270, 116 Sask.R. 141 [hereinafter *St. Paul*].

[52] *Id.* at ¶ 1 (construing *Saskatchewan Human Rights Code*, S.S., c. S-24.1, ss. 2(d.1), 16(1), 32).

[53] *Id.* at ¶ 11.

[54] *Id.* at ¶¶ 23–24.

[55] *Id.* at ¶ 4.

[56] *Evans*, 2003 N.J. No. 61 at ¶¶ 23–25; *City of Montreal*, 1 S.C.R. 665 at ¶¶ 10–17; *Granovsky*, 1 S.C.R. 703 at ¶¶ 79–81.

[57] *St. Paul*, [1993] S.J. No. 591 at ¶ 1.

conditions are considered. This may include clarification of the question of guide/assistive dog or other animal use.

B. Guide/Assistive Dogs

Courts seem to be moving toward a more expansive definition of guide/assistive dogs as part of a trend toward a principled approach to the legal definition of disabilities.[58] This may be the result of courts trying to deal with statutory definitions that do not work, or that are discriminatory, as applied to specific fact situations.

The case of *Lamb v. Lamb* provides some interesting insights into how the issue of disability in relation to animal use was treated by courts before formal legal definitions of disability involving guide/assistive dog use were in place.[59] This case involved a dispute over property distribution upon the break-up of a marriage.[60] Mr. Lamb wanted to either retain the matrimonial home, forcing his wife to leave, or allow his wife to stay as a tenant who would pay him rent.[61] Mrs. Lamb was deaf and relied on what courts today would readily define as a guide/assistive dog.[62] However, at the time, Mrs. Lamb had to struggle to establish the relevance of the dog to her hearing impairment.[63] This was a crucial aspect of the case since Mrs. Lamb was arguing that being evicted from her home would be a major problem and it was unlikely that she could find an apartment that would allow her to keep the dog.[64]

The judge linked things that would later emerge in definitions of disability. He allowed that the dog "warns and guides her with regard to doorbells, telephones and such" and "is a very necessary part of her life."[65] The court's order was that Mrs. Lamb would live rent-free in the matrimonial home throughout her life.[66] This foreshadowed what has become a part of the definition of disability in many pieces of relevant legislation: reliance on a guide/assistive animal.[67]

The right to access public places with a guide/assistive animal has been tested in the courts. In *Parisian v. Hermes Restaurant Ltd.*, a man with a guide/assistive dog was denied access to a restaurant.[68]

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[58] Denise Reaume has advocated for a more expansive approach to interpretation in her discussion of the *Ontario Human Rights Code*. *See generally* Denise G. Reaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 Osgoode Hall L.J. 113 (2002) (arguing for the development of a common law cause of action for discrimination).

[59] *Lamb v. Lamb*, [1980] O.J. No. 1647.

[60] *Id.*

[61] *Id.* at ¶¶ 12, 25, 29.

[62] *Id.* at ¶ 21.

[63] *Id.* at ¶¶ 21–22.

[64] *Id.* at ¶ 22.

[65] *Lamb*, O.J. No. 1647 at 1705, ¶¶ 21–22.

[66] *Id.* at ¶ 31.

[67] *Supra* pt. II(A).

[68] *Parisian v. Hermes Rest. Ltd.,* [1987] M.J. No. 611, 50 Man. R. (2d) 198, [1988] 3 W.W.R. 118, 47 D.L.R. (4th) 84.

The appeals court found that the Board of Adjudication under the *Manitoba Human Rights Act* erred in finding that it was incumbent upon Mr. Parisian to prove that he was blind.[69] In another case, *Peters*, the issue was whether refusing to allow a guide/assistive dog to accompany a person visiting a patient in a hospital violated the *Saskatchewan Human Rights Code*.[70] The trial court held that it was not discrimination to impose a special restriction upon Ms. Peters when she visited a patient at the hospital with her guide/assistive dog.[71] The appeals court, however, held that placing this restriction on Ms. Peters was discrimination.[72] In so doing, it found that visiting a hospital patient's room constituted using "facilities," unequal access to which constitutes discrimination.[73]

Several cases have arisen where the right to keep dogs in housing has been challenged. In one 1989 case, *Metropolitan*, the owners of a condominium were told by the developer's agent that they could keep a dog in their unit.[74] However, the condominium rules prohibited dogs other than guide dogs in the building.[75] The owners tried to argue discrimination.[76] The court relied on the *Blind Persons' Rights Act* and the *Human Rights Code* to hold that the allowance of persons with disabilities with guide dogs meant that the condominium rule was not discriminatory.[77]

The positive message from this case is that, even prior to the granting of more comprehensive rights, protection for persons with disabilities is currently in place. Courts are already protecting the right to guide/assistive dog-reliant access. However, the nature of the case may suggest that the law has been used as a way to prohibit other kinds of dogs. This may have negative implications as the range of services that animals provide to persons with disabilities increases.

The argument of this article, that there is an overall trend toward more inclusive definitions of dogs in relation to disability, is bolstered by two cases which suggest that restrictive definitions are under attack. In *Nipissing Condominium Corp. No. 24 v. Ferris*, which took place in 1993, a couple was allowed to keep a dog that, although not meeting the formal requirements of a hearing assistance dog, was considered to be a hearing assistance dog by the courts.[78] Another case, *Niagara North Condominium Corp. v. Chassie*, took place in 1999

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[69] *Id.* at 21.

[70] *Peters v. Saskatoon Univ. Hosp.*, [1983] 5 W.W.R. 193, 1 Admin. L.R. 221, 4 C.H.R.R. D/1464, 147 D.L.R. (3d) 385, 23 Sask. R. 123.

[71] *Id.* at 37.

[72] *Id.* at 43.

[73] *Id.*

[74] *Metro. Toronto Condo. Corp. No. 776 v. Gifford*, [1989] O.J. No. 1691, ¶ 10, 6 R.P.R. (2d) 217 [*Metropolitan*].

[75] *Id.* at ¶ 5.

[76] *Id*. at ¶ 11.

[77] *Blind Persons' Rights Act*, R.S.O., 1980, c. 44 (1980) (Can.); *Human Rights Code*, S.O. 1981, c. 53 (1981) (Can.).

[78] *Nipissing Condo. Corp. No. 24 v. Ferris*, [1993] O.J. No. 1504, ¶ 10.

before the Ontario Court of Justice (General Division) in St. Catharines, Ontario.[79] In this case, there was a condominium building with a no pets rule.[80] The condominium corporation made an application to force a couple, the Chassies, to get rid of a cat they kept in their unit.[81] The court dismissed this application and held that a total prohibition of dogs and cats was not reasonable.[82] Muriel Chassie had been diagnosed with depression, high blood pressure, and myalgic encephalitis.[83] The court considered evidence from doctors which suggested that Ms. Chassie would suffer emotional and physical distress if forced to get rid of the cat.[84] It went on to hold that she had a handicap within the meaning of the *Human Rights Code*.[85] It also presented an expansive discussion of the relationship of animals to the question of disability as follows:

> Further, the argument that the cat is merely a companion comfort animal providing emotional support, and not a therapy utility animal like a seeing eye dog, does not stand. Her handicap is mental not physical. In the broad sense, as set out above under the heading *The Therapeutic Value of Pets*, there is a growing awareness of the extent which animals improve the mental and physical well being of people. It has been said that therapy dogs have been shown to lower blood pressure, another medical problem of Mrs. Chassie, and help people relax. In the specific circumstances of this case, a part of Mrs. Chassie's treatment for her mental disorder, depression, is the emotional support provided by her cat. I would, therefore, say that the cat is a therapy utility animal and that its ouster would constitute discrimination against Mrs. Chassie because of her handicap.[86]

The holding in this case has several important elements. First, it outlines a court test that established depression as a disability.[87] Second, it establishes a definition of the relationship between disability and animals.[88] Third, it holds that the relationship need not be instrumental as it was in the traditional model of guide dogs.[89] There can be emotional support or "therapy," as well as a desire to avoid the adverse effects caused by the cessation of such emotional support.[90] This decision has been mentioned and explained in several cases,[91] but has no negative treatment at present.

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[79] *Niagara N. Condo. Corp. No. 46 v. Chassie*, [1999] 173 D.L.R. (4th) 524, 94 O.T.C. 352, 23 R.P.R. (3d) 25.

[80] *Id*. at ¶ 1.

[81] *Id*.

[82] *Id*. at ¶ 94.

[83] *Id*. at ¶ 22.

[84] *Id*.

[85] *Niagara*, 173 D.L.R. at 565–66.

[86] *Id.* at 566–67.

[87] *Id*.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] *Becker v City Park Coop. Apts. Inc.*, [2004] CarswellOnt 5370, ¶ 16; *Metro. Toronto Condo. Corp. No. 601 v. Hadbavny*, [2001] CarswellOnt 3777, ¶ 22.

Another more recent case, however, suggests caution in assuming that the issue was settled by the cases of *Metropolitan*, *Nipissing*, and *Niagara*. In *Scarborough Bluffs Co-operative Inc. v. Loomes*, Ms. Loomes lived in cooperative housing that had bylaws prohibiting dogs but allowing cats.[92] The Scarborough Bluffs Co-operative filed an appeal to the Ontario Superior Court of Justice for a judicial review of an order from the Co-op Board, requiring Ms. Loomes to get rid of her dog.[93] She had a letter from her doctor stating that she "would benefit tremendously if she could keep her dog. She suffers from severe depression and anxiety and the dog has great sentimental value."[94] The doctor also gave testimony at trial that getting rid of the dog could well send Ms. Loomes into clinical depression.[95] The court dismissed the application, but gave Ms. Loomes six months to find a new home for the dog.[96]

This more recent case is paradoxical. The facts are very similar to those in *Niagara*, a case dealt with by a higher level Ontario court. The court in *Scarborough* even cites *Niagara* in its decision, but uses a less inclusive definition of disability, and the *Scarborough* court's holding seems to contradict the higher court.[97] This suggests that the law is uncertain in this area and may be fact driven. Alternatively, it could be that the lower court made an inappropriate finding by not following the decision of a higher Ontario court and that this was not challenged in an appeal. Therefore, while there seems to be an overall trend toward more inclusive definitions of dogs in relation to disability, this is not wholly consistent.

Further evidence of the courts' willingness to expand the definition of animals is provided in *R. v. Olendy*, a criminal prosecution for cruelty to a guide/assistive dog.[98] Mr. Olendy was convicted of causing unnecessary suffering to his guide/assistive dog.[99] Two things in this case are germane to the discussion of legal definitions of animals. First, the court likened the abuse to that of a family member.[100] Second, the court referred to guide/assistive dogs as "special," and worthy and valuable as "life companions."[101] This suggests a significant expansion of the definition of guide/assistive dogs through this definition of disability.

Questions of the legal application of the term disability become more interesting still in the 2002 case of *Soto v. Canada*.[102] This case

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92 *Scarborough Bluffs Coop. Inc. v. Loomes*, [2003] O.J. No. 325, 10–11, ¶¶ 1–2; 7 R.P.R. (4th) 80.

93 *Id*.

94 *Id.* at ¶ 2(g).

95 *Id.* at ¶ 27.

96 *Id.* at ¶¶ 31, 33.

97 *Id.* at ¶¶ 12–14.

98 *R. v. Olendy*, [2001] O.J. No. 1957 (QL) (unpublished opinion).

99 *Id.*

100 *Id.* at ¶ 6.

101 *Id*. at ¶¶ 10, 12.

102 *Soto v. Canada* (Minister of Citizenship & Immig.), [2002] F.C.T. 768.

involved Ms. Soto's request for a finding by the Convention Refugee Determination Division of Immigration and Refugee Canada that she qualified as a refugee.[103] She was visually impaired and had been fired from a job in Chile when she started using a guide/assistive dog.[104] The original determination was that this did not constitute the well-founded fear of persecution that was necessary to qualify for refugee status and that she could earn a living if she remained in Chile.[105] She applied to the Federal Court of Canada, Trial Division for a review. This court found that the evidence did not support the original finding that Ms. Soto could earn a living in Chile.[106] The case was referred back for a rehearing with a new panel,[107] but there is no subsequent information available. However, the case does indicate an expanding definition of dog use as an aspect of disability by entering into questions of immigration.

In total, this case law suggests a move toward a more expansive notion of disability regarding guide/assistive dogs or animals with one cautionary note. It is possible to argue that this notion will expand further in the near future because more cases will arise for several reasons. Population aging in Canada means that the proportion of persons living with disabilities will increase.[108] A growing range of assistive services provided by animals will mean that a greater proportion of the population will rely on assistive animals.[109] As the "baby boomers" move into retirement and later life, they will transition from private houses to condominiums or assisted health care settings with rules pertaining to animals.[110] This will continue a trend toward increasingly inclusive definitions as the "baby boomers" use their political influence and money to fight for the rights of their elderly parents now and their own rights in the near future.[111]

The review of case law, therefore, lends further support to the argument that what affects dogs affects disability rights to some extent. Definitions of disability that involve social construction models of animal assistance are being applied by courts, including the Supreme Court of Canada. Dogs and other animals are increasingly being seen in terms of this model, and courts have shown a willingness to expand the model relating persons with disabilities and their assistive animals to include emotional as well as physical dimensions. Legislation

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103 *Id.* at ¶ 1.

104 *Id.* at ¶ 3.

105 *Id.* at ¶¶ 7, 2.

106 *Id.* at ¶¶ 7–8, 18–21.

107 *Id.* at ¶ 22.

108 The Atlas of Canada, *An Aging Population*, http://atlas.gc.ca/site/english/maps/health/ruralhealth/agingpop/1 (last updated Feb. 16, 2004).

109 Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 Animal L. 69, 70–71 (2005) (dissussing the large portion of people who report health and support benefits from companion animals).

110 *Id*. at 90–93, 103.

111 *See generally id.* at 69 (showing the trend towards more inclusive definition of support animal).

that affects dogs also, therefore, affects disability rights. To this end, one law that restricts dogs and the ownership of dogs, the OPBL, is examined below.

IV. PROBLEMATIC DOG-FOCUSED LAW: THE ONTARIO PIT BULL LEGISLATION (OPBL)

Integration of dogs and disability as a legal construct is seen in statutes, justified by theories of social construction, and enforced by courts. This should not be construed as an argument that this is an exclusive or exhaustive connection. Rather, it is an argument that there is a connection that has entered into the realms of housing, work, health care, immigration, tax law, and criminal prosecution.[112] The areas where this connection appears are likely to increase.[113] This provides a rationale for taking a critical look at dog-focused legislation that may have a negative impact on dogs in general and, through this, on disability issues.

In this vein, the OPBL will likely be problematic for dogs and their owners. This is particularly relevant because the statute defines ownership broadly as the possession or harboring of any type of dog.[114] This could encompass situations ranging from long-term ownership with any kind of dog living in your home to temporary relationships like walking, grooming, or veterinary services. Therefore, the number of persons potentially affected is large and would seem to capture even fleeting relationships between humans and guide/assistive dogs.

Royal Assent was given to the OPBL on March 9, 2005.[115] This was done via The Dog Owners Liability Act Amendment Act that amends the Dog Owners' Liability Act.[116] There were two bills, 161 and 132, that ultimately fed into the final version of the act.[117] This legislation arose in a storm of controversy and competing views.[118] It came into effect as of August 29, 2005.[119]

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112 *Supra* pt. III.

113 *See supra* nn. 109–112 and accompanying text (discussing the aging population and corresponding growth of numbers of persons using guide/assistive animals). This suggests a further expansion into other areas.

114 R.S.O., ch. D.16, §1 (1990); 2005, ch. 2, §1 (2).

115 *Public Safety Related to Dogs Statute Law Amendment Act*, S.O. c.2 (2005); *Dog Owners' Liability Act*, R.S.O., c. D.16 (1990) (available at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90d16_e.htm#BK6).

116 *Id.*

117 Bill 132, *An Act to Amend the Dog Owners' Liability Act to Increase Public Safety in Relation to Dogs, Including Pit Bulls, and to Make Related Amendments to the Animals for Research Act*, 1st Sess., 38th Parliament, Ontario, 2004; Bill 161, *An Act to Amend the Dog Owners' Liability Act*, 1st Sess., 38th Parliament, Ontario, 2004.

118 *See* Alan Barber, *Dog Legislation Council of Canada, Peterborough Ontario Solicitor Report, Banning Certain Breeds of Dogs*, http://www.doglegislationcouncilcanada.org/peterboroughlegal.html (last updated Jan. 21, 2006) (discussing public debate about the proposed law); Marjory Darby, *An Open Letter to Michael Bryant*, http://www.goodpooch.com/BSL/openlettertomichaelbryant.htm (updated Oct. 2005).

119 R.S.O., c. D.16.

Several features of this legislation are worth exploring in conjunction with other relevant municipal legislation. The City of Winnipeg's Pound By-laws are particularly relevant since these laws were held out as a model during the debates that led to the enactment of OPBL.[120] They are also at issue in the only available Canadian case law on challenges to this type of legislation.[121] Below, several features of the Ontario legislation are examined: definitions, proof, impetus for proceedings, guide/assistive dogs, penalties, and process. Throughout this consideration, it is argued that the OPBL is flawed by vagueness and legal contradictions. This is problematic for dogs, dog owners, and people who rely on assistive services from dogs.

A. Definition of Pit Bull

In the OPBL, the definition of pit bull includes "(a) a pit bull terrier, (b) a Staffordshire bull terrier, (c) an American Staffordshire terrier, (d) an American pit bull terrier, (e) a dog that has an appearance and physical characteristics that are substantially similar to those of dogs referred to in any of clauses (a) to (d); ('pit bull')."[122] In determining whether or not a dog is a pit bull, the court *may* regard breed standards established by various official kennels clubs.[123]

The OPBL's definition can be critiqued for vagueness on several grounds. There are specific breeds listed. However, by offering that kennel club standards may be considered to decide on breed, the definition has no specificity. This is seen in use of the word "may" that gives no firm direction as to what will or will not be the standard. This means that it will likely be left to the courts to decide what evidence can be admitted.

B. Impetus for Proceedings

Under the OPBL, an action against a dog or owner is commenced on several grounds. Owning, breeding, transferring, abandoning (other than to a pound), importing, allowing to stray, or training a pit bull to fight is prohibited.[124] For all dogs, a proceeding may be commenced against the owner if "the dog has bitten or attacked a person or domestic animal," or "behaved in a manner that poses a menace to the safety of persons or domestic animals."[125] Proceedings may also be commenced if an owner fails to take reasonable precautions to prevent their dog from biting, attacking, or menacing.[126] It is important to note that the provisions in section 4.1 above apply to all dogs, not just pit

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120 *See Dog Ban More Bark than Bite*, Toronto Sun 18 (Jan. 24, 2005) (noting support for Winnipeg's model pit bull ban).

121 *Manitoba Assn. of Dog Owners Inc. v. Winnipeg (City)*, [1993] M.J. No. 661.

122 R.S.O., c. D.16 at § 1.2.

123 *Id*.

124 *Id.* at § 6.

125 *Id.* at §§ 4.1(a)–(b).

126 *Id*. at § 4.1(c)(1)–(2).

bulls. This becomes problematic because what has come to be known as pit bull legislation has effectively increased the potential criminalization of ownership of any dog regardless of breed.

In this context, the issues of biting, attacking, and/or menacing as the impetus for proceedings are problematic for two reasons. First, there is no direct allowance for whether or not a bite or attack is provoked.[127] This means that proceedings can be started against dogs who are acting in self-defense or in protection of their owners. Second, there is no direct mention of severity, although courts may indirectly consider severity and provocation as factors when making an order for the destruction or restraint of a dog.[128] One can argue that the lack of direct mention may become problematic because such considerations will come relatively late in the process, perhaps after a dog has already been killed by a peace officer or pound operator.

By merely relegating severity and provocation to an indirect and discretionary aspect of proceedings, the Ontario legislation stands in contrast to other examples of dog-focused legislation. For example, the City of Toronto Municipal Code defines "bite" as "[p]iercing or puncturing the skin as a result of contact with a dog's tooth or teeth."[129] The Winnipeg By-law recognizes both severity and provocation by defining dangerous dogs as ones who have—without provocation—caused severe injury to a person or killed a domestic animal.[130] In this legislation, "severe injury" is defined as a "physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery."[131]

In contrast, "attack" and "menace" are undefined terms in the Ontario legislation. Dogs frequently charge at threats, human or animal, to warn.[132] Young or untrained dogs often jump up on people to lick them.[133] Dogs bark, growl, and snap at threats.[134] Dogs defend and refuse to leave vulnerable owners or animals, particularly if the person or animal is sick or injured.[135] Are these attacks? Are the attacks menacing? Yes, in some ways. Indeed having a dog may be recommended

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127 *Id.* at § 1 *et seq*.

128 R.S.O., c. D.16 at § 4.6.

129 *City of Toronto Mun. Code*, c. 349-1.

130 *The City of Winnipeg, The Pound By-law*, No. 2443/79 § 20.1.4.a.1 (available at http://winnipeg.ca/clerks/pdfs/bylaws/2443.79.pdf).

131 *Id.* at § 16.

132 *See* Rich Harden, *Aggressive Pet Could Be Scared or Angry*, Richmond Times-Dispatch 10 (May 10, 1989) (explaining that a dog's aggressive behavior can be an attempt "to protect against perceived threats to the family or property").

133 *See The Last Word*, 179 New Scientist 81 (Aug. 2, 2003) ("By trying to lick human faces a dog is expressing its recognition of our superior social status and inviting us to be friendly.").

134 *See Four-Legged Friends with Attitude*, Torquay Herald Express 28 (July 31, 2004) (describing behavior of dogs used for personal protection and trained security dogs).

135 *See Nestle Purina PetCare Hands Out Annual Awards for Pet Heroism; Purina Animal Hall of Fame Honours Three Gutsy Canines and One Plucky Cat for Life-Saving Efforts*, Canada NewsWire (May 5, 2003) (noting altruistic acts of approximately one

as an effective safety measure in preventing crimes against property or person. But to label protective behavior as contravening a law that has severe penalties deprives owners of their right to ensure their safety in a way that is a deterrent. This may be particularly problematic for guide/assistive dogs, who may act in the interest of the safety of a person with a disability.

Therefore, one can argue that the definition of behavior by a dog that is the impetus for proceedings is overly inclusive. Because of this, the OPBL may function as a *carte blanche* for penalizing dogs and their owners in a context where the legal definition of owner is broad. This is certain to lead to problems and may be particularly relevant in criminal cases where a person's right to self defense through an animal comes into conflict with the Ontario legislation.[136]

Imagine a case where a marginally employed person with a disability needs to work nights at an all night convenience store to support her family. She brings her dog with her for protection at work, and during the trip to and from work. On the way home in the middle of the night, the woman is approached by a person suggesting menace, and her dog barks or bites to protect her. I suspect that a court will be unlikely to find liability on the part of the owner or order the dog killed in these circumstances. Yet the Ontario legislation would seem to legitimize commencing proceedings and punishment in this fact scenario. Ultimately a court could take the circumstances into consideration under the discretion granted in section 4.6 of the OPBL.[137] However, until case law develops on this issue, there is a window of vulnerability for dog owners in general, and for persons with disabilities in particular. Because of this, persons who rely on guide/assistive dogs may be deprived of necessary support.

This vagueness in impetus for proceedings adds to the vagueness in the definition of pit bulls that may lead to Charter challenges. The Supreme Court of Canada has held that laws must be specific in order to not offend section 7 of the Charter.[138] Vagueness in laws offends the principles of fundamental justice set out in section 7 of the Charter.[139] However, it is unlikely that any challenges will take place on this level before the harm is done, and a dog has been killed or removed from the owner. Even if legal challenges do take place, the owner will have to pay for them.[140] Killed dogs cannot be restored on appeal.

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hundred dogs inducted in the Hall of Fame since 1968 for feats, including bringing help to their sick and injured owners).

136 *See* R.S.O., c. D.16 at § 6 (discussing an owner's obligation to prevent a dog from attacking).

137 R.S.O., c. D.16 at § 4.6.

138 *R. v. Nova Scotia Pharm. Socy.*, [1992] 2 R.C.S. 606 (CA.1.).

139 *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (U.K.), c. 11, § 7 (1982) (available at http://laws.justice.gc.ca/en/charter/index.html).

140 However, if the owner wins the suit, he may recover legal fees and expenses from the plaintiff, according to Canada's general "loser-pays" rule. Steven R. Schoenfeld et al., *Fundamentals for Law Firms and Their Clients in the Cross-Border Market*, 21 No. 12 Of Counsel 8, 9 (2002).

This may be particularly problematic for persons with disabilities, who tend to have lower financial status,[141] as highlighted by recent figures on how disability welfare payments mean that people are living below the poverty line.[142] Problems may be exacerbated for women with disabilities.[143] Relatively lower financial status means that person with disabilities will be less able to afford undertaking legal action to enforce their rights.[144]

C. Proof: Presumed Pit Bull

Vagueness in the definition of pit bull and impetus for proceedings becomes more troubling when we look at the onus of proof for establishing that a dog is, or is not, a pit bull. In the Ontario legislation, the owner of a dog has the onus of proving that a dog is *not* a pit bull.[145] This implies a presumption that the owner is guilty, in that the process begins with the assumption that all dogs are pit bulls. Providing evidence that a dog is not a pit bull is, therefore, the equivalent of rebutting a presumption.

The problem of the onus of proof is further complicated by the standard of proof. This is set as the balance of probabilities.[146] A signed certificate from a veterinarian stating that a dog is a pit bull will be accepted as evidence if there is no evidence to the contrary.[147] However, problems are certain to arise when veterinarians attempt to apply the vague definition of pit bull provided in the legislation. This will be exacerbated when kennel clubs offer conflicting definitions. Given that there is confusion and conflict in the category, there is a high likelihood that two veterinarians will come to different conclusions as to which dogs fit the category. This becomes even more complex in section 19(3), which states that the onus on the prosecution to prove beyond a reasonable doubt is not removed.[148] In total, this is at least murky and perhaps contradictory on the issue of onus of proof.

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141 K. Seelman & S. Sweeney, *The Changing Universe of Disability*, 21 Amer. Rehabilitation 2 (1995) (In 1998, the general population in the United States had an average annual household income of $34,017, while that of people with disabilities was about $18,000—a 47% difference.).

142 Natl. Council of Welfare, *Welfare Incomes 2003*, 121 Natl. Council Welfare Rpts. 1, 28 (Spring 2004) (available at http://www.ncwcnbes.net/htmdocument/reportWelfare Incomes2003/WI2003_e.pdf).

143 Catherine Frazee et al., *Now You See Her, Now You Don't: How Law Shapes Disabled Women's Experiences of Exposure, Surveillance, and Assessment in the Clinical Encounter*, in *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* 10 (Dianne Pothier & Richard Devlin, U. British Columbia Press, forthcoming).

144 *See e.g.* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 318 (2001) (noting that a person with a disability may decide against addressing discrimination with a lawsuit because of cost).

145 R.S.O. 1990, c. D.16 at § 4(10).

146 *Id*. at § 4(1.3).

147 *Id*. at § 19(1).

148 *Id.* at § 19(3).

This leads to an uncomfortable combination of a vague definition of pit bull, vague impetus for proceedings, a pit bull presumption, and mixed standards of proof. It suggests a process that is at least confusing and may stack the process against owners. Using the civil standard of proof, a balance of probabilities would seem to evoke the civil principle that the burden of proof lies on the plaintiff.[149] The OPBL legislation attempts to shift this burden to the defendant.[150] At the same time the prosecution retains the onus of proof beyond a reasonable doubt.[151] Given this, it remains to be seen how courts will deal with the Ontario legislation when assessing evidence and liability. This lack of clarity may add to the indices of vagueness outlined above and could lead to Charter challenges regarding principles of fundamental justice.

Another pit bull statute that has been challenged in the courts, the Winnipeg By-law, might be instructive here.[152] This legislation is similar to the OPBL legislation in that it also involves pit bulls.[153] It was challenged in 1993 before the Manitoba Court of Queen's Bench in *Manitoba Assn. of Dog Owners Inc. v. Winnipeg*.[154] In this case, questions of vagueness and discrimination were raised.[155] The court held that the by-law was clear and precise.[156] It rejected the argument that provisions for banning dogs that resemble defined breeds were vague and imprecise, because the legislation required a licensed veterinarian to make the determination.[157] The court also rejected the argument that the law was discriminatory by citing other instances where a court upheld differing fees for dogs in different categories.[158]

This case could provide a road map for how the OPBL will be received by the courts. However, there are key differences between the Winnipeg legislation and the Ontario legislation. The Winnipeg and Ontario laws list the same breeds,[159] and both statutes have a clause addressing similarity to the defined breeds.[160] However, Winnipeg By-law section 16(v) uses the following standard for determining whether the particular breed falls within the breeds contemplated by the law: "[a]ny dog which has the appearance and physical characteristics predominantly conforming to the standards for any of the above breeds."[161] OPBL uses the standard, "an appearance and physical

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149 *See e.g. Bradley Air Servs. Ltd. v. Chiasson*, [1995] CarswellNat 1021 ¶ 4 (noting that the civil burden of proof is "proof on the balance of probabilities").

150 R.S.O. 1990, c. D.16 at § 4(10).

151 *Id.* at § 19(3).

152 *The City of Winnipeg, The Pound By-law*, *supra* n. 130.

153 *Id.* at § 6.

154 *Manitoba Assn. of Dog Owners Inc.*, M.J. No. 661 at § 20.2.

155 *Id.* at ¶¶ 11–14, 25–28.

156 *Id.* at ¶ 12.

157 *Id.* at ¶¶ 11–14.

158 *Id.* at ¶¶ 15–24.

159 *The City of Winnipeg, The Pound By-law*, *supra* n. 130, at § 16(g); R.S.O., c. D.16 at § 1.

160 *Id.* at § 16(g)(v); R.S.O., c. D.16 at § 1(e).

161 *Id.*

characteristics that are substantially similar."[162] The Winnipeg By-law has a higher and more precise standard in its use of "predominantly conforming." Also, the Winnipeg By-law section 16(v) determination is made by a licensed veterinarian,[163] whereas the Ontario determination puts a reverse onus on the owner to prove a dog is not a pit bull,[164] with veterinarian certificates accepted in the absence of other evidence.[165]

Thus, it might be possible to read the decision in *Manitoba* in reverse. The court decision to uphold the legislation can be tied to specific parts of the Winnipeg legislation that demarcate a more reasonable process in determining whether a dog is a pit bull.[166] This can be contrasted with aspects of the Ontario legislation that are less reasonable and therefore stray onto tenuous legal ground. Or, Ontario courts may not feel bound by the decision of a Manitoba court. This will be interesting to follow as legal challenges of the OPBL are put forward in Ontario.

D. Guide/Assistive Dogs

As mentioned above, in the OPBL, an "owner" is defined as anyone who "possesses or harbours" a dog.[167] This suggests that a person who relies on a guide/assistive dog will be defined as an owner for the purposes of the statute. There is no mention of guide/assistive dogs or persons with disabilities in the OPBL. In contrast, the Winnipeg By-law sections 20.1(c) and 20.2 deal with disability and guide/assistive dog issues by allowing any dog owner who is blind, deaf, or hearing impaired, owns a registered guide dog, or is being assisted by a guide dog to let the dog defecate on property other than their own, and by exempting these owners from picking up the dog excrement.[168] Further, unlike people who do not fit the classification, people in this category are allowed to bring their dogs onto school grounds and playgrounds.[169]

This makes it possible to argue that failure to explicitly address guide/assistive dogs in the OPBL is problematic. The Winnipeg By-law has similar provisions regarding the definition of pit bulls.[170] However, the totality of the Winnipeg By-law makes it clear that guide/assistive dogs are included in a special category.[171] The OPBL does

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162 R.S.O., c. D.16 at § 1(1)(e).
163 *The City of Winnipeg, The Pound By-law*, *supra* n. 130.
164 R.S.O., c. D.16 at § 4(10).
165 *Id.* at § 19(1).
166 *Manitoba Assn. of Dog Owners Inc.*, 1993 M.J. No. 661 at §§ 15–22.
167 R.S.O., c. D.16 at § 1(1).
168 *The City of Winnipeg, The Pound By-law, supra* n. 130, at §§ 20.1(h), 20.2.
169 *Id.* at § 20(2).
170 *Id.* at § 16; R.S.O., ch. D.16 at § 1.
171 *The City of Winnipeg, The Pound By-law*, *supra* n. 130, at §§ 16, 18(b), 20(e), 20.2. (These sections distinguish guide dogs by defining them as a separate category and by establishing exceptions to the standard rule for them.).

not. Because of this, cases will likely arise where the access rights of persons with disabilities clash with the rights of persons who claim menace or attack by a dog.

E. Penalties and Process

In the OPBL, upon conviction, persons may be fined up to $10,000, imprisoned for up to six months or both and/or be ordered to make compensation or restitution.[172] Corporations may be fined up to $60,000.[173] Seized dogs must be promptly delivered to a pound.[174] Peace officers may use "as much force as necessary" in executing warrants.[175] This suggests that a dog can be killed by a peace officer during seizure. Conceivably, lethal force can be used against an owner who tries to physically prevent the removal of the dog. This has significant implications for persons with disabilities who rely on guide/assistive dogs. As mentioned above, there is no specific qualification or exemption for guide/assistive dogs in the Ontario legislation. This means that a person with a disability relying on a guide/assistive dog could have their dog seized or killed by a peace officer. Either outcome would impair the ability to function of the person with a disability. The person will, therefore, either be forced to fight for the return of her dog in a state of decreased accommodation, or be temporarily deprived of necessary guide/assistive dog support until the dog is returned, or until it is replaced (if the dog is killed). Either scenario suggests that the Ontario legislation is destined to lead to cases that challenge its lack of attention to persons with disabilities.

Because of this, problems with the lack of specified process may come back to haunt the OPBL as court challenges arise. Instructive in this vein is the 1971 case of *Regina v. Soper*, where an owner appealed an order for the destruction of his dog to the Ontario District Court.[176] The destruction had been ordered under the *Vicious Dogs Act* that contained no right of appeal.[177] The question put to the court was whether the owner could appeal the destruction order.[178] The court held that there was a right of appeal, based on general principles of fair process.[179] It emphasized that a lack of appeal would only be allowable where the penalty involves only a monetary fine.[180] A right of appeal is only implied in the Ontario legislation: section 4.2 of the OPBL speaks

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172 R.S.O., ch. D.16 at §§ 18.1, 18.1.3.

173 *Id.* at § 18.3.

174 *Id.* at § 17.

175 *Id.* at § 16.

176 *Regina v. Soper*, [1970] CarswellOnt 724.

177 *Id.*; *Vicious Dogs Act*, R.S.O., c. 418 (1960).

178 *Regina*, CarswellOnt 724 at ¶ 4.

179 *Id.* at ¶¶ 5–10.

180 *Id.* at ¶ 7.

to the ability to make an interim order pending the appeal of an order.[181] There is no direct mention of the right of appeal.[182]

All of the elements in the OPBL, discussed in detail above, may be problematic for dogs and dog owners. These are broad categories, since the legislation is so broad that it covers all dogs and all persons who harbor a dog.[183] Definitions of categories, procedures, and rights are vague and broad.[184] This means that legal battles are certain to ensue as courts are asked to give specificity to various aspects of the legislation. While it is difficult to speculate on the form this specification may take, it seems relatively certain that there will be significant legal expenses for dog owners and dogs may be removed from their homes or killed while the details are being worked out.

V. CONCLUSION: DISABILITY AND CRIMINALIZATION OF DOG USE

Dog use is a relevant feature of the definition of disability. The link between dogs and disability is seen in statutes, connected to social theory, and reflected in relevant case law. Because of this, any legislation that holds the potential to have a negative impact on dog use is problematic for the rights of persons with disabilities. Various features of the OPBL could have such a negative impact. This is one example of the general principle that dogs and disability rights are a linked legal construct in some aspects.

It is worthwhile to consider disability rights in debates and cases involving dogs and dog-focused legislation. This deliberation may have long lasting benefits in terms of preserving hard fought rights for persons with disabilities. It could also inform legislation involving dogs in general. The model of guide/assistive dog use could show how responsible dog ownership benefits humans in multiple ways. It may also add a dimension to political actions that are aimed at fostering positive relationships between dogs and humans.

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181 R.S.O., c. D.16 at § 4(10).
182 *Id.*
183 *Supra* nn. 145–148 and accompanying text.
184 *Supra* nn. 124–136 and accompanying text.

COMMENT

EVERY DOG CAN HAVE ITS DAY: EXTENDING LIABILITY BEYOND THE SELLER BY DEFINING PETS AS "PRODUCTS" UNDER PRODUCTS LIABILITY THEORY

By
Jason Parent*

Is a pet a "product"? A pet is a product for purposes of products liability law in some states, and, as this article will show, the remaining states should follow suit. Every year, thousands of "domesticated" animals are sold to consumers who are uninformed as to the animals' propensities or to the proper method of animal care. In some instances, these animals are unreasonably dangerous in that they spread disease to humans or attack, and possibly kill, unwitting victims. Improper breeding and training techniques and negligence in sales have led to horrific injury. This comment will demonstrate how merely considering pets as products opens up new theories of liability for the plaintiff's lawyer, offering a deeper base of defendants who are both morally and legally at fault. From the standpoint of a consumer advocate and with concern for both human and animal welfare, the author proposes employing products liability theory to the sale of domesticated animals. By making sellers of "defective" animals accountable for personal injury that these animals cause, the quality of the animals bred and sold will likely improve. Where it does not improve and injury results, the victim may have recourse beyond the confines of contract remedies. Products liability theory is a lawful and needed method for preventing future harm and providing for a healthier human and animal kingdom.

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But the poor dog, in life the firmest friend,
The first to welcome, foremost to defend;
Whose honest heart is still his master's own,
Who labors, fights, lives, breathes for him alone,
Unhonour'd falls, unnoticed all his worth,
Denied in heaven the soul he held on earth:
While man, vain insect, hopes to be forgiven,
And claims himself a sole exclusive of Heaven.[1]
A pet is not an inanimate thing that just receives affection; it also returns it.[2]

I. INTRODUCTION

When a goldfish dies on the same day of purchase, the pet store might replace the goldfish free of charge.[3] The problem would be solved at the store owner's expense, quickly and efficiently. When an eleven-month-old Persian or Pomeranian dies of leukemia,[4] the costs are more burdensome—veterinary bills, expenses for additional care, replacement costs, and the loss of what many would consider a family member.[5] Who should bear these costs? When an inadequately trained assistive animal leads its master into a busy intersection, liability cer-

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[1] *McCallister v. Sappingfield*, 144 P. 432, 433 (Or. 1914) (quoting George Gordon, Lord Byron, *Inscription on the Monument of a Newfoundland Dog*).

[2] *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. City Civ. Ct. 1979).

[3] For example, Fish Express, a world-wide shipper of goldfish and koi, even guarantees that a fish will make a transnational journey safely, ending in one's fishbowl or the fish is replaced for free. Fish Express, *Guarantee*, http://www.fish-express.com/guarant.html (accessed Feb. 7, 2006). However, the company will still charge the buyer for boxing and shipping costs associated with the dead fish. *Id*.

[4] *See e.g*. *State v. Lazarus*, 633 So. 2d 225 (La. App. 1st Cir. 1993) (vacating animal cruelty convictions of breeders of many diseased Persian and Himalayan cats on basis of illegal search and seizure).

[5] *See* Geordie L. Duckler & Dana M. Campbell, *Nature of the Beast: Is Animal Law Nipping at Your Heals*, 61 Or. St. B. Bull. 15, 17 (June 2001) ("[T]he law now recognizes that pet owners and their pets can have a 'relationship,' and that that relationship has an intrinsic worth which can be valued and compensated if destroyed."); *but see Soucek v. Banham*, 524 N.W.2d 478, 478 (Minn. App. 1994) ("[D]amages for the loss of a pet are limited to replacement cost.").

tainly cannot lie with the master.[6] Who should be responsible? When an overly aggressive pit bull, trained to fight by its indigent owner, massacres a small child, the loss imposed upon the child's family is immeasurable and unbearable.[7] To whom can the family turn to right the wrong done to it?

These issues are commonplace and nationwide in scope. Goldfish are easy—there are plenty of fish in the sea. But when a human factor is added—when loss is something more than just mere numbers—things become complex. Although human loss can never truly be recovered, its associated financial burdens can be compensated.

Products liability is a potential answer to the problem of financial compensation. By simply labeling a domesticated animal a "product" for the purposes of products liability theory, tort, and contract law, all of the above situations are financially compensable, often by unorthodox parties with more culpability (and deeper pockets) than one might imagine. Many pet owners undoubtedly feel uncomfortable applying the term "product" to describe a creature to which they have a special and lifelong bond. However, to do so will equally benefit animal and owner alike.

This comment will demonstrate how merely considering pets as products opens new theories of liability for the plaintiff's lawyer, offering a deeper base of defendants who are both morally and legally at fault. Part II of this comment discusses the term "product" as defined through statute and case law. It proves that pets comfortably fit within any definition of the term and, thus, are susceptible to products liability theories. Part III incorporates pets into negligence, strict liability, and warranty claims, the primary claims under the guise of products liability law. Part IV discusses the multi-faceted implications of deeming pets as products, its public policy concerns and its adverse effects. Finally, the conclusion of this comment advocates a nationwide policy of applying products liability theory to the sale of all domesticated animals and offers some solutions to properly institute and enforce this proposal.

Simply conceding that a pet is a product will likely reduce the horrors of animal attacks and unnecessary human and animal deaths tenfold. An appropriate and lawful interpretation of a single word can improve our courts in such a manner that every dog will have its day.

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[6] *See Meacham v. Loving*, 285 S.W.2d 936, 937 (Tex. 1956) (overturning a Court of Appeals ruling that a blind pedestrian was contributorily negligent as a matter of law when she was struck by a car while crossing a street with her seeing eye dog).

[7] *See Chase v. City of Memphis*, 971 S.W.2d 380, 381 (Tenn. 1998) (Two pit bulls viciously attacked and killed a woman.); *County of Spokane v. Bates*, 982 P.2d 642, 643 (Wash. App. 1999) (A pit bull mauled a three-year-old girl.).

II. ANIMALS AS "PRODUCTS"

A. Animals and Restatements

Since the inception of the American legal system, one principle has remained unchanged: animals are property, "in many ways no different than a chair or car or other chattel."[8] Further, "[t]he classification of animals as property to be owned and used by humans has had ramifications throughout the law–for example, in the permissible degradation of the environment, the sanctioning of hunting, the legal use of animals in scientific experiments, and the underenforcement of anticruelty laws."[9] Some states have this classification expressly embedded in their statutes.[10] Pets, too, are considered property, but undoubtedly this alone is an inadequate classification:

> [A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property . . . . [Property,] while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection . . . . To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness.[11]

Although most pet owners might not consider their animals as mere property, considering animals as property, and further equating "property" with "product," would benefit the average pet owner.

The unfortunate truth is that some courts short-change the pet owner in two ways. First, since pets are considered property under the law, owners are entitled only to replacement costs or the objective "fair market value" when the animal is negligently destroyed by another.[12] Second, because pets are not "products" for the purposes of products liability theory, plaintiff pet owners, as well as victims of animal vio-

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[8] Duckler & Campbell, *supra* n. 5, at 16; *Soucek*, 524 N.W.2d at 481 ("Soucek cannot recover punitive damages for the loss of his pet because he only suffered property damage."); *see infra* nn. 168–174 and accompanying text (for a discussion of animals as "chattels" in negligence).

[9] Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 Neb. L. Rev. 783, 783–84 (2004).

[10] Or. Rev. Stat. Ann. § 609.020 (2003) ("Dogs are hereby declared to be personal property."); Ariz. Rev. Stat. § 1-215(30) (2006) ("'Personal Property' includes money, goods, chattels, dogs . . . ."); Cal. Penal Code Ann. § 491 (West 1999) ("Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property.").

[11] *Corso*, 415 N.Y.S.2d at 183.

[12] *Anzalone v. Kragness*, 826 N.E.2d 472, 476–77 (Ill. App. 1st Dist. 2005); *but see McCallister v. Sappingfield*, 144 P. 432, 434 (Or. 1914) ("The true rule being that the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree, and may offer the opinions of witnesses who are familiar with such qualities."). This doctrine has since evolved into the "value to the owner" rule. *See Mitchell v. Heinrichs*, 27 P.3d 309, 313 (Alaska 2001) ("The majority rule holds that the proper measure of recovery for the killing of a dog is the dog's fair market value at the time of its death. But other courts have recognized that the actual value to the owner, rather than the fair market value, may sometimes be the proper measure of the dog's value.").

lence or disease, are foreclosed from using product liability principles in court.[13] The terms "property" and "product" are not legally synonymous, especially for purposes of products liability. While all products certainly are someone's property, only in some jurisdictions is the converse true of pets for product liability purposes.[14]

Arguably, the Uniform Commercial Code (UCC) and proposed amendments thereto place animals into an entirely different context.[15] Under the UCC, animals comfortably fit into the definition of "goods."[16] Livestock have been analyzed under UCC provisions,[17] but cases involving house pets are few and far between; however, some courts expressly find dogs and cats classifiable as "goods."[18]

The UCC defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."[19] Certainly, even an elephant is a movable thing when it is bought and sold. Further, the UCC specifically includes "the unborn young of animals" within its definition of "goods."[20] Thus, animals may be considered both "property" and "goods." It is unclear whether "products" are included within the "specially manufactured goods" to which the code refers.[21]

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[13] *See generally Whitmer v. Schneble*, 331 N.E.2d 115, 119 (Ill. App. 2d Dist. 1975); *Anderson v. Farmers Hybrid Cos., Inc.*, 408 N.E.2d 1194, 1199 (Ill. App. 3d Dist. 1980). *Whitmer* is the leading case for the line of cases reasoning that animals are not products for the purposes of strict products liability. *Infra* nn. 66–71.

[14] *See e.g. Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778, 778–79 (N.Y. Misc. 2d 1977) (denying defendant's motion to dismiss based on defendant's claim that a hamster is not a product, thus ruling that a hamster may be a product); *Worrell v. Sachs*, 563 A.2d 1387, 1387–89 (Conn. Super. 1989) (holding that a puppy sold to plaintiff (i.e. his property) was a "product"); *but see Whitmer*, 331 N.E. 2d at 119–20 (holding that a dog, though property of its master, was not a product for purposes of strict products liability).

[15] *See generally* U.C.C § 2-105, 1 U.L.A. 379 (2005); U.C.C. § 2-103, 1 U.L.A. 372 (2005) (proposed amended version).

[16] *See e.g. Wang v. Miss Ark Fisheries*, 1996 U.S. Dist. LEXIS 21489 (N.D. Miss. Oct. 11, 1996) (applying state version of the Uniform Commercial Code to dispute over sale of striped bass fingerlings); *Alpert v. Thomas*, 643 F. Supp. 1406, 1413 (D. Vt. 1986) ("The provisions of the Uniform Commercial Code are applicable to the sale of the [Arabian] stallion in this case."); *Clifton Cattle Co. v. Thompson*, 117 Cal. Rptr. 500, 504 n.3 (Cal. App. 2d Dist. 1974) (citing Ann. Cal. Com. Code § 215) (in a case about a contract for the sale of cattle, stating that "'[g]oods' of course includes animals."); *Bazzini v. Garrant*, 455 N.Y.S.2d 77, 78 (N.Y. Misc. 2d 1982) (upholding District Court's application of the Uniform Commercial Code to the sale of a bird); *Dempsey v. Rosenthal*, 468 N.Y.S.2d 441, 443 (N.Y. Misc. 2d 1983) ("Mr. Dunphy, a pet dog, is considered a 'good' as defined by" the Uniform Commercial Code.).

[17] *See e.g. Anderson*, 408 N.E.2d at 1199 (holding that swine are not "products" under products liability law or the Restatement (Second) Torts § 402A).

[18] *See e.g. O'Brien v. Wade*, 540 S.W.2d 603 (Mo. App. 1976) (holding seller liable under the U.C.C. for breach of warranty regarding the sale of a dog).

[19] U.C.C. § 2-105(1).

[20] *Id.*

[21] *Id.*

Products liability law has been around for nearly half a century.[22] Yet legal definitions of the term "product" are hard to come by, leaving unclear exactly what is included in its definition.[23] The Restatement (Second) of Torts and the works of tort experts are void of any viable definition.[24] The lack of a concrete definition has led to many, often inequitable, interpretations of the term. "Courts in a number of jurisdictions have wrestled with this problem, alternatively turning to the applicable case law, public policy considerations, the Restatement (Second) of Torts, and other sources for guidance."[25] To this day, there is no nationally accepted definition of "product."[26]

With courts issuing different rulings on similar facts,[27] the need for a concrete definition of "product," accepted by a majority of jurisdictions, is clear. Animals sold to consumers must be included in that definition. The controversial Restatement (Third) of Torts: Products Liability attempts to provide a modern definition:

> (a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.
>
> (b) Services, even when provided commercially, are not products.
>
> (c) Human blood and human tissue, even when provided commercially, are not subject to the rules of the Restatement.[28]

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[22] *See Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 461–68 (Cal. 1944) (concurring in judgment that the defendant is liable for an exploding bottle, but expressing a desire to have done so using strict liability theory).

[23] Christopher H. Hall, *Live Animal as "Product" for Purposes of Strict Products Liability*, 63 A.L.R.4th 127, 130 (2004).

[24] *See e.g. Lowrie v. City of Evanston*, 365 N.E.2d 923, 925–26 (Ill. App. 1st Dist. 1977) ("In comment d to section 402A, what appears to be an attempt to define the meaning of the phrase 'sale of any product' resulted in a mere listing of various types of products . . . . [We] note also that no definition of the term 'product' appears in the works of Prosser, the driving force behind strict products liability.").

[25] Hall, *supra* n. 23, at 130.

[26] *Id*.

[27] *Id*. at 130–32.

[28] *Restatement (Third) of Torts: Products Liability* § 19(a)–(c) (1998); Andrew C. Spacone, *Strict Liability in the European Union – Not a United States Analog*, 5 Roger Williams U. L. Rev. 341, 341 n. 2 (2000) ("In 2(b), the American Law Institute adopted a definition for design defect, which moves away from the 'consumer expectation' test set forth in the previous Restatement, towards a test which centers on the feasibility of an alternate design. Such a test is much closer to a negligence concept than to traditional strict liability."); Kristen David Adams, *The Folly of Uniformity? Lessons From the Restatement Movement*, 33 Hofstra L. Rev. 423, 441 n.73 (2004) ("James Henderson and Aaron Twerski, for example, served as Reporters for the highly controversial *Restatement (Third) of Torts: Products Liability*. Henderson and Twerski have stated unequivocally that, 'In no meaningful sense of the term did we "play politics" in our roles as

A few terms in this definition are ambiguous. For example, Merriam-Webster defines "tangible" as "capable of being perceived especially by the sense of touch."[29] Undoubtedly, even a pet sea monkey meets this definition, as do all live pets. Obviously, pets are also distributed commercially, such as in pet stores and through breeders.[30] Further, one certainly does not purchase a service when buying an animal. Yet, in many of the jurisdictions that have addressed the issue, pets are still not regarded as "products" under the law.[31]

The problem must arise from the provision "for use or consumption."[32] Clearly, food is a product,[33] and courts implicitly recognize it as such.[34] Yet, while a live cow is not a "product," it becomes so once killed for human use. Perhaps this oversimplifies the issue, but pets are bought "for use" much like their stuffed toy versions are bought for children. Many buy live pets for the same purpose as a doll or toy—for the enjoyment of the purchaser or ultimate consumer. Further, animals are also bought for work purposes, be it a horse-and-carriage ride around Central Park[35] or a husky-pulled sled race across the Alaskan tundra.[36] Therefore, even under a conservative reading, animals fall within the Restatement's definition of "product."[37]

Perhaps the exemption of human blood from the Restatement's provisions causes courts to deny animals as "products."[38] Blood has been the source of much debate in the area of products liability,[39] and

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drafters of the new Restatement.' Henderson and Twerski go on to state that 'law, fairly articulated and evenly applied must, of necessity, impose constraints . . . . ' 'Thus,' they argue, 'political opposition to the Products Restatement may stem not so much from what it says than from the fact that it says anything at all.'" (citations omitted)).

[29] Merriam-Webster's Online Dictionary, *Tangible*, http://www.webster.com/dictionary/tangible (accessed Feb. 24, 2006).

[30] Hundreds of thousands of cats and dogs are sold commercially in the United States every year; for example, statistics from the Pet Industry Joint Advisory Council (PIJAC) estimate that pet stores sell approximately four hundred thousand puppies annually. Humane Socy U.S., *Get the Facts on Puppy Mills*, http://www.hsus.org/pets/issues_affecting_our_pets/get_the_facts_on_puppy_mills/index.html (accessed Feb. 21, 2006).

[31] *See generally Whitmer v. Schneble*, 331 N.E.2d 115, 119 (Ill. App. 2d Dist. 1975); *Anderson v. Farmers Hybrid Cos., Inc.*, 408 N.E.2d 1194, 1199 (Ill. App. 3d Dist. 1980). *Whitmer* is the leading case for the line of cases reasoning that animals are not products for the purposes of strict products liability. *Infra* nn. 63–67.

[32] *Restatement (Third) of Torts: Products Liability* § 19(a).

[33] *Restatement (Second) of Torts* § 402A cmt. b (1965).

[34] Charles E. Cantu, *A Continuing Whimsical Search for the True Meaning of the Term "Product" in Products Liability Litigation*, 35 St. Mary's L.J. 341, 355 (2004).

[35] *See e.g.* New York Focus, *Central Park Carriage Rides*, http://www.centralpark2000.com/touring/sports_recreation/carriage_rides.htm (accessed Feb. 18, 2006) (showing photos of carriage rides in Central Park, N.Y.C., N.Y.).

[36] *See e.g.* Iditarod Trail Committee, *Iditarod Trail Sled Dog Race*, http://www.iditarod.com (accessed Feb. 18, 2006) (for information about dogsled race across arctic terrain in Alaska).

[37] *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

[38] *Id.* at § 19(c).

[39] Daniel A. Harvey, *The Applicability of Strict Products Liability to Sales of Live Animals*, 67 Iowa L. Rev. 803, 809–10 (1982).

"[m]ost states have enacted 'Blood Shield Statutes' which explicitly state that blood is not a product."[40] It is important to note, however, that some of these statutes look at a blood transfusion as providing a service rather than a product.[41] Typically, the ordinary sale of an animal should not be construed as providing a service. The transaction fits better when characterized as the sale of a product. When the subject of the sale induces the purchase, then the subject sold is a product.[42] Therefore, under the Restatement (Third) of Torts: Products Liability, animals sold in commerce are products.

At least, the language seems to support that conclusion. However, comment (b) of the Restatement should end all debate. It states that "when a living animal is sold commercially in a diseased condition and causes harm to other property or persons, the animal constitutes a product for purposes of this Restatement."[43] Therefore, an animal is a product, but only clearly so for a limited number of situations in which that animal can cause harm.

B. State Legislative and Judicial Constructions

The Restatement (Third) of Torts: Products Liability offers a useful definition of product.[44] But courts and legislatures continue to ignore the only nationally acknowledged definition of "product"[45] and the only law review article relating to the subject, which may be the

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[40] Cantu, *supra* n. 34, at 343 n. 7; *see e.g.* Ala. Code § 7-2-314(4) (Supp. 2005) (Medical use of human blood and blood products is considered rendition of a service and not the sale of such blood or blood products.); Ark. Code Ann. § 4-2-316(3)(d)(i) (2001) (Human blood and related products are not considered commodities but are considered as medical services.); Colo. Rev. Stat. § 13-22-104(2) (2005) (Medical use of human tissues and blood is the performance of a medical service and does not constitute a sale.); Conn. Gen. Stat. § 19a-280 (2003) (Human blood and tissues are not commodities subject to sale, but are considered as medical services.).

[41] *See supra* n. 40 and accompanying text (discussing various blood shield statutes and their treatment of blood as services).

[42] Cantu, *supra* n. 34, at 353.

[43] *Restatement (Third) of Torts: Products Liability* § 19 cmt. b.

[44] *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

[45] *Id.* The ill-received Model Uniform Product Liability Act and the Consumer Product Safety Act (CPSA) also provide definitions of "product," both of which arguably include live animals. Model Uniform Product Liability Act, § 102(C) (reprinted in 44 Fed. Reg. 62,714, 62,717 (Oct. 1, 1979)) ("'Product' means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce."); 15 U.S.C. § 2052(a)(1)(I) (2000) (excluding food from CPSA definition of "product" but not addressing live animals); *see also* 15 U.S.C. § 2052(a)(1) (defining "product" as: "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise."); *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Or. App. 1985) (holding that a rabid skunk is a "product" under product liability law).

most logical and common sense approach to viewing animals sold in commerce.[46]

Unfortunately, restatements, law reviews, and even common sense do not always accurately state the law. As such, the term "product" is subject to widely differential interpretations and "must be examined on a state by state, and sometimes even court by court basis."[47] The broadest legislative definitions are found in the statutes of Arkansas and Tennessee.[48] Nearly identical, the two statutes define "product" as any "tangible object or goods produced."[49] These states seem to adhere to section 19(a) of the Restatement (Third) of Torts: Products Liability.[50]

Louisiana and Indiana created their own definitions of "product."[51] Louisiana's statute refers to a product as a "corporeal moveable," but exempts human organs, tissue, and blood, as well as certain animal tissues.[52] Indiana, on the other hand, "equates a product with 'personalty' at the time it is conveyed, and restricts the application of the term to a transaction which is predominantly a service."[53] However, state legislatures that actually define "product" are rare;[54] if a state legislature chooses to be silent, its courts often do the speaking.[55]

The Restatement (Third) of Torts makes strict products liability simple. In one sentence, the model code sums up the modern trend in products liability theory: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by

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[46] Harvey, *supra* note 39 (Harvey advocates strict liability in animal sales ahead of its time; unfortunately the law has yet to catch up.).

[47] Louis R. Frumer & Melvin I. Friedman, *Products Liability* § 1.03 (Matthew Bender & Co., Inc. 2005).

[48] Ark. Code. Ann. § 16-116-102(2)(1987); Tenn. Code Ann. § 29-28-102(5)(1980).

[49] *Id*.

[50] *Restatement (Third) of Torts: Products Liability* § 19(a)–(c).

[51] La. Rev. Stat. Ann. § 9:2800.53(3)(West 1997); Ind. Code. Ann. § 34-6-2-114(a)(LEXIS 1998).

[52] La. Rev. Stat. Ann. § 9:2800.53(3).

[53] Ind. Code. Ann. § 34-6-2-114(a).

[54] Anita Bernstein, *How Can a Product Be Liable?* 45 Duke L.J. 1, 51 n. 252 (1995) (citing Ariz. Rev. Stat. Ann. § 12-681 (1982); Ark. Code Ann. § 16-116-102; Del. Code Ann. tit. 18, § 7001 (1989); Idaho Code § 6-1402(3) (2006); Ill. Rev. Stat. ch. 110, ¶ 13-213 (1989 & Supp. 1990); Ind. Code Ann. § 33-1-1.5-2 (West 1983 & Supp. 1991); Md. Cts. & Jud. Proc. Code Ann. § 5-311 (1995); Ohio Rev. Code Ann. § 2307.71 (Anderson 1991); Tenn. Code Ann. § 29-28-102; Wash. Rev. Code Ann. § 7.72.010 (West 1992) (1990)) ("Several states have defined 'product' for purposes of strict liability in their statutes."). Other states entirely fail to define the term "product." Frumer & Friedman, *supra* n. 47, at § 1.03 (Connecticut, New Jersey, and Kentucky are just a few of the states that do not define the term at all.).

[55] *See e.g. Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (holding that the intangible thoughts, ideas, and expressive content in games and movies were not "products" as contemplated by the strict liability doctrine); *Condos v. Musculoskeletal Transplant Foundation*, 208 F. Supp. 2d 1226, 1229–30 (D. Utah 2002) (human bone tissue was not a "product" subject to products liability law).

the defect."[56] But not all jurisdictions have adopted strict products liability;[57] few adopt it for the sale of animals.[58] As such, the focus should simply be to include animals as products for the purposes of all claims, not just for the purposes of strict liability.

"The modern rule of strict liability for defective products that turn out to be unreasonably dangerous would, at first blush, appear to afford a basis for relief" from damages caused by living organisms.[59] After Illinois first denied "product" status to animals,[60] other states followed suit. These include Colorado,[61] Missouri,[62] Ohio,[63] South Dakota,[64] and, only recently, Georgia.[65]

Illinois' justifications for the rule were first enumerated in *Whitmer v. Schneble*.[66] There, a female doberman pinscher who had just given birth bit a child in the defendant-owner's home.[67] The defendant, however, filed a third-party complaint against the dog's previous owner, alleging strict liability for selling the defendant an "inherently dangerous" (or defective) product, among other claims.[68] To be successful on this claim, the defendant had to convince the court that the doberman pinscher was, in fact, a product.[69]

The court ruled that for the doberman to be deemed a product, it must meet the following criteria:

> [I]ts nature must be fixed when it leaves the manufacturer's or seller's control. And the product must reach the user without substantial change. The purpose of imposing strict liability is to insure that the costs of injuries resulting from defective products are borne by those who market such products rather than by the injured persons, who are powerless to protect themselves. This purpose would be defeated if [strict liability] were to be

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56 *Restatement (Third) of Torts: Products Liability* § 1.

57 Massachusetts, Delaware, Michigan, Virginia, and North Carolina are all holdouts. David G. Owen et al., *Products Liability and Safety* 170 (4th ed., Foundation Press 2004).

58 For examples of the few jurisdictions that have adopted strict liability for the sale of animals, *see Beyer*, 404 N.Y.S.2d at 778 (strict products liability applied to the sale of diseased hamsters); *Worrell v. Sachs*, 563 A.2d 1387, 1387–89 (Conn. Super. 1989) (strict products liability applied to the sale of a puppy with a parasitic infection).

59 J. W. Looney, *Serving the Agricultural Clients of Tomorrow*, 2 Drake J. Agric. L. 225, 226–27 (1997) (pointing out that courts may have difficulty applying traditional liability rules when the "harmful thing" is a living organism).

60 *Whitmer*, 331 N.E.2d at 119; *Anderson*, 408 N.E.2d at 1199.

61 *Kaplan v. C Lazy U Ranch*, 615 F. Supp. 234, 238 (D. Colo. 1985).

62 *Latham v. Walmart Stores, Inc*., 818 S.W.2d 673, 676 (Mo. App. 1991).

63 *Malicki v. Koci*, 700 N.E.2d 913, 915 (Ohio App. 8th Dist. 1997).

64 *Blaha v. Stuard*, 640 N.W.2d 85, 88 (S.D. 2002) (arguably overruling the Supreme Court of South Dakota's prior decision in *Sybesma v. Sybesma*, 534 N.W.2d 355, 357 (S.D. 1995), which upheld a cause of action for injuries sustained from a domestic animal under negligence or strict liability theory).

65 *Coogle v. Jahangard*, 609 S.E.2d 151, 153 (Ga. App. 2005).

66 331 N.E.2d 115.

67 *Id.* at 117.

68 *Id.*

69 *Id.* at 119.

> applied to products whose character is shaped by the purchaser rather than the seller.[70]

In assuming that a dog's character is shaped by the owner rather than the seller, the court ruled that the doberman pinscher was not a product.[71] However, given current knowledge and scientific advancement in genetics,[72] one could imagine the seller or a third party being at fault as a result of genetically shaping an animal's character. Then again, under some of today's laws, an animal is not always an "animal," much less a "product."[73]

Illinois followed the same logic in *Anderson v. Farmers Hybrid Cos., Inc.*, stating that products liability should not be applied "to products whose character is easily susceptible to changes wrought by agencies and events outside the control of the seller."[74] Further, the court added that animals are not part of "the extensive list of products" enumerated in the commentary of the Restatement (Second) of Torts section 402A and that courts should refrain from using a dictionary to define "product."[75] Section 402A does not exclude animals as products, but nor does it include many items universally accepted as "products."[76] Further, comment (c) of the Restatement seems to interchange "products" and "goods" as if the two are synonyms.[77] This could mean that animals, as "goods," are also "products" under the Restatement.

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[70] *Id.* at 119 (citations omitted).

[71] *Id.*

[72] Today,

> [n]early all breeding of domestic animals is selective as opposed to random. Years ago, before the era of scientific genetics, breeding was done more by phenotype than by pedigree. Race horses tended to be bred by the stopwatch. That was where the money was. Dairy cattle were bred by the volume and quality of their milk, meat animals, by the speed of maturation and ratio of feed to meat, and so on. Later, it was recognized that breeding together closely related animals tended to speed up the process of "fixing" the desired traits within a few generations.

Catherine Marley, *Breeding-Dogs or Pedigrees*, http://www.canine-genetics.com/Assort2.htm (1997). The more knowledge we gain of a particular species' "defective genes," the sooner we can use that knowledge to eliminate these defects through selective breeding. *Id.*

[73] *See* Duckler & Campbell, *supra* n. 5, at 15–16 (explaining how varying definitions of "animal" are found in laws and statutes as well as providing examples of states' definitions).

[74] 408 N.E.2d 1194, 1199.

[75] *Id.* at 1198.

[76] *Restatement (Second) of Torts* § 402A. Section 402A does not expressly denote many things as "products," such as blood, surgical pins, and electricity, which are products in other contexts. *See e.g. N. Suburban Blood Ctr. v. NLRB*, 661 F.2d 632, 638 n.9 (7th Cir. 1981) (explaining that several states recognize blood as a product and a service); *Bowles v. Zimmber Mfg. Co.*, 277 F.2d 868, 875 (7th Cir. 1970) (while the manufacturer of a surgical pin is not an insurer of his "product," he is liable for harm caused by the pin's negligent manufacture); *Bryant v. Tri-County Elec. Membership Corp.*, 844 F.Supp. 347, 352 (W.D. Ky. 1994) (holding that "ordinary electricity" is a product).

[77] *Restatement (Second) of Torts* § 402A cmt. c ("[T]he public has the right to and does expect, in the case of *products* which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their *goods* . . . .") (emphasis added).

Though the court may be uncomfortable using a dictionary to define products, this hesitancy is unwarranted. Merriam-Webster defines "product" as "something produced."[78] Granted, this definition is vague, but when two animals mate we say that they "produce" offspring.[79] Building on this broad dictionary definition, perhaps the court should define "product" according to the current Illinois statutory definition: "any tangible object or goods distributed in commerce."[80]

The later cases from Colorado, Missouri, Ohio, and South Dakota[81] solidified a name for the principle used to deny animals "product" status—"mutability."[82] "Mutability" is the "constant process of internal development and growth" affecting living creatures as well as their "constant interaction with the environment around them."[83] Though this argument is not entirely without merit, it completely ignores the fact that when a person buys an animal there are certain qualities he or she justifiably expects the animal to always have. For example, a person likely does not expect to buy a dog that only has three legs from a pet shop. The buyer expects the dog to have four legs, to always have four legs, and to not have a pre-existing condition that will cause the dog to lose a leg. This example may seem absurd, but less obvious defects such as a cat with leukemia[84] or an animal with a disease transferable to humans are not so absurd.[85] This comment will show that even a dog bite may be the result of a defective product. One buys an animal with the expectation that it is in good health and of sound mind at the time of purchase.[86] If the animal is not, then one can argue that the seller sold a defective product.[87]

On the other side of the argument, New York paved the trail for "product" status for animals,[88] followed by Oregon[89] and Connecti-

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78 Merriam-Webster Online Dictionary, *Product*, http://www.webster.com/dictionary/product (accessed Feb. 19, 2006).

79 Conversely, when an animal is spayed or neutered, it is no longer capable of "producing offspring." Janet Tobiassen Crosby, *Veterinary Q&A—Neutering (Castration) in Dogs and Cats*, http://vetmedicine.about.com/cs/diseasesall/a/neutering.htm (accessed Mar. 26, 2006).

80 735 Ill. Comp. Stat. § 5/13-213(a)(2) (2006).

81 *Blaha*, 640 N.W.2d at 88.

82 *Latham*, 818 S.W.2d. at 676.

83 *Id.*

84 *Lazarus*, 633 So. 2d at 227.

85 *Sease*, 700 P.2d at 1055.

86 *Infra* n. 125.

87 "Defective condition" is defined in *Restatement (Second) of Torts* § 402A, comment g: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Assuming a rabid skunk sold by a pet store is a product, the skunk most certainly seems to fall comfortably within this definition of "defective condition." *See Sease*, 700 P.2d 1054, 1055 (a rabid skunk sold by pet store treated as a product).

88 *Beyer*, 404 N.Y.S. 2d at 779.

89 *Sease*, 700 P.2d at 1058.

cut.[90] In *Beyer v. Aquarium Supply Co.*, the plaintiff became ill after having contact with diseased hamsters sold by the defendant.[91] She brought a strict products liability action against the defendant.[92] The Supreme Court of New York denied the defendant's motion to dismiss, reasoning:

> The purpose for imposing this doctrine in the products liability field is to distribute fairly equitably the inevitable consequences of commercial enterprise and to promote the marketing of safe products. Accordingly, there is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product.[93]

The court further pointed out that a disease in an animal can be just as difficult to detect, if not more so, than a defect in a manufactured product.[94]

Oregon expounded upon the ruling in *Beyer* when a rabid pet skunk was sold to an unsuspecting plaintiff.[95] Consequently, the Court of Appeals of Oregon took an opposite view to that of *Anderson*[96] regarding the Restatement (Second) of Torts section 402A:

> *Comment e* [to section 402A] makes clear that a "product" need not be manufactured or processed:
>
> "Normally the rules stated in this section [402A] will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated."[97]

If a naturally growing, untreated fungi—a living organism—can be a "product" under the Restatement (Second) of Torts,[98] then so should other living organisms.

Further, the Oregon court refused to accept the mutability rule promulgated by Illinois case law and its progeny.[99] The court held that states' strict products liability statutes, which mirror section 402A, "cover products that are subject to both natural change and intentional alteration."[100]

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90 *Worrell*, 563 A.2d at 1389; *Johnson v. William Benedict, Inc.*, 1993 Conn. Super. LEXIS 2605, *2 (Conn. Super. Ct. Oct. 5, 1993).

91 404 N.Y.S.2d at 778.

92 *Id.*

93 *Id* at 779.

94 *Id.*

95 *Sease*, 700 P.2d at 1056.

96 *Anderson*, 408 N.E.2d at 1199 (holding "gilts . . . are not products for purposes of imposing strict liability in tort under Section 402A").

97 *Sease*, 700 P.2d at 1058.

98 *Restatement (Second) of Torts* § 402A cmt. e.

99 *Sease*, 700 P.2d at 1058.

100 *Id.*

Connecticut took its views against the mutability doctrine even further.[101] The Superior Court of Connecticut scoffed at the Illinois-based doctrine, stating that cases following it "inadequately analyze the interrelationship between mutability and product status."[102] Thus,

> While § 402A makes mutability of the product highly significant on the issue of liability in any particular case, it does not speak to the question of product status. Since liability provisions require that the product reach the consumer without substantial change in its condition, a plaintiff cannot prove a case under this theory in the face of such change. But it does not necessarily follow logically, that inability to prove a case because of mutability means that an animal is not a product at all. Rather it means that liability may not attach to that particular product. The argument confuses proof of liability with status.
>
> Not all product change provides exemption—only substantial change. Moreover . . . analogous product statutes do apply to products which are susceptible to change in character over time (e.g., food products, pressurized bottles, etc.)[.][103]

The court further compares "products" to "goods" under the UCC, recognizing the latter's inclusion of "the unborn young of animals."[104]

In 2005, Georgia weighed in on the issue, deciding, like Illinois and its followers, against application of products liability doctrine to pets.[105] But all hope is not lost, as many jurisdictions have yet to rule on the issue, and others, such as Wisconsin,[106] may be headed in the right direction.

The rules for each jurisdiction appear to have been established on a case-by-case analysis.[107] Depending on the grotesque or common-

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101 *Worrell*, 563 A.2d at 1387.

102 *Id.*

103 *Id.* at 1387–88.

104 *Id.* at 1388. This is the converse of South Dakota. *See Blaha* 640 N.W.2d at 88–89 (adopting the holding of the courts of Illinois, Colorado, and Missouri, which have all held that animals, including dogs, cannot be "products" under the Restatement of Torts).

105 *See Coogle*, 609 S.E.2d at 153 ("We are not persuaded by Coogle's attempts to analogize this case involving the transfer of dog ownership to cases involving product liability and the placement of defective products into the stream of commerce. The inherent differences between a pet dog and a manufactured product are obvious, including whether the performance or behavior of these two is reasonably predictable."). Is it not predictable that a dog will bite if provoked? That a young dog will chase a cat? That a dog will kick its leg if one scratches it in just the right spot? The point is that a consumer can reasonably expect a dog to have certain characteristics and not to have others, such as diseases or an overly-aggressive nature. *See infra* n. 125 (explaining consumer expectations).

106 *See Griffin v. Miller*, 417 N.W.2d 196 (table), 1987 WL 29615 (Wis. App. 1987) (denying plaintiff's strict liability claim for the sale of diseased cattle, completely bypassing the issue of whether cattle constitute "products," as if assuming this to be so).

107 Hawaii has literally adopted a case-by-case analysis, refusing to define "product" in any concrete form. Frumer & Friedman, *supra* n. 47, at § 1.03. Cantu states:

> In short, the courts had employed a backdoor approach. They did not start with the issue of whether a product was involved. Instead, they determined whether

place nature of the facts of the first case addressing the issue, the court in question will adopt either the New York or Illinois view. By applying the New York rule to the facts of *Whitmer*, a court, although finding a dog to be a "product," would still find no defect in the doberman pinscher. As the Illinois court provided, "[i]t is common knowledge that dogs bite," especially when a child is viewing its newborn puppies.[108] Thus, as in *Whitmer*, a dog that bites is not always unreasonably dangerous. Applying the Illinois rule, however, to the rabid skunk in *Sease*,[109] reasonable people could not disagree that it is good public policy to hold a seller of a rabid skunk strictly liable. Again, it seems the rule adopted by the jurisdiction correlates strongly to the lack or presence of egregious facts.

If one considers the "tales of the heinous puppy farms where cages are periodically moved, and breeding takes on the characteristics of a breeding assembly line, one could reason that we do in fact have a product."[110] As the next section will show, establishing a pet as a product opens doors to new claims, more defendants, and higher damage awards.

III. PRODUCTS LIABILITY CLAIMS

"[P]laintiffs in most states typically ground a claim for injuries arising from a product's design on any [or all] of the conventional triumvirate of negligence, breach of implied warranty of merchantability, and strict liability in tort."[111] In this section, the author will address each of these claims individually, pointing out the benefits and disadvantages of each claim. As noted in part II(B) of this comment, courts are split as to strict products liability for animal defects. Negligence and warranty claims, however, are more common (although far from commonplace), but they fail to apply products liability law or to view animals as "products."[112] Not surprisingly, the jurisdictions in which claims are brought most often and in which such claims are likely to

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> the transaction was one which should come under the umbrella of strict products liability, and then concluded if necessary that they were dealing with goods . . . [leading] to some unusual results.

Cantu, *supra* n. 34, at 348–49.

[108] *Whitmer*, 331 N.E.2d at 118.

[109] *Sease*, 700 P.2d at 1057–58.

[110] Cantu, *supra* n. 34, at 362.

[111] Owen et al., *supra* n. 57, at 235.

[112] *See e.g. Radoff v. Hunter*, 323 P.2d 202 (Cal. Dist. App. 1958) (negligence applied to dog bite); *Slack v. Villari*, 476 A.2d 227 (Md. Spec. App. 1984) (negligence applied to unleashed dog); *Cahill v. Blume*, 801 N.Y.S.2d 776 (table), 2005 WL 1422133 (N.Y.C. Civ. Ct. 2005) (breach of contract applied to puppy sold with health problems); *Dempsey*, 468 N.Y.S.2d 441 (breach of contract applied to defective poodle); *Bazzini*, 455 N.Y.S.2d 77 (U.C.C. applied to defective bird).

succeed are the same jurisdictions in which animals fit within the definition of "product."[113]

A. Strict Liability in Tort

> Strict liability as applied to animals is not a new phenomenon. The concept has been invoked in any one of three distinct scenarios. One centers upon animals that possess distinct barnyard characteristics and that trespass upon the land of another. The second involves domesticated animals with known vicious tendencies, and the third includes animals that are described as being ferae naturae, or those whose natural habitat is the wild. The law has never hesitated to impose strict liability in these cases. In fact, it is one of the seven areas of law in which strict liability has been traditionally applied.[114]

Yet the law hesitates to apply strict products liability to the sale of domesticated animals.[115] The trespass and wild animal statutes are formidable pieces of legislation,[116] but they do nothing to help those injured by the sale of a pet or other domesticated animal. Similarly, the vicious or dangerous animal statutes have awarded some plaintiffs

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[113] New York is the forerunner in successful claims against pet stores under a host of theories. *See e.g. Cahill*, 2005 WL 1422133 (Plaintiff recovered medical costs against pet store owner for puppy sold with health problems.); *Dempsey*, 468 N.Y.S.2d 441 (Plaintiff recovered purchase price for defective poodle.); *Bazzini*, 455 N.Y.S.2d 77 (Plaintiff recovered purchase price for defective bird.); *Beyer*, 404 N.Y.S.2d 778 (plaintiff allowed to proceed in action against distributor after becoming ill from contact with diseased hampsters). On the contrary, Illinois is the trendsetter for denying claims that apply products liability theories to animals. *See e.g. Whitmer*, 331 N.E.2d 115 (plaintiff's strict products liability claim denied on the ground that a dog is not a "product"); *Anderson*, 408 N.E.2d 1194 (plaintiff"s claims under products liability theory denied because baby pigs are not "products").

[114] Cantu, *supra* n. 34, at 359–60, n. 58 (citations omitted). The seven different areas of law that apply strict liability are: (1) trespassing, wild or vicious animals (*see e.g. Lindsay v. Cobb*, 627 P.2d 349 (Kan. App. 1981); *May v. Burdett*, 115 Eng. Rep. 1213 (Q.B. 1846)); (2) abnormally dangerous activities (*see e.g. Fletcher v. Rylands*, 159 Eng. Rep. 737 (Q.B. 1865)); (3) libel (*see e.g. E. Hulton Co. v. Jones*, [1910] A.C. 20 (H.L. 1909)); (4) trespass (*see e.g. Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 1999 U.S. App. LEXIS 21583 (7th Cir. 1999)); (5) vicarious liability (*see e.g. Oke Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768 (9th Cir. 2002)); (6) nuisance (*see e.g. Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001)); (7) misrepresentation (*see e.g. Herzog v. Arthrocare Corp.*, 2003 U.S. Dist. LEXIS 5224 (D. Me. 2003)).

[115] *Supra* n. 13.

[116] The Restatement (Third) of Torts provides:

> (a) An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.
>
> (b) A wild animal is an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.

Restatement (Third) of Torts: Liability for Physical Harm § 22(a)–(b) (Proposed Final Draft No. 1 2005). How does this apply to tropical birds, snakes, tarantulas, and ferrets, all of which are sometimes pets?

compensation for their injuries, primarily in dog bite cases,[117] but the statutes are narrow in scope and exclude liability from all other potential parties other than the owner or possessor of the animal.[118]

Strict products liability, where enacted,[119] largely incorporates the Restatement (Second) of Torts section 402A.[120] This provision states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[121]

Under this provision, the court must not only find that an animal is a "product," but that it was also sold in a defective condition rendering it unreasonably dangerous to the consumer or user.[122] "Unreason-

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[117] *See e.g. Hamby v. Haskins*, 630 S.W.2d 37, 38 (Ark. 1982) (affirming judgment awarding plaintiff $12,000 in damages for injuries received from a dog bite); *see also County of Spokane*, 982 P.2d at 645 (noting that through its statute Spokane County clearly wanted to make dog owners criminally liable for the vicious acts of their dogs).

[118] 510 Ill. Comp. Stat. 5/15 (2005) (setting forth a complex process to determine whether a dog is vicious: a thorough investigation, veterinarian reports, and court proceedings which must result in clear and convincing evidence of viciousness, while providing several exceptions to the law when a dog cannot be found vicious); *see Restatement (Third) of Torts: Liability for Physical Harm* § 23 (Proposed Final Draft No. 1 2005) ("An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harms caused by the animal which ensue from that dangerous tendency.").

[119] *See* Owen et al., *supra* n. 57, at 170 (noting that only five states, Massachusetts, Delaware, Michigan, Virginia, and North Carolina, have yet to enact strict products liability).

[120] *See e.g. Worrell*, 563 A.2d at 1387–88 (holding that seller of a puppy that infected buyer with a disease may be held liable under strict product liability if the puppy was sold in the diseased condition); *Phipps v. Gen. Motors Corp*., 363 A.2d 955, 963 (Md. 1976) (Adopting § 402A of the Restatement (Second) of Torts, the Maryland court held that an automobile manufacturer who placed a defective automobile into the stream of commerce is liable for injuries caused by that automobile.); *see also Vincer v. Esther William All-Aluminum Swimming Pool Co*., 230 N.W.2d 794, 799 (Wis. 1975) (noting that while the court adheres to strict liability theory in § 402A, a swimming pool manufacturer was not liable for child's injuries from falling into pool when the condition was an obvious one of which the consumer should have been aware).

[121] *Restatement (Second) of Torts* § 402A.

[122] Looney, *supra* n. 59, at 227.

ably dangerous" is defined in comment i of § 402A.[123] "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[124] Courts have held that an ordinary consumer should not expect an animal bought from a pet store to be diseased or rabid.[125] In many jurisdictions, however, this "consumer expectation" test is but one factor in an overall risk-utility analysis.[126] The existence of feasible, safer alternative products, as well as regulations and standards within the trade, also contribute to the ultimate decision of whether a product sold is unreasonably dangerous.[127] "There is no duty to produce an accident-proof product or one that is foolproof."[128] All products are potentially dangerous; the standard is whether the product is unreasonably dangerous.[129]

Further, open and obvious dangers may foreclose a successful strict liability claim.[130] As the *Whitmer* court stated:

> A reasonable man is required to have such knowledge of the habits of animals as is customary in his community. Thus, he should know that certain objects are likely to frighten horses and that frightened horses are likely to run away. He should know that cattle, sheep and horses are likely to get into all kinds of danger unless guarded by a human being, that bulls and stallions are prone to attack human beings and that even a gentle bitch, nursing her pups, is likely to bite if disturbed by strangers.[131]

In short, "when man and other animals interact, it is usually man that gets the short end of the stick."[132] The *Whitmer* court's point is welltaken; however, disease, parasites, and even aggressive tendencies may not be open and obvious to the pet buyer. Breeders, trainers, and sellers are privy to knowledge of an animal's heritage, pedigree, demeanor, characteristics, and suitability that the buyer often cannot hope to amass prior to purchasing the animal. As Part IV of this comment will show, all of these parties play an important role in animal

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123 *Restatement (Second) of Torts* § 402A cmt. i.

124 *Id.*

125 *See generally Worrell*, 563 A.2d at 1389 (citing the "Pet Lemon Law," Conn. Gen. Stat. Ann. § 22-344b (1997)) (suggesting that when the consumer purchased a diseased puppy from a pet store, she should not expect that it might have a dangerous disease); *Sease*, 700 P.2d at 1058 (suggesting that the consumer should not expect that skunk purchased from pet store was rabid because at the time of purchase, the disease was in the incubation stage).

126 *Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky. 1980).

127 Owen et al., *supra* n. 57, at 68.

128 *Whitmer*, 331 N.E.2d at 119 (citing *Fanning v. LeMay*, 230 N.E.2d 182 (Ill. 1967)).

129 *Restatement (Second) of Torts* § 402A(1).

130 *Brown v. Sears, Roebuck & Co*., 328 F.3d 1274, 1282–83 (10th Cir. 2003) (a riding lawn mower going in reverse is an open and obvious danger that precludes strict liability for injury to a small child standing behind it).

131 *Whitmer*, 331 N.E.2d at 118.

132 *Blaha*, 640 N.W.2d at 88.

development which, if negligently handled, could produce an unreasonably dangerous animal.

The elements of a strict products liability claim are fairly straightforward. The plaintiff must establish that:

> (1) the product at issue was in a defective condition at the time it left the possession or control of the seller, (2) that [the product] was unreasonably dangerous to the user or consumer, (3) that the defect [in the product] was a cause of [plaintiff's injuries or damages], and (4) that the product was expected to and did reach the consumer without substantial change in its condition.[133]

Often, the first two elements are essentially the same, as a defective condition is unreasonably dangerous in many products. Once a defect is established, the rest can almost always be proved by circumstantial evidence.[134]

Of course, a claim under section 402A is not immune to affirmative defenses. Misuse of a product, in this case inadequate training or control over one's pet, for example, could stave off liability for the seller.[135] Where a buyer is adequately warned about an animal's dangerous propensities or characteristics, the seller may have another defense if the buyer fails to act in accordance with the seller's warnings.[136] Further, as in *Whitmer*, the buyer may assume the risks of known or obvious dangers.[137] In addition, if the seller is not "engaged in the business of selling such a product," a strict liability claim is barred.[138] Finally, if the product undergoes *substantial* change after sale, the seller is not liable for a resulting, unreasonably dangerous condition.[139]

Perhaps the most important aspects of strict products liability are that there is no fault requirement,[140] there is no privity requirement,[141] and awards for physical harm and property damage are attainable.[142] By shifting "the risk of loss to those better able financially to bear the loss," strict products liability is an equitable means of protecting consumers who justifiably rely on sellers and manufacturers to provide a reasonably safe product.[143] This reasonable reliance "is better fulfilled by the theory of strict liability than by traditional negligence or warranty theories."[144] The importance of strict liability may

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133 *Phipps*, 363 A.2d at 958 (interpreting § 402A).

134 Cantu, *supra* n. 34, at 369.

135 *See Phipps*, 363 A.2d at 960; *Restatement (Second) of Torts* § 402A cmt. h. (A seller is not liable for abnormal use or handling.).

136 *Id.*; *Restatement (Second) of Torts* § 402A cmt. j.

137 *Whitmer*, 331 N.E.2d at 118; *Phipps*, 363 A.2d at 960; *Restatement (Second) of Torts* § 402A cmt. n.

138 *Restatement (Second) of Torts* § 402A(1)(a).

139 *Worrell*, 563 A.2d at 1388; *Restatement (Second) of Torts* § 402A(1)(b).

140 *Restatement (Second) of Torts* § 402A(2)(a).

141 *Id.* at § 402A(2)(b).

142 *Id.* at § 402A(1).

143 *Phipps*, 363 A.2d at 958.

144 *Id.*

be most evident when used as a third alternative to impose liability, used with or without warranty and negligence claims, because strict liability does not carry all the limitations of warranty and negligence claims.[145] "For example, in situations in which the seller gives no express warranty and conspicuously disclaims all implied warranties, the contributorily negligent buyer's recourse under contract and negligence theories is foreclosed."[146] So when in doubt, bring them all and see which one sticks.

Another issue is choosing the terminology for strict liability claims for defective animals. Of the three categories of product defect—manufacturing, design, and warning—it seems likely that, in considering an animal as a "product," a buyer could claim a manufacturing defect in an animal born with a congenital disease.[147] It certainly "departs from its intended design," as the breeder likely intended healthy young.[148] Likewise, a parasitic bird may very well be a design defect, as it certainly has a "reasonable alternative design" (a healthy bird) and the omission of that "alternative design renders the product unreasonably safe."[149] Failure to warn a buyer of the viciousness of a particular animal may render that animal unreasonably dangerous, so warning defects are applicable to animal sales, as well.[150] Thus, strict products liability should be available for all possible animal defects. The terminology, however, is not the important consideration. A defect is a defect, and when one purchases an unreasonably dangerous appliance, automobile, food product, herbicide, or animal, injury is inevitable. The consumer should be protected from all injuries from defect in the same manner, regardless of the product.

B. Negligence

For those courts that believe strict products liability for animal sales would "yield the harsh result of holding [defendants] responsible

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145 Harvey, *supra* n. 39, at 804.

146 *Id.*

147 *Restatement (Third) of Torts: Products Liability* § 2. A product:

> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id.

148 *Id.* at § 2(a).

149 *Id.* at § 2(b).

150 *Id.* at § 2(c).

as absolute insurers of the health of a living organism . . . [l]iability may, however, still be imposed upon such defendants for the sale or distribution of animals under a theory of negligence."[151] Under a standard negligence claim, a plaintiff must prove four elements: (1) a legal duty, (2) a breach of that duty, (3) causation, and (4) damages.[152] Under this theory, one who sells animals must, at a minimum, maintain a standard of ordinary care when conducting transactions with buyers.[153] This duty is applicable to all sellers throughout the vertical chain of distribution.[154]

The amount of care that is "ordinary" or "reasonable" is "proportionate to the extent of the risk involved."[155] This is best illustrated by Judge Learned Hand's famous formula:

$$B < P \times L = N^{156}$$

In not-so-simple terms, if the burden or costs for a defendant to provide a safer product (B), is less than the probability of injury from the current incarnation of the product (P), multiplied by the loss or value in damages of each injury sustained (L), then the defendant is negligent in providing that product (N).[157] In simpler terms, if it is

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[151] *Malicki*, 700 N.E.2d at 915. Strict liability does not have the affect of making defendants absolute insurers. Many feel, and this comment agrees, that "the requirement of proof of a defect rendering a product unreasonably dangerous is a sufficient showing of fault on the part of the seller to impose liability without placing an often impossible burden on the plaintiff of proving specific acts of negligence." *Phipps*, 363 A.2d at 958.

[152] Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 108 (4th ed., West 2001).

[153] *Malicki*, 700 N.E.2d at 915 (citing plaintiff's expert's opinion that pet store owners should inform buyers of potential diseases the animal could carry and should recommend that the buyer have the animal examined by a veterinarian). Arguably, the standard of care for the pet seller is one of a reasonable seller of animals, a more specialized standard specific to the trade rather than mere ordinary care. *See Rhoads v. Serv. Mach. Co., Inc.*, 329 F. Supp. 367, 376 (E.D. Ark. 1971) (stating that the "real issue" for negligence is whether a person of "ordinary prudence" exercising "ordinary care" would have taken certain measures to protect buyers from an item's dangers); *Roach v. Ivari Intl. Ctrs., Inc.*, 822 A.2d 316, 322 (Conn. App. 2003) ("The standard of care in the ordinary negligence case is the care that a reasonably prudent person would exercise under the same circumstances.").

[154] *See Malicki*, 700 N.E.2d at 915 (stating that no evidence was given as to the wholesaler's, manufacturer's, or breeder's negligence, thus only the retailer could be found negligent in this case). "A legal duty is one arising from contract between the parties or the operation of law." *Coogle*, 609 S.E.2d at 152.

[155] *Restatement (Second) of Torts* § 395 cmt. g.

[156] *U.S. v. Carroll Towing Co., Inc.*, 159 F.2d 169, 173 (2d Cir. 1947).

[157] *Id*. Extended to strict liability, "N" could signify a "defect," an "unreasonably dangerous product," or "strict liability." Some courts, as in *Malicki*, could be denying strict liability but allowing potential negligence claims on the same facts, in essence, allowing strict liability via negligence. 700 N.E.2d at 915 (declining to extend product status to a parrot, but stating that "[l]iability may, however, still be imposed upon the defendants for the sale or distribution of animals under a theory of negligence."). Practically speaking, there may not be much difference in proving fault than in proving a product defect. The risk-utility analysis "has proved over the years to be helpful when attempting to

cheaper to make something safer than it would be to pay out foreseeable damages for the product in its current state, the manufacturer or supplier is negligent.[158]

However, suppliers may be negligent in numerous situations. In addition to instances in which the product itself is unreasonably dangerous, sellers ought to have "a duty to warn of a latent defect, which, if known or constructively known, constitutes a breach of duty of ordinary care to a business invitee."[159] This includes the failure to instruct on proper use of a product where such a duty may be owed.[160] Thus, it seems "reasonably foreseeable that if a person places into the stream of commerce an animal or other instrumentality known by him to be dangerous, without disclosing the dangerous nature of the animal or object, injury to a third party can result."[161] Such a third party certainly should be entitled to recompense from the person placing the animal into the stream of commerce. Further, in some jurisdictions, negligence claims may call for the "recovery of damages for mental distress absent physical injury . . . where there is an 'independent basis of liability.'"[162]

The Restatement (Second) of Torts section 518 provides for liability in negligence for domesticated animals that are not abnormally dangerous:

> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,
>
> (a) he intentionally causes the animal to do the harm, or
>
> (b) he is negligent in failing to prevent the harm.[163]

This provision only covers owners or possessors of animals and has no impact on the transaction between an animal seller and a buyer.[164]

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determine whether the defendant was negligent, as well as in strict products liability cases where we are attempting to prove that the product at issue has been mis-designed or mis-marketed." Cantu, *supra* n. 34, at 372.

158 Cantu, *supra* n. 34, at 373–74.

159 *Malicki*, 700 N.E.2d at 916 (The latent defect at issue was a bird's "parrot fever.").

160 *Sease*, 700 P.2d at 1059.

161 *Coogle*, 609 S.E.2d at 152.

162 *Sease*, 700 P.2d at 1058 n. 7 (citing *Meyer v. 4-D Insulation Co.*, 652 P.2d 852, 854 (Or. App. 1982)).

163 *Restatement (Second) of Torts* § 518(a)–(b) (1977).

164 The type of negligence that exposes an animal owner who is unaware of the animal's dangerous propensities occurs in the failure to control the creature or prevent the harm caused by it. The degree of control required is generally held to be that which would be exercised by a 'reasonable person.'

Slack, 476 A.2d at 231 (citing *Arnold v. Laird*, 621 P.2d 138, 141 (Wash. 1980) (en banc); *Restatement (Second) of Torts*, § 518).

Negligence is a broad term, encompassing potentially unlimited relationships and situations.[165] However, it is not without its downsides. Negligence requires "proof of lack of ordinary care and proximate cause, both of which [are] questions of fact for the jury."[166] The degree of control over an animal, subject to its own behavioral processes, that constitutes ordinary care may prove difficult for a jury to determine. Further, in the case of an animal bite, a jury may likely hold the animal itself as the proximate cause of an injury. Finally, injuries must be foreseeable for a negligence claim to succeed.[167]

Perhaps the best status to be given an animal for the purposes of negligence, and the view this author advocates, is that of a "chattel."[168] The Sixth District Court of New York adopted this view in the sadly humorous case of *Bazzini v. Garrant*:

> This is a sad tale (or is it a tail) of the noble, but late toco toucan bird (hereinafter Bird) . . . . Bird suffered a seizure. (There was no evidence of fowl play.) The plaintiff contacted the veterinarian who advised her to coax Bird back to health by having him sip Gatorade. Like a champion, Bird seemed to recover. But this recovery enjoyed only the reign of a lame duck politician. Seven days later Bird was dead . . . . In life Bird was a bird – an animal of feelings, of flesh and blood and feathers. It is one of the sad aspects of the law that the heat and passion of life so often translate to cold, unfeeling words upon a page. This is such an instance for in death, notwithstanding his memory, Bird is a chattel.[169]

And it is logical to deem an animal a chattel. If an animal is both a "good" and mere property, then it stands to reason that an animal can be described as a chattel, since courts indiscriminately use all three terms to describe animals.[170]

To consider animals "chattels" would give new depth to negligence claims. The Restatement (Second) of Torts section 388 provides:

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165 *Restatement (Third) of Torts* § 3 ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

166 Cantu, *supra* n. 34, at 364; *Webster v. Pacesetter Inc*., 259 F. Supp. 2d 27, 38 (D.D.C. 2003) (Plaintiff must prove defendant's lack of due care.); *Timmons v. Ford Motor Co*., 982 F. Supp. 1475, 1480 (S.D. Ga. 1997) (Speeding, not the automobile's design, was the proximate cause of the accident.).

167 *Winnet v. Winnet*, 310 N.E.2d 1, 4 (Ill. 1974).

168 *See Bazzini*, 455 N.Y.S.2d at 78; *Nashville C. & St. L. Ry. v. Bingham*, 62 So. 111, 112 (Ala. 1913); *Boswell v. Laird*, 8 Cal. 469, 496 (Cal. 1857); *Chicago & Aurora R.R. Co. v. Thompson*, 19 Ill. 577, 584 (Ill. 1858) ("Chattels personal are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place.").

169 *Bazzini*, 455 N.Y.S.2d at 78. If one can get past the court's "fowl" attempts at humor, the court introduces a new term into the discussion. An animal may be a product, a good, property, or a chattel. *See supra* nn. 44–45 and accompanying text (concluding that animals can be products); *supra* n. 10 and accompanying text (discussing animals as property similar to chattel); *supra* n. 16 and accompanying text (discussing animals as goods).

170 *See e.g. People v. Dyer*, 95 Cal. App. 4th 448, 456 (Cal. App. 4th Dist. 2002) ("We recognize that dogs are considered personal property or chattels for some purposes.").

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[171]

This all encompassing provision could find a supplier of animals, either a breeder or store owner, liable for negligently placing dangerous or harmful animals into the stream of commerce.[172] Similar to liability under section 518,[173] a showing of the supplier's knowledge or constructive knowledge of the animal's dangerous condition, as well as a lack of knowledge on the buyer's part, is essential to establishing a claim per section 388.[174] All intended uses of animals—as a household pet, a workhorse, or even dinner—require the animal to be healthy. If not under a theory of strict products liability, a supplier of animals should be held liable for negligently providing the consumer with an unhealthy or dangerous animal. The Restatement (Second) of Torts section 388 could provide an alternative to standard negligence claims involving animals and may be the solution for healthier animals and, in turn, healthier human purchasers.

C. Warranty

The tragedy of the chattel Bird in the foregoing section, however, was not decided on tort grounds; rather, the court turned to contract principles to provide an adequate remedy for Bird's melancholic owner.[175] There are three warranties of quality: (1) express warranty;[176] (2) implied warranty of merchantability;[177] and (3) implied warranty of fitness for a particular purpose.[178] Each of them covers the sale of animals, "goods" under the UCC,[179] in a unique fashion.

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171 *Restatement (Second) of Torts* § 388 (1965).

172 *Id.*

173 *See Restatement (Second) of Torts* § 518(a)–(b) (The provision presumes that the owner of an animal does not know and should not know that the animal is abnormally dangerous.).

174 *Restatement (Second) of Torts* § 388(a)–(b).

175 *Bazzini*, 455 N.Y.S.2d at 78.

176 *See e.g.* U.C.C. § 2-313 (2005), 1A U.L.A. 482 (2004).

177 U.C.C. § 2-314, 1A U.L.A. 669.

178 U.C.C. § 2-315, 1B U.L.A. 8.

179 *Bazzini*, 455 N.Y.S.2d at 78; *Key v. Bagan*, 221 S.E.2d 235, 235 (Ga. Ct. App. 1975) ("This transaction for the purchase of a horse, apparently for recreational use, while possibly a casual sale, nevertheless, is provided for in the Uniform Commercial Code which applies to transactions in goods.").

Unlike the risk-utility analysis that often controls strict liability and negligence claims, warranty claims focus "on the expectations for the performance of the product when used in the customary, usual [or] reasonably foreseeable manners."[180] Like strict liability, however, "breach of express warranty requires no showing of fault," just a failure to conform to the seller's or supplier's representations need be shown.[181]

"Transactions involving the sale of domestic animals have been among the most fruitful sources of litigation giving rise to the claim that affirmations as to the soundness of the animals constituted a warranty."[182] Express warranties are generally easy to spot. They usually consist of factual representations (written or oral) by the seller to the buyer that relate to the characteristics or performance of a product and which induce the buyer to purchase that product.[183] Also, express warranties "can be created when given in response to a specific question or when given in the context of a specific averment of fact."[184] Mere "puffing," or sales talk that gives the seller's opinion of the product, generally does not constitute an express warranty.[185] General representations of safety, however, can create express warranties.[186] But if a seller states, "I expressly warrant that this puppy will not bite," the buyer does not have an express warranty claim if the dog, in fact, bites because "[e]ven a docile dog is known and expected to bite under certain circumstances."[187]

For the implied warranties of merchantability and fitness for a particular purpose, perhaps the case of Mr. Dunphy, a pedigree poodle whose pedigree was flawed by an undescended testicle, best illustrates the application of these warranties to animal sales.[188] In *Dempsey v. Rosenthal*, the Civil Court of the City of New York addresses both merchantability and fitness warranties in connection with Mr. Dunphy's inadequate reproductive organs.[189] The plaintiff bought Mr. Dunphy for $541.25 from the defendant's pet store.[190] The "congenital

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180 *Denny v. Ford Motor Co.*, 639 N.Y.S.2d 250, 256 (N.Y. 1995).

181 Owen et al., *supra* n. 57, at 97.

182 Lee R. Russ, *Extent of Liability of Seller of Livestock Infected with Communicable Disease*, 14 A.L.R.4th 1096 (2004).

183 U.C.C. § 2-313(1)(a), 1A U.L.A. 482.

184 *Blaha*, 640 N.W.2d at 90.

185 *Cf. Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 901 (Pa. 1975) (Advertisements touting a helicopter as a "safe, dependable helicopter" that was "easy to fly" constituted puffing.).

186 Owen et al., *supra* n. 57, at 98 (referring to *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975) (A caustic drain cleaner was advertised as safe for household use.)).

187 *Whitmer*, 331 N.E.2d at 118 (cited with approval in *Blaha*, 640 N.W.2d at 91). Further, "[t]he law will not lend itself to the creation of an implied warranty which patently runs counter to the experience of mankind or known forces of nature. It will not read into any sale or bailment a condition or proviso which is unreasonable, impossible or absurd." *Meester v. Roose*, 144 N.W.2d 274, 276 (Iowa 1966).

188 *Dempsey*, 468 N.Y.S.2d at 441.

189 *Id.*

190 *Id.* at 442.

defect" was discovered five days later by the plaintiff's veterinarian.[191] Outraged, the plaintiff rejected poor Mr. Dunphy and attempted to return the hapless poodle, declaring that she "assumed it would be suitable for breeding but it's defective–it can't breed."[192] In truth, Mr. Dunphy was entirely capable of continuing his proud heritage, although future litters would likely carry the same defect.[193] Further, any dog with such a condition could never be a show dog.[194] Alas, with his pride hurt and his manhood questioned, Mr. Dunphy's value, though priceless as a pet and friend, was somewhat diminished for one who wished to breed or show the poodle or its offspring.

Finding no applicable express warranties, the court turned to the implied warranty of merchantability.[195] Under the UCC section 2-314 implied warranty of merchantibility cause of action, a plaintiff must prove: (1) the seller is a merchant with respect to the goods sold; (2) the goods were not "merchantable" at the time of sale; (3) the defect in the goods caused, and (4) damages.[196] In *Dempsey*, the defendant was a merchant in the business of regularly selling pets.[197] The court employed the first test of merchantability, set out in section 2-314(2)(a), to determine whether Mr. Dunphy would "pass without objection in the trade under the contract description."[198] The court stated that this provision "sums up all the various 'definitions' of merchantable quality since the principal function of the warranty of merchantability [is] to give legal effect to a buyer's reasonable expectations based on the trade understanding of the quality of goods normally supplied under such a contract."[199] Understanding that when one buys a purebred dog, he or she rightfully assumes the dog is of show quality, or at least of breedable quality, the court held Mr. Dunphy "would not pass without objection in the trade."[200] As such, Mr. Dunphy was not merchantable.[201]

Another clause of UCC section 2-314 often implicated in animal sales is subsection 2-314(2)(c), which states that goods are merchantable if they "are fit for the ordinary purposes for which such goods are used."[202] Recalling the case of Bird, the toucan sold with a congenital defect, the Sixth District Court of New York held that "Bird was not fit

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191 *Id.*

192 *Id.*

193 *Id.*

194 *Dempsey*, 468 N.Y.S.2d at 442.

195 *Id.* at 443–45.

196 U.C.C. § 2-314, 1A U.L.A. 669 (2000). The term "merchantability" is defined within § 2-314(2)(a)–(f) with six different standards, serving as the minimal requirements. *See also* § 2-314 Official Comment 6. Trade usage may also define what is considered "merchantable." J. White & R. Summers, *Uniform Commercial Code* 360–368 (5th ed., West 2000).

197 468 N.Y.S.2d at 443.

198 *Id.* (citing U.C.C. § 2-314(2)(a)).

199 *Id.*

200 *Id.* at 444.

201 *Id.*

202 U.C.C. § 2-314(2)(c), 1A U.L.A. 669.

for the ordinary purposes for which toco toucans are used."[203] The court bluntly stated that at least one such ordinary purpose of a pet toucan "is to stay around as a live bird."[204] The "ordinary purpose" of an animal likely depends on the type of animal involved and who the buyer and seller are. Certainly a pet store patron's ordinary purpose for an animal bought from the pet store would be, in most cases, as a household pet. As costs increase with the pedigree of the animal, ordinary purposes may entail breeding or showing the animal. But questions such as whether a cow is bought for milk or for meat, a horse is bought for racing or for riding, or a dog is bought for companionship or for aiding the disabled, may be better served by an implied warranty of fitness for a "particular purpose" analysis.

UCC section 2-315 states:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[205]

This "particular purpose" differs from ordinary purposes for goods "in that it envisages a specific use to the buyer which is peculiar to the nature of his business,"[206] rather than "uses which are customarily made of the goods in question."[207] For a claim under this warranty, a plaintiff must prove: (1) the seller had reason to know of the plaintiff's particular purpose for the goods; (2) the seller knew or should have known the plaintiff was relying on the seller's skill or judgment; and (3) the plaintiff did rely on such skill or judgment to his or her detriment.[208]

The *Dempsey* court held that the sale of Mr. Dunphy also breached the implied warranty of fitness for a particular purpose.[209] The plaintiff specified to the seller that she wanted a dog suitable for breeding.[210] "Further, it is reasonable for a seller of a pedigree dog to assume that the buyer intends to breed it."[211] Thus, the seller knew of

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[203] *Bazzini*, 455 N.Y.S.2d at 79.

[204] *Id.* The court explained that "the inference is permissible that Bird was not of merchantable quality at the time of sale since he ceased to function as a merchantable bird so soon thereafter." *Id.*

[205] U.C.C. § 2-315, 1B U.L.A. 8 (2006).

[206] *Id.* § 2-315 cmt. 2.

[207] *Id.*

[208] *Van Wyk v. Norden Laboratories, Inc.*, 345 N.W. 2d 81, 84 (Iowa 1984) (explaining the elements of Iowa's warranty of fitness for a particular purpose, which is based on U.C.C. § 2-315).

[209] 468 N.Y.S.2d at 445.

[210] *Id.*

[211] *Id.* "The fact that Mr. Dunphy's testicle later descended and assumed the proper position is not relevant. 'The parties were entitled to get what they bargained for at the time that they bargained for it. . . . The parties[‘] rights are not to be determined by subsequent events.'" *Id.* (quoting *White Devon Farm v. Stahl*, 389 N.Y.S.2d 724, 727 (Sup. Ct. N.Y. Co. 1976)).

the plaintiff's particular purpose, the plaintiff relied upon the seller's assurance that Mr. Dunphy was suitable for breeding, and this reliance was reasonable, fulfilling the requirements of an implied warranty of fitness for a particular purpose.[212]

The trouble with warranty claims, however, is that they are subject to a number of limitations. First, privity still plays an important part in contract law, and serves as an "ongoing obstacle to injured persons seeking to reach a remote seller through the law of warranty."[213] Also, per the UCC section 2-607(3)(a), "the buyer must within a *reasonable time* after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[214] Hence, if the buyer fails to give notice to the seller of any warranty claim prior to filing suit, that suit may be barred.[215] Further, under certain conditions, warranty claims may be disclaimed and damages may be limited in any manner the seller sees fit (if not unconscionable).[216] Finally, incidental or consequential damages are not often available to the buyer who brings suit for breach of warranty, as in the case of Bird's autopsy costs[217] and the veterinary costs for examination of a defective Mr. Dunphy.[218]

IV. IMPLICATIONS

As this comment has shown, it makes a huge difference whether an animal is a product, chattel, good, property, or in some other legal category. "[T]he 'legal, social, or biological nature of animals' is an important element of cases and statutes in nearly every category of the law."[219] In addition to the potential negligence claim under the "chat-

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212 U.C.C. § 2-315, 1B U.L.A. 8 (2004).

213 Owen et al., *supra* n. 57, at 94.

214 U.C.C. § 2-607(3)(a), 1B U.L.A. 701 (2004) (emphasis added).

215 "Most courts have refused to bar recovery for unreasonable delay of notice in consumer injury cases, but some courts still apply the rule even in this context." Owen et al., *supra* n. 57, at 114.

216 *See* U.C.C. §§ 2-316, 2-718, 2-719, 1B U.L.A. 141, 1C U.L.A. 437, 1C U.L.A. 454 (addressing exclusion and modification of warranties, liquidation, and limitation of damages; and contractual modification and limitation of remedies, respectively); *see also Hininger v. Case Corp.*, 22 F.3d 124, 128 (5th Cir. 1994) (allowing buyer no recovery for negligence claim and affirming dismissal of buyer's implied warranty claim); *Rynders v. E.I. Du Pont, De Nemours & Co.*, 21 F.3d 835, 840 (8th Cir. 1994) (holding that no warranty could be implied because the buyer did not rely on the seller's skill and knowledge and that the buyer had disclaimed the warranty); *Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543, 1545 (11th Cir. 1987) (holding that the buyer was not bound by a post-sale disclaimer); *Paramount Aviation Corp. v. Agusta*, 288 F.3d 67, 74 (3d Cir. 2002) (holding that a seller can limit liability to third parties with a disclaimer in an agreement with a buyer); *Schlenz v. John Deere Co.*, 511 F. Supp. 224, 229 (D. Mont. 1981) (holding that a seller's disclaimer did not overcome the express safety warranty in the equipment's operating manual).

217 *Bazzini*, 455 N.Y.S.2d at 79.

218 *Dempsey*, 468 N.Y.S.2d at 446.

219 Duckler & Campbell, *supra* n. 5, at 19.

tel" provisions of the Restatement (Second) of Torts,[220] what status courts give to animals has a tremendous impact on the claims a plaintiff may bring, the defendants who may be held liable, and the damages that may be awarded. As previously mentioned, the strict liability statutes for wild animals and abnormally dangerous animals are only somewhat effective in holding owners liable for the actions of their animals.[221] But the narrow scope of these statutes, the limited pool of potentially liable defendants, and the insignificant deterrence factor, requires an attack at the source of the problem.[222]

A. Diseases and Dog Bites

The question arises as to who should be liable for an animal, diseased from birth, when the disease causes health problems amongst its ultimate purchasers and owners. One hopes the seller would be liable, and that the seller could, in turn, hold the breeder from which it received the animal liable for the costs of the animal itself. As it now stands in many jurisdictions, a buyer has no right of action against a breeder and sometimes no right to consequential damages[223] because these jurisdictions do not consider the animal a "product."[224]

In *State v. Lazarus*, for example, under a Louisiana statute, two breeders of Persian and Himalayan cats were charged with ten counts of animal cruelty.[225] The cats were alleged to have been infected with ulcerated eyes, feline leukemia, herpes, ringworm, and salmonella.[226]

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[220] *Restatement (Second) of Torts* § 388(a)–(c), discussed *supra* part II. B.

[221] *See supra* nn. 116–118 and accompanying text (discussing wild animal statutes).

[222] *See Kaplan*, 615 F. Supp. at 236–37 (strict liability further limited by Colorado statute precluding strict liability claims against most lessors and bailors). Conversely, some animals that many think of as pets may still be considered "wild animals" for the purposes of statutes governing such animals. *See Gallick v. Barto*, 828 F. Supp. 1168, 1170 (M.D. Pa. 1993) ("[A] ferret is a wild animal.").

[223] *See e.g. Moreland v. Austin*, 330 P.2d 136 (Colo. 1958) (consequential damages reversed for costs of medicines, labor, and lost production when buyer purchased brucellosis-infected cows); *cf. Chaplinski v. Gregory*, 559 P.2d 1244 (Okla. 1977) (upholding consequential damages for loss of cattle, medicines, and profits lost because of seller's misrepresentations about quality of the cows sold).

[224] In many states,

> the ordinary or basic measure of damages for the seller's breach of warranty or fraud in the sale of an animal, due to its being infected with a communicable disease, is the difference between the actual or market value of the animal in its diseased condition at the time of delivery to the buyer and the amount the animal would have been worth had it been in the condition that the seller had represented or warranted it to be.

Russ, *supra* n. 182, at 1103.

[225] 633 So.2d at 227.

[226] *Id*. (The actual physical condition of ten cats taken into evidence was suppressed on illegal search and seizure grounds.); *see also* The Goldfish Sanctuary, *Fish Abuse by Wal-Mart and What You Can Do*, http://www.petlibrary.com/goldfish/walmart.htm (accessed Feb. 26, 2006) (The website attacks Wal-Mart for selling defective animals. The Goldfish Sanctuary currently runs a campaign against the corporation "for their atrocious treatment of all kinds of fishes" and selling of diseased fish.).

One buying these cats should be entitled to all products liability theories in pursuit of a damage award from these breeders, regardless of whether he or she bought a cat directly from the breeder or from an intermediary seller. Further, the buyer should be entitled to any resulting damages, such as the spread of feline leukemia to other household cats or the veterinary bills associated with the cat's maintenance. Under traditional warranty theory, such damages may be foreclosed.[227]

Further the breeder should be charged with knowledge of his or her animals' defects. "The motto of the responsible breeder . . . is 'Breed to Improve.'"[228] The scientific term encompassing this motto is "selective breeding," which is the process of breeding animals of the highest quality in an effort to produce offspring with the most desirous traits.[229]

> Responsible breeders do not breed unless they are convinced that their knowledge, experience, and devotion to their favorite breed will result in a mating that will produce an exceptional litter of puppies, with qualities that are as near as possible to the ideal for that breed. They breed to preserve and to enhance the characteristics that make their breed unique. In short, they breed to improve . . . . The goal of breeding, after all, is to produce a better dog.[230]

Responsible breeders do not breed animals with inheritable defects or animals that are overly aggressive.

Selective breeding is by no means a new concept.[231] Genetic engineering and selective breeding in the laboratory "has potential benefits for animal health – for producing vaccines and antibodies and for conferring resistance to disease."[232] But professional breeders already know the dangers of negligent breeding and the benefits of selective breeding; amateur breeders should be required to learn. Under negligence principles, the breeding and selling of a diseased animal shows a lack of reasonable care, ordinary care, due care—a lack of any care whatsoever. Under strict liability concepts, such a breeder should be held liable for introducing a defective product into the stream of commerce.

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227 *See* U.C.C. § 2-719(3), 1C U.L.A. 455 (addressing limits on consequential damages).

228 Amer. Kennel Club, *Responsible Breeding Steps*, http://www.akc.org/breeders/resp_breeding/steps_2.cfm (accessed Sept. 13, 2005).

229 Prof. Breeders, *About Professional Breeders*, http://www.probreeders.com/htm/professional.html (accessed Feb. 27, 2006) (advertising commercially bred reptiles with "distinctive traits and progressive quality improvements accomplished through selective breeding").

230 Amer. Kennel Club, *supra* n. 228.

231 Food & Agric. Org. U.N., *Animals: Unexpected Products?* "The health question," http://www.fao.org/english/newsroom/focus/2003/gmo4.htm (accessed Sept. 13, 2005).

232 *Id.*

For some diseases, such as the polycystic kidney disease affecting primarily Persian cats, selective breeding is the veterinary world's only hope for disease elimination.[233]

> Veterinarians hope that breeders act conscientiously and consult with a veterinarian before breeding their Persian cat. A combined effort of veterinarians and owners will aid people . . . who want to see this gene and this disease eliminated from the Persian cat population.[234]

If altruism does not encourage breeders to breed responsibly, perhaps products liability claims could deter them from breeding improperly.

One jurisdiction may in the future reconsider strict products liability in some potential animal-related cases based on the following language: "[a] diseased condition of an animal is a defect more relevant to an animal as a product than is an animal's behavior."[235] Although a disease is clearly a defect, an animal's behavior may be a defect, as well. In the breeding of certain dogs, particularly the American pit bull, the principles of selective breeding have been used to create a hunter, a fighter, and maybe even a monster.[236]

Pit bulls get a bad rap. Perhaps the many dog bite cases, such as *Chase v. City of Memphis* where a woman was mauled to death by two pit bulls, contribute to their poor reputation.[237] Similar cases likely led the Ontario legislature to ban its citizens from acquiring pit bulls.[238] Likewise, several American jurisdictions have adopted breed-specific laws regulating ownership of dogs.[239] People generally believe that pit

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[233] Sarah Probst, *Selective Breeding Only Solution to Feline Genetic Disease*, http://www.cvm.uiuc.edu/petcolumns/showarticle.cfm?id=104 (accessed Feb. 7, 2006). Selective breeding is used across the animal kingdom. For example, "[t]he eastern oyster industry along much of the Atlantic coast has been devastated by two pathogens." Haskins Shellfish Research Laboratory, *Selective Breeding for Disease Resistance in the Eastern Oyster*, http://vertigo.hsrl.rutgers.edu/breeding.html (accessed Feb. 7, 2006). Selective breeding has been employed to produce several lines of pathogen-resistant oysters. *Id.*

[234] Probst, *supra* n. 233, at http://www.cvm.uiuc.edu/petcolumns/showarticle.cfm?id=104.

[235] *Worrell*, 563 A.2d at 1388.

[236] *See* Real Pit Bull, *Dog Fighting*, http://www.realpitbull.com/fight.html (accessed Feb. 7, 2006).

[237] 1998 Tenn. LEXIS 435, *2 (July 21, 1998); *see also County of Spokane*, 982 P.2d at 643 (young child bit in the face by a pit bull).

[238] CBC Canada News, *Ontario Passes Ban on Pit Bulls*, http://www.cbc.ca/story/canada/national/2005/03/01/pit-bull-ban050301.html (accessed Feb. 7, 2006).

[239] *See e.g.* Colo. Code of Ordinances for the City of Commerce City § 4-8 (2005) ("*Unlawful to keep vicious animals* [pit bull terriers or wolf hybrids]. It is unlawful for any person, except for a duly authorized agent or employee of the city acting in his/her official capacity in conformance with the duties and obligations of this chapter, to own, keep, possess, harbor or maintain any pit bull terrier, pit bull terrier mix, or wolf hybrid within the city [unless] the animal [is] confined in a pen with a lockable latch surrounded by a fence at least six (6) feet in height with a secure top and a concrete base to a depth not less than six (6) inches below grade or on a secure leash under the control at all times by a person at least eighteen (18) years of age or older."); *In re Pourdas*, 206 B.R. 516, 517 (Bankr. S.D. Ill. 1997) (Granite City, Ill. Ordinance 6.10.020(A) (1989)

bulls are aggressive animals[240] because they were bred to be fighting dogs throughout American history:

> Fighting dogs fight because that is what they were bred to do. The "training" they receive is physical conditioning, aimed at building strength and stamina. The dogs know how to fight, are born knowing how to fight. The truth of the matter is that the desire to scrap with other animals is in the breed's genes, built up through selective breeding for the traits that allowed them to excel at tasks they were routinely used for.[241]

If breeders truly caused the pit bull dilemma, they should be encouraged to breed a more docile pit bull. Two good ways to effectuate this result would be to allow the victim of a pit bull attack to proceed against the breeder with either a strict products liability claim for the production of an unreasonably dangerous animal or an extended claim beyond the owner and encompassing the breeder under strict liability for an abnormally dangerous animal.

Of course, there are many responsible breeders,[242] and a pit bull can be a great pet with extensive and proper training and control. This, however, brings up another potential products liability claim. If a breeder is producing overly aggressive pit bulls,[243] rabid skunks,[244] diseased felines,[245] canines with hip dysplasia,[246] or sickly gilts,[247] he or she ought to have a duty to warn consumers of these defects. A fail-

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"provides that no person shall possess a pit bull dog within city limits for a period of more than forty-eight hours without obtaining a license.") (footnote omitted).

240 *See* Animal Control Center, *Types of Dogs*, http://www.pethelp.net/dogbreeds.html #pit (accessed Feb. 24, 2006) (suggesting the media is partly responsible for the public perception that pit bulls are more dangerous than any other breed of dog).

241 Real Pit Bull, *supra* n. 236, at http://www.realpitbull.com/fight.html; *cf.* Official Pit Bull Site of Diane Jessup, *Are Pit Bulls "Naturally Aggressive?"* http://www.working pitbull.com/aboutpits.htm (accessed Feb. 6, 2006) ("Many working breeds have antipathy towards other animals - coonhounds go mad at the sight of a raccoon, foxhounds will not hesitate to tear a dog-like fox to shreds, greyhounds live to chase and maul rabbits and will eagerly kill cats. They are still used today to chase down and slaughter coyotes. Even the ever-friendly beagle will 'murder' a rabbit, given the chance. And yet the greyhound, coon and foxhound and beagle are among the friendliest of breeds towards humans. And it is the same with the well bred pit bulldog.").

242 The author owns a two-year-old Pembroke Welsh Corgi and could not be happier with the breeder's care and attentiveness to her trade.

243 *See Chase* (1998 Tenn. LEXIS 435 *2–4) (The plaintiff could potentially have asserted a strict liability claim against the trainer (here, the owner) of two overly vicious pit bulls that mauled the decedent, since the trainer failed to properly control or train the dogs).

244 *See Sease*, 700 P.2d at 1058 (holding breeder, Taylor's Pets, strictly liable for the seller's sale of a rabid skunk).

245 *See Lazarus*, 633 So. 2d at 227 (The defendants, breeders of diseased cats, should have been liable to each and every person to whom they sold the cats under strict products liability.).

246 *See generally Cahill*, 2005 WL 1422133 (Buyer successfully sued pet store owner after discovering puppy had hip dysplasia; owner failed to warn of the condition, which breached the implied warranty of merchantability.).

247 *Anderson*, 408 N.E.2d at 1195 (Ill. App. 3d Dist. 1980) (products liability claims barred against the breeder and seller of gilts). Other jurisdictions may rule differently.

ure to warn, especially where human injury or even death could occur, is almost *per se* a warning defect. Of course, a dog need not come with an actual warning label, but maybe it should come with proper instructions and warnings. The reasonable breeder and seller of animals should have a duty to educate buyers about the characteristics and qualities of the animals and of the breed in general. The breeder is in a better position to have such knowledge.

In cases where the injury-causing animal is trained by the seller or owner, the breeder should be free from liability because training constitutes a "substantial change" in the product, which would effectively terminate the breeder's liability under section 402A.[248] This would hold particularly true in cases where dogs are trained as fighters or guard dogs.[249]

B. Other Implications

One particular group of animals would face unique treatment if considered a "product" for products liability purposes—assistive animals. In *Meacham v. Loving*, a near-blind woman was struck and injured by a car when she and her guide dog walked into traffic.[250] In *Slack v. Villari*, a service dog allegedly attacked a stranger.[251] In *Meacham*, perhaps the seeing eye dog was not fit for its particular purpose, but it does not follow that a strict products liability claim attaches.[252] But if strict products liability were proper, and if it were the case that the accident was caused by a physical defect in the seeing eye dog or its inadequate training, a claim could be brought against the animal's trainer for producing a defective assistive animal. An assistive animal trainer could possibly be held strictly liable for selling an improperly trained animal that causes injury to a client. This, in turn, would potentially improve the quality of service animals and the safety of their owners and those around them.

Animal shelters could also face liability if animals are "products." Animal rescue services and shelters, which rescue animals and find homes for them at little cost to the buyer, cannot possibly know the history of each animal rescued and can only gauge an animal's temperament from its often minimal stay at the shelter. If a rescued animals turn out to be "defective," courts may deem this to be an open and obvious danger of purchasing a rescued animal. Further, a rescue league has no reason to know of a rescued animal's vicious propensities. Certainly, that an animal may be aggressive is foreseeable, but if it does not show this trait while in the shelter's care, it would be difficult to

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[248] *Restatement (Second) of Torts* § 402A.

[249] *See Radoff*, 323 P.2d at 203–05 (personal injury action where German shepherd, acting as a guard dog, attacked a trespasser in a parking lot).

[250] *Meacham*, 285 S.W.2d at 937–38.

[251] 476 A.2d at 229–30.

[252] *Meacham*, 285 S.W.2d at 931 (Plaintiff hit by car while crossing street with seeing eye dog.).

show the shelter was culpable if the animal causes harm. Perhaps the sale of a used car is a helpful analogy. One buying a new car would undoubtedly expect it to have less defects than one buying a used car, notwithstanding that the used car could be equally dependable. Similarly, reasonable care in the context of shelter animals is less burdensome on the shelter than is reasonable care in the context of sales through breeders and pet store owners—both of whom possess much more knowledge of an animal's temperament, training and pedigree.

However, express warranty claims and strict liability are equally applicable to "used" products.[253] By selling animals "as is" and simply not making any express warranties, animal shelters can avoid warranty litigation entirely.[254] Conversely, shelters would probably be exempt from strict liability claims if either (depending on the jurisdiction): (1) no reasonable consumer would expect the animal to be free of potential defects or (2) the burden on the shelter to guarantee reasonably safe animals outweighs the risks to potential buyers. Of course, the burden to warn of potential "defects" in shelter animals is minimal when compared to the risks of public harm. Therefore, shelters should have a duty to disclose to prospective buyers any pertinent information that may assist the buyer in avoiding potential harm.

Finally, horse and greyhound racers may be entitled to strict products liability claims for animals that cannot win races. In *Sessa v. Reigle*, however, the plaintiff lost on a similar argument brought under express and implied warranty claims.[255] The horse involved had temporary tendonitis; when it recovered, it won three out of thirteen races in one year.[256] Although the horse did not win as many races as the owner would have liked, "such disappointments are an age old story in the horse racing business."[257] Similarly, if a horse or greyhound can run, it likely is not defective. However, perhaps it is good public policy to allow products liability claims against owners who abandon greyhounds when they can no longer race, if the dogs subsequently cause any damage whatsoever. Products liability, combined with stricter penalties for greyhound termination, would hopefully deter further cruelty to these benign and lovable dogs.[258]

V. CONCLUSION

Sooner or later, every jurisdiction will be forced to answer the question whether an animal is a "product" for the purposes of products

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[253] *See Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co.*, 660 P.2d 1236, 1236 (Ariz. App. Div. 1 1983) ("We hold that a dealer in used goods may be held strictly liable under the Restatement (Second) of Torts § 402A (1965) . . . .").

[254] *See* U.C.C. § 2-316(3)(a) (selling "as is" negates any implied warranties).

[255] 427 F. Supp. 760 (E.D. Pa. 1977).

[256] *Id.* at 763–64.

[257] *Id.* at 770.

[258] *See generally* Grey2KUSA, *Cruelty of Dog Racing*, http://www.grey2kusa.org/Racing/cruelty.html (accessed Feb. 7, 2006). The treatment of these animals by their owners is appalling.

liability. "In fact, animal law is one of the fastest growing emerging practice areas in the country today."[259] With its growth, one can expect creative lawyers to look for new methods for imposing liability on irresponsible breeders and sellers. Perhaps the necessary answers already exist within the contemporary doctrines of products liability.

Adopting the methodology of New York, Oregon, and Connecticut is not enough. Adopting the Restatement (Third) of Torts: Products Liability section 19 is a good start, but it, too, is not enough. The full application of products liability theory must be employed to the sale of defective or unreasonably dangerous animals. Most agree that animals are property in the eyes of the law. It is not a stretch to consider animals bred and sold for commercial gain as products.

By simply labeling an animal a product in this context, the law would impose responsibility on the part of the breeder and seller. Instituting a strict products liability claim would encourage sellers to provide full disclosure of all breed or animal specific propensities, full pedigree information, medical examination of the animal, and training certification.

Education and communication are key to proper animal handling and healthier, well adjusted pets. Without giving full disclosure of known or probable animal propensities to the buyer, the seller has negligently sold the animal. If that animal is unreasonably dangerous and harms the buyer, strict liability should be invoked. And if an animal is bred to be abnormally vicious or sold in a diseased state, the animal should be held defective and not merchantable.

The law must do what it can to encourage responsibility amongst the parties to these transactions or, conversely, to deter them from supplying consumers with defective animals that have and will continue to cause injury and death. Products liability theory, in its many incarnations, is an appropriate, lawful, and needed method for preventing future harm and providing for a healthier human and animal kingdom.

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[259] Laura Ireland Moore, *A Review of* Animal Rights: Current Debates and New Directions, 11 Animal L. 311, 311–12 (2005) (detailing the impressive and expansive growth of the field of animal law). The breadth of the subject also indicates room for further growth: "Animal law is, in its simplest (and broadest) sense, statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor." Sonia S. Waisman et al., *Animal Law: Cases and Materials* xvii (2d ed., Carolina Academic Press 2000).

2005–2006 LEGISLATIVE REVIEW

REVIEW EDITOR'S NOTE

I am very pleased to present the eighth annual edition of *Animal Law*'s Legislative Review. This year's review surveys developments in both federal and state animal-related legislation from 2005 through early 2006. The legislation this year reflects a trend of mounting interest among legislators regarding animal issues, but also demonstrates

the difficulties inherent in pushing legislation through to enactment. However, even when not all bills succeed in becoming law, it is important to recognize the value of having more legislators who are willing to sponsor and support animal-friendly legislation.

At the federal level, Ms. Marjorie Berger reports on significant advances and setbacks in federal legislation this year. She examines the saga of the Horse Slaughter Amendment to the 2006 Agriculture Appropriations Bill; the failure of key measures such as the Downed Animal Amendment, the Pet Protection Amendment, and animal fighting prohibition enforcement provisions; the successful blocking of another attempt to drill in the Arctic National Wildlife Refuge; the benefits to wildlife from the new transportation bill; and, finally, the fate of the Pets Evacuation and Transportation Standards Act, which is aimed at preventing some of the chaos and tragedy endured by pet owners following a natural disaster such as Hurricane Katrina.

Mr. Rahul Kukreti reports on this year's developments in state legislation, including state efforts to prohibit internet hunting; passage of constitutional amendments codifying a "right to hunt"; attempts to target acts of animal and ecological terrorism; increased state awareness regarding the dangers associated with antibiotic use in factory farms; the regulation and inspection of factory farms; confinement of animals in factory farms; further state attention to the issue of foie gras; and state approaches to breed-specific legislation and breed discrimination.

This year, at both the state and federal level, legislators who sponsored or supported important and sometimes controversial bills benefiting animals provided a valuable service by helping to educate fellow legislators and the public about key animal issues and by making future passage of increasingly innovative and effective pro-animal legislation more feasible. It is our hope that this Legislative Review section also serves to educate by providing analysis of the progress of animal-related legislation at the state and federal levels, and by monitoring significant developments in animal law.

Sunrise Cox
Legislative Review Editor

I. FEDERAL LEGISLATION

A. Appropriations Bills for Fiscal Year 2006

Approximately two-thirds of the federal budget is allocated to mandatory spending governed by permanent laws such as Social Security and Medicare.[1] All remaining funds comprise the federal discretionary budget, which Congress allots through thirteen annual

[1] *Unauthorized Appropriations and Expiring Authorizations*, Cong. Budget Off. Rpt. 1–2 (Cong. Budget Off. Jan. 15, 1998) (available at http://www.cbo.gov/ftpdocs/3xx/doc315/unauth98-h.pdf).

appropriations bills that must be passed annually and usually are effective for only one fiscal year.[2] Legislators often use amendments to appropriations bills to raise issues that have been introduced as standalone legislation but have been delayed in committees.[3] In 2005, legislators used both the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006[4] (Agriculture Appropriations Bill) and the Department of Defense Appropriations Act, 2006[5] (Defense Appropriations Bill) to advance important animal causes.[6]

1. Agriculture Appropriations Bill

The Agriculture Appropriations Bill includes the Horse Slaughter Amendment,[7] which was one of the most important animal-friendly federal legislative provisions to pass in 2005. Unfortunately, the United States Department of Agriculture (USDA) recently granted a petition that will seriously undermine the purpose of the Amendment.[8] Two other significant animal provisions, the Downed Animal[9] and Pet Protection Amendments,[10] were stripped from the Agriculture Appropriations Bill during the resolving differences conference committee meetings (resolving differences meetings).[11] The final bill was passed in the House on October 28, 2005 by a vote of 318-63 and in the Senate

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[2] *Id.* at 2.

[3] *See e.g.* 109 Cong. Rec. H4249 (daily ed. June 8, 2005) (statements of Rep. John Spratt explaining the use of an appropriations bill to fight for stalled horse slaughter legislation).

[4] Pub. L. No. 109-97, 119 Stat. 2120 (2005).

[5] Pub. L. No. 109-48, 119 Stat. 2680 (2005).

[6] *See* Humane Socy. U.S., *The System Works: Horse Slaughter Ban Saved from Last Minute Threat*, http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html (Oct. 27, 2005) [hereinafter Humane Socy. U.S., *The System Works*] (explaining how legislators used amendments to the Agriculture Appropriations Bill to pass animal-friendly legislation); Humane Socy. U.S., *DoD Appropriations Bill Gives Polar Bears a Reprieve, Goes Easy on Cockfighters Who Could Help Spread Avian Flu*, http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html (Dec. 22, 2005) [hereinafter Humane Socy. U.S., *DoD Appropriations Bill*] (outlining various sections of the Defense Appropriations Bill used for animal advocacy).

[7] 119 Stat. at 2163.

[8] Humane Socy. U.S., *HSUS and Others Seek Injunction to Halt USDA in Its Attempt to Buck Congress on Horse Slaughter*, http://www.hsus.org/pets/pets_related_news_and_events/usda_threatens_horse_slaughter.html (Feb. 22, 2006).

[9] Sen. Amend. 1730, 109th Cong. (2005) (amendment to H.R. 2744).

[10] Sen. Amend. 1729, 109th Cong. (2005) (amendment to H.R. 2744).

[11] Human Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html. These meetings are held to resolve the differences between the House and Senate bills so Congress can present a single bill to the President. *Id.* Because the Downed Animal and Pet Protection Amendments had no House counterparts, they were particularly vulnerable to being cut during the resolving differences meetings. *Id.*

on November 3, 2005 by a vote of 81-18.[12] The bill was signed into law on November 10, 2005.[13]

a. The Horse Slaughter Amendment

Representatives Nick Joe Rahall II (D-W. Va.), John Spratt (D-S.C.), and John Sweeney (R-N.Y.) introduced the Horse Slaughter Amendment to the House on September 20, 2005.[14] But not long after the Agriculture Appropriations Bill had been approved by Congress and signed into law by the President, the USDA granted a petition that seriously undermines the effect of the bill's Horse Slaughter Amendment.[15] Despite this disappointing last minute turn of events, the Amendment still marks a significant and well-fought victory toward increased protection of American horses. As the Representatives explained, the United States houses three foreign-owned slaughterhouses that purchase approximately sixty-five thousand American horses each year, the meat of which is exported to foreign countries for human consumption.[16] No American businesses profit from these foreign operations;[17] and most Americans disapprove of slaughtering horses for human consumption.[18] Yet, because the Federal Meat Inspection Act requires inspection of all meat to be processed for human consumption,[19] American tax dollars fund the inspections of these slaughtered horses.[20] The Horse Slaughter Amendment ends American subsidization of this foreign-based industry by prohibiting the use of federal funds for the inspection of horses being sent to slaughterhouses for human consumption.[21]

During House debates, Representative Henry Bonilla (R-Tex.) and other Representatives who opposed the Amendment questioned its potentially drastic consequences.[22] They argued that the increase in expense to support unwanted horses would result in already overwhelmed facilities having to spread their resources even thin-

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12 Lib. Cong., *Bill Summary and Status for the 109th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02744:@@@R (accessed Mar. 3, 2006).

13 119 Stat. at 2120.

14 151 Cong. Rec. S10218 (daily ed. Sept. 20, 2005).

15 Humane Socy. U.S., *supra* n. 8, at http://www.hsus.org/pets/pets_related_news_and_events/usda_threatens_horse_slaughter.html.

16 151 Cong. Rec. at S10218–19 (quoting *Save the Horses*, Washington Times A20 (Sept. 15, 2005)). The meat is primarily exported to Japan, Italy, Belgium, and France, where horse meat is considered a delicacy. *Id.*

17 151 Cong. Rec. at S10220.

18 151 Cong. Rec. at S10219 (quoting Ltr. from Paula Bacon, Mayor of Kaufman, Tex., to Sen. John Ensign, *Support for the Horse Slaughter Amendment* (Sept. 6, 2005)).

19 21 U.S.C. § 603(a) (2000).

20 151 Cong. Rec. H4248 (daily ed. June 6, 2005).

21 *Id.*

22 *See generally* 151 Cong. Rec. at H4248–51 (debating the benefits and potential consequences of the Horse Slaughter Amendment).

ner;[23] but the statistics do not support these claims.[24] In the five states that have banned horse slaughter for human consumption, cases of horse neglect and abuse have not increased.[25] In fact, there have been virtually no negative consequences.[26] Ultimately, the House passed the Amendment by a vote of 269-158.[27]

The Senate passed an identical amendment in its version of the Agriculture Appropriations Bill.[28] Because the House and Senate versions of the amendments were identical, the Horse Slaughter Amendment should have been automatically included in the final Agriculture Appropriations Bill and immune to alteration during the resolving differences meetings.[29] Senator Bonilla, however, tried to use the meetings as a final attempt to strip the Amendment from the final bill.[30] A Washington Times editorial article describing the underhanded activity[31] revitalized support efforts,[32] and Congress passed the Amendment, albeit in a slightly weaker form.[33] The final version allows for a four month phase-in period and includes language that thwarts future use of appropriations bills for horse slaughter prevention.[34]

After the bill was signed into law, the foreign-owned slaughterhouses petitioned the USDA, offering to pay the USDA to inspect their horses in exchange for permission to continue their operations.[35] The USDA granted the petition, thereby undermining Congress's attempt to protect American horses from being slaughtered for human consumption.[36] In response, The Humane Society of the United States (HSUS) and other animal advocacy groups filed a motion for a tempo-

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[23] 151 Cong. Rec. at H4250 (statement of Rep. Goodlatte).

[24] 151 Cong. Rec. at H4249 (statement of Rep. Whitfield).

[25] 151 Cong. Rec. at H4249 (statement of Rep. Spratt).

[26] *Id.*

[27] Lib. Cong., *Amendments for H.R. 2744*, http://thomas.loc.gov/cgi-bin/bdquery/L?d109:./temp/~bdaWB6t:1[1-145](Amendments_For_H.R.2744)&./temp/~bdkdjV (accessed Mar. 15, 2006).

[28] *Id.*

[29] *See generally* Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html (explaining that the resolving differences meetings are generally used only to resolve conflicting versions of House and Senate bills).

[30] *Editorial: Bonilla Attempted to Thwart Majority*, San Antonio Express-News 6B (Oct. 27, 2005) (available at http://www.mysanantonio.com/opinion/editorials/stories/MYSA102705.1O.editorial.bonilla.b33fd31.html) (site no longer available).

[31] *Slaughterhouse on the Hill,* Washington Times A14 (Oct. 25, 2005) (available at http://www.washtimes.com/op-ed/20051024-094721-4515r.htm).

[32] Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html.

[33] *Id.*

[34] 119 Stat. at 2163.

[35] Humane Socy. U.S., *supra* n. 8, at http://www.hsus.org/pets/pets_related_news_and_events/usda_threatens_horse_slaughter.html.

[36] *Id*.

rary restraining order to stop the USDA's new "fee-for-service" regulation from going into effect until a hearing on the rule is held.[37]

Representatives Sweeney and Spratt are also continuing to fight to protect American horses.[38] On February 1, 2005, they re-introduced The American Horse Slaughter Prevention Act,[39] which would permanently prohibit the sale and transport of American horses to be sold for human consumption.[40] The bill was referred to the Subcommittee on Commerce, Trade and Consumer Protection on February 25, 2005.[41] At the time of this writing, no hearings have been scheduled on this bill.[42]

b. The Downed Animal Amendment

Senator Daniel Akaka (D-Haw.) introduced an amendment to the Agriculture Appropriations Bill that would have prohibited using downed livestock, including cattle, sheep, pigs, goats, and horses, for human consumption.[43] Downed livestock are animals too sick to walk or stand unassisted.[44] These animals suffer tremendously on the long journeys to slaughterhouses, often being pushed by bulldozers or dragged by chains if they collapse en route.[45] By prohibiting the use of federal funding to inspect downed animals at slaughterhouses, the Amendment would have encouraged animal handlers to humanely euthanize these animals rather than risk transporting them to a slaughterhouse that may refuse to accept them.[46]

The Downed Animal Amendment also would have protected livestock and humans from infectious diseases, including bovine spongiform encephalopathy (BSE), more commonly known as mad cow disease.[47] Because BSE is found in a higher percentage of downed livestock than general cattle populations, and because downed livestock is used for human consumption, the USDA has recognized downed live-

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[37] Pl.'s Mot. for T.R.O & Prelim. Inj., *Humane Socy. of the U.S. v. Johanns*, (Feb. 22, 2006) (available at http://www.hsus.org/web-files/PDF/HorsesPI.pdf) (site no longer available).

[38] Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html.

[39] Lib. Cong., *Bill Summary and Status for the 109th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00503: (accessed Feb. 27, 2006).

[40] H.R. 503, 109th Cong. (Feb. 1, 2005).

[41] Lib. Cong., *supra* n. 39, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00503: (accessed Feb. 27, 2006).

[42] *Id.*

[43] 151 Cong. Rec. S10221(daily ed. Sept. 20, 2005).

[44] *Id.*

[45] Humane Socy. U.S., *The HSUS Demands Ban on Processing Downed Animals for Human Consumption*, http://www.hsus.org/press_and_publications/press_releases/the_hsus_demands_ban_on_processing_downed_animals_for_human_consumption.html (Dec. 24, 2003).

[46] Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html.

[47] 151 Cong. Rec. at S10221.

stock as a serious threat in the spread of BSE in the United States.[48] While all American cattle intended for human consumption are inspected before slaughter, studies have shown that BSE is often confused with other diseases and regularly goes undetected in the inspection process.[49] By refusing acceptance of downed livestock for human consumption, the Downed Animal Amendment would have reduced the threat of passing infectious diseases like BSE through the food chain.[50] Unfortunately, the Amendment was cut from the final Agriculture Appropriations Bill during the resolving differences meetings.[51] Because these meetings are held behind closed doors, the exact reason for the cut is unknown.[52] Historically, however, strong lobbying from the cattle and beef industries has played a crucial role in blocking downed animals legislation.[53]

Senator Akaka also introduced stand-alone legislation that would protect downed animals, the Downed Animal Protection Act.[54] The bill has twenty-three co-sponsors and was referred to the Senate Committee on Agriculture, Nutrition and Forestry on September 28, 2005.[55] Representative Gary Ackerman (D-N.Y.) introduced a similar House Bill, H.R. 3931, which has 137 co-sponsors and was referred to the House Committee on Agriculture.[56] At the time of this writing, no hearings have been scheduled for either of these bills.[57]

c. The Pet Protection Amendment

Senator Akaka also introduced the Pet Protection Amendment to the Agriculture Appropriations Bill.[58] Based on his Pet Safety and Protection Act,[59] Senator Akaka's Amendment would have prohibited federal funding of research facilities that purchase animals from class "B" animal dealers.[60]

Animal advocates have long opposed class "B" dealers' fraudulent and inhumane practices.[61] These dealers frequently obtain their ani-

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html.

[52] *Id.* (referring to *Slaughterhouse on the Hill*, Washington Times A14 (Oct. 25, 2005)).

[53] Gary Ackerman, *Ackerman Statement on Downed Animal Ban*, http://www.house.gov/ackerman/press/downedanimalban.htm (Dec. 30, 2003).

[54] Sen. 1779, 109th Cong. (Sept. 28, 2005).

[55] Lib. Cong., *Bill Summary and Status for the 109th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01779:@@@X (accessed Mar. 1, 2006).

[56] Lib. Cong., *Bill Summary and Status for the 109th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03931:@@@X (accessed Feb. 27, 2006).

[57] *Id.*

[58] 151 Cong. Rec. S10221 (daily ed. Sept. 20, 2005).

[59] Sen. 451, 109th Cong. (Feb. 17, 2005).

[60] 151 Cong. Rec. at S10221.

[61] *See generally* Humane Socy. U.S., *Notorious Animal Dealer Loses License and Pays Record Fine*, http://www.hsus.org/animals_in_research/animals_in_research_

mals, many of which are former family pets, through deceptive means such as theft and "free to good home" advertisements.[62] Class "B" dealers are also notorious for violating the Animal Welfare Act by housing animals in inhumane conditions and denying them sufficient food, water, and care.[63] Senator Akaka introduced the Pet Protection Amendment one month after the largest USDA-licensed class "B" animal dealer, C.C. Baird, was arrested for operating a pet-theft ring, falsifying animal acquisition records, and violating the Animal Welfare Act.[64]

Despite the C.C. Baird case, research organizations such as the Association of American Medical Colleges continue to argue that class "B" dealers acquire their animals from credible sources.[65] These organizations fiercely opposed the Pet Protection Amendment claiming that it would do little to protect animals while seriously impeding research efforts.[66] Supporters of the Amendment argue that animals from class "B" dealers are unsuitable for research because, based on the dealers' deceptive practices such as pet theft and record falsifications, the animals' histories are too uncertain.[67]

The Senate approved Akaka's Amendment by voice vote on September 20, 2005,[68] but it was ultimately struck from the final Agriculture Appropriations Bill.[69] The Conference Committee, however, recognized the importance of pet protection, and directed the Secretary of Agriculture to prepare a report on the enforcement of class "B" dealer regulations by March 1, 2006.[70]

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news/animal_dealer_loses_license_and_pays_record_fine.html (Feb. 23, 2005) (discussing some of the practices of class "B" animal dealers in reference to a recent case brought against a dealer).

62 151 Cong. Rec. at S10221.

63 Humane Socy. U.S., *The System Works*, *supra* n. 6, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/system_works.html.

64 Last Chance for Animals, *CC Baird Violations Charged by the USDA (Synopsis)*, http://www.lcanimal.org/invest/baird/baird_synopsis.htm (accessed Feb. 27, 2006).

65 Ltr. from Jordan J. Cohen, M.D., Pres., Assoc. of Am. Med. Colleges, to Thad Cochran, Chairman, Comm. on Appropriations, *Oppositions to the Pet Protection Amendment* (Sept. 29, 2005) (available at http://www.aamc.org/advocacy/library/research/corres/2005/092905.pdf).

66 *Id.*; Press Release, Found. Biomedical Research, *Defeat of Akaka Amendment Hailed as Victory for Medical Research* (Oct. 26, 2005) (available at http://www.fbresearch.org/Journalists/Releases/102605AkakaDefeat.pdf).

67 151 Cong. Rec. at S10221.

68 Lib. Cong., *Amendments for H.R. 2744*, http://thomas.loc.gov/cgi-bin/bdquery/L?d109:./temp/~bdaDo1o:1[1-145](Amendments_For_H.R.2744)&./temp/~bdPuJI (accessed Mar. 3, 2006).

69 Press Release, Found. Biomedical Research, *supra* n. 66, at http://www.fbresearch.org/journalist/press-releases/102605AkakaDefeat.pdf.

70 H.R. Rpt. 109-255 (Oct. 26, 2005) (available at http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr255&dbname=109&).

2. Defense Appropriations Bill

On December 30, 2005, President Bush signed into law the Defense Appropriations Bill, which authorizes spending on, among other things, military personnel, emergency wartime preparedness, and disaster assistance.[71] Although avian and pandemic influenza preparedness was a key component of this year's bill, Congress failed to use the bill to address a significant threat in facilitating the spread of avian flu in America: the illegal transport of fighting birds.[72] Worse, some congressional leaders actually attempted to use the national defense bill to allow for oil drilling in the Arctic National Wildlife Refuge.[73] Fortunately, many legislators recognized that arctic drilling does not belong in a defense appropriations bill and stripped the provision from the final version.[74]

a. Animal Fighting Prohibition Enforcement Provision

Representatives Roscoe Bartlett (R-Md.), Elton Gallegly (R-Cal.), and Mark Green (R-Wis.) sent a letter to the House leadership requesting that the language of the Animal Fighting Prohibition Enforcement Act (AFPEA) be added to the final Defense Appropriations Bill report.[75] The AFPEA seeks to amend the Animal Welfare Act by increasing the penalty for animal fighting violations from a misdemeanor to a felony.[76] The Congressmen sought inclusion of this language in the Defense Appropriations Bill because the President had declared avian flu preparedness as a key issue in the bill, and the spread of avian flu has been linked to cockfighting.[77]

Avian flu is an infectious disease of birds that is particularly dangerous for domestic poultry.[78] The flu has affected birds for over one hundred years, but the first documented human infections occurred in Hong Kong in 1997.[79] That episode affected eighteen people, six of whom died.[80] To avoid a pandemic, Hong Kong destroyed its entire

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71 119 Stat. at 2680.

72 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

73 *Id.*

74 CNN.com, *Senate Blocks Attempt to Allow ANWR Drilling*, http://www.cnn.com/2005/POLITICS/12/21/arctic.drilling.ap/ (Dec. 21, 2005) (accessed Feb. 10, 2006) (site no longer available).

75 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

76 H.R. 817, 109th Cong. (Feb. 15, 2005).

77 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

78 World Health Org., *Avian Influenza ("Bird Flu") Fact Sheet*, http://www.who.int/mediacentre/factsheets/avian_influenza/en/ (Feb. 2006).

79 *Id.*

80 *Id.*

poultry population.[81] Since 1997, human avian flu cases have appeared in Turkey, Vietnam, Korea, and Thailand.[82]

In 2004, the World Health Organization (WHO) linked the spread of avian flu to cockfighting[83] and claimed that as many as eight confirmed human avian flu cases may have been caused by participation in the sport.[84] Cockfighting is a violent activity where two gamecocks with razor-sharp picks strapped to their feet are entrapped in a ring to fight to the death.[85] Victorious gamecocks usually leave the ring with severe injuries such as missing eyes, punctured lungs, and broken bones.[86] Gamecock handlers often suck the blood out of their birds' wounds to alleviate the pain and pressure.[87] This contact with the birds' blood and other bodily fluids puts the handlers at high risk for contracting avian flu and other viruses.[88] Even spectators are at risk of contracting the virus if they are sprayed with the gamecocks' blood during the match.[89]

Avian flu has not reached American soil yet, but the billion-dollar-a-year American cockfighting industry[90] is a likely avenue for the disease to enter the country.[91] Cockfighting is only legal in Louisiana and New Mexico, but matches regularly occur in several other states.[92] Bans on cockfighting are routinely disregarded because the penalties for violations are so weak.[93] For instance, on June 13, 2005, federal agents raided the Del Rio Cockfighting Pit in Tennessee and arrested 144 participants.[94] David Webb, a gamecock breeder, was one of the people arrested at the Del Rio cockfight.[95] After paying his fifty dollar fine, he reinvested five thousand dollars to replace the gamecocks that

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[81] *Id.*

[82] *Id.*

[83] Alan Sipress, *Bird Flu Adds New Danger to Bloody Game; Cockfighting among Asian Customs That Put Humans at Risk*, Washington Post A16 (Apr. 14, 2005) (available at http://www.washingtonpost.com/wp-dyn/articles/A51593-2005Apr13.html) (site no longer available).

[84] *Id.*

[85] L.A. Dept. Health Servs., *Cockfighting*, http://www.lapublichealth.org/vet/docs/cockfight.pdf (accessed Mar. 4, 2006).

[86] *Id.*

[87] Sipress, *supra* n. 83.

[88] *Id.*

[89] *Id.*

[90] L.A. Dept. Health Servs., *supra* n. 85, at http://www.lapublichealth.org/vet/docs/cockfight.pdf.

[91] Elton Gallegly, *Smuggling Cockfighting Roosters a Conduit to Bird Flu*, http://www.house.gov/gallegly/press2005/col121105cockfighting.htm (Dec. 11, 2005).

[92] L.A. Dept. Health Servs., *supra* n. 85, at http://www.lapublichealth.org/vet/docs/cockfight.pdf.

[93] *Id.* Violating the animal fighting provision of the Animal Welfare Act is a federal misdemeanor. *Id.*

[94] CBS News, *144 Arrested at Huge Cockfight*, http://www.cbsnews.com/stories/2005/06/13/national/main701212.shtml (June 13, 2005).

[95] Television Interview by John Pless, News Channel 9 WTVC, with David Webb. (Nov. 30, 2005) (available at http://www.newschannel9.com/engine.pl?station=wtvc&id=2854&template=breakout_story1.shtml&dateformat=%25M+%25e,%25Y).

were confiscated.[96] When interviewed, Webb stated that the cockfights had been moved to Virginia and would return to Tennessee in the future.[97] Entirely undeterred by the weak laws, gamecock owners often simply smuggle their birds across state and international borders to fight.[98] This transportation greatly increases the risk of an American gamecock contracting avian flu and bringing the virus into the United States.[99]

Representatives Bartlett, Gallegly, and Green sought to protect America from the threat of avian flu by increasing the penalties for cockfighting violations in hope of deterring future disregard of the laws.[100] The Conference Committee not only refused to add the AFPEA language to the Defense Appropriations Bill, but also issued a statement explaining that the bill "[d]oes not include any language nor was any language ever being considered related to cockfighting or animal fighting."[101] Opponents of the Animal Fighting Prohibition Enforcement Provision stated that it is "a bit of a stretch to say that the animal fighting bill should be an important part of any avian flu efforts."[102] It is not, however, necessarily a stretch to link cockfighting and disease transmission considering the fact that cockfighting has previously brought devastating diseases into the U.S.[103] For example, in 2003, California declared a state of emergency when illegally transported gamecocks contaminated the state's entire poultry population with the exotic Newcastle disease.[104]

Advocates for increased penalties for animal fighting violations are continuing to push for this important legislation. This year, the Senate passed S. 382, the Animal Fighting Prohibition Enforcement Act, without amendment and by unanimous consent.[105] A reciprocal

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96 *Id.*

97 *Id.*

98 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

99 *Id.*

100 *Id.*

101 Press Release, U.S. H.R. Comm. Appropriations, *News Room, Highlights of FY06 Defense Appropriations Bill* (June 7, 2005) (available at http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=577&Month=6&Year=2005) (site no longer available).

102 NewsMax.com, *Cockfighting Bill Aimed at Stopping Bird Flu Spread*, http://www.newsmax.com/archives/articles/2005/11/7/55529.shtml (Nov. 7, 2005).

103 Gallegly, *supra* n. 91, at http://www.house.gov/gallegly/press2005/col121105cockfighting.htm.

104 Press Release, Off. of the Gov., *Governor Davis Declares State of Emergency* (Jan. 8, 2003) (available at http://www.cdfa.ca.gov/ahfss/ah/END_Test/pdfs/GovDavEndEmerg.pdf).

105 Lib. Cong., *Bill Summary and Status for the 109th Congress*, *S.382*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00382:@@@R (accessed Feb. 28, 2006) [hereinafter Lib. Cong., *Bill Summary and Status S.382*].

bill in the House, H.R. 817, had more than two hundred sponsors.[106] These bills are endorsed by many organizations including the U.S. Department of Agriculture and the National Chicken Council.[107] At the time of this writing, both bills have been referred to subcommittees and no hearings have been scheduled on either bill.[108]

b. Arctic Drilling Amendment

Representative Ted Stevens (R-Alaska) introduced an amendment to the Defense Appropriations Bill that would have allowed oil drilling in Alaska's Arctic National Wildlife Refuge (ANWR or "the Refuge").[109] Oil drilling in ANWR has been a hotly debated issue for nearly three decades.[110] President Eisenhower established ANWR in 1960 to preserve the unique wildlife, wilderness, and recreational values of the area.[111] It is the nation's largest wildlife preserve and the "only protected area in the world that includes an intact arctic, subarctic, and boreal ecosystem."[112] This unique ecosystem is vital to the survival of the Refuge wildlife,[113] which includes 36 species of mammals, 180 species of birds, and 36 species of fish.[114]

ANWR also represents North America's highest petroleum potential yet to be explored.[115] Supporters of Representative Stevens's amendment claim the Refuge holds ten billion barrels of oil[116] and believe that drilling the Refuge will decrease U.S. dependence on foreign oil.[117] Opponents of drilling, however, claim that the amount of oil that would be economically feasible to recover would provide only six

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106 Lib. Cong., *Bill Summary and Status for the 109th Congress*, *H.R.817*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00817:@@@X (accessed Feb. 28, 2006) [hereinafter Lib. Cong., *Bill Summary and Status H.R.817*].

107 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

108 Lib. Cong., *Bill Summary and Status H.R.817*, *supra* n. 106, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00817:@@@X; Lib. Cong., *Bill Summary and Status S.382*, *supra* n. 105, at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00817:@@@X.

109 Sheryl Gay Stolberg, *A Senator's Bold Ploy on Arctic Drilling*, N.Y. Times A33 (Dec. 21, 2005).

110 *All Things Considered* (NPR Nov. 10, 2005) (Radio broadcast, transcr. available at http://www.npr.org/templates/story/story.php?storyId=5007819).

111 U.S. Fish & Wildlife Serv.-AK, *Arctic National Wildlife Refuge History Time Line*, http://arctic.fws.gov/timeline.htm (updated Feb. 14, 2006).

112 Defenders of Wildlife, *Help Save the Arctic National Wildlife Refuge, Wildlife Impacts*, http://www.savearcticrefuge.org/sections/wildimpacts.html (accessed Feb. 26, 2006).

113 *Id.*

114 Animal Welfare Inst., *Senate Votes to Allow Drilling in Alaska's Arctic National Wildlife Refuge*, http://www.awionline.org/pubs/Quarterly/05_54_2/542p45.htm (accessed Feb. 26, 2006).

115 Arctic Power, *The Issue: Which One is the Real* ANWR? http://www.anwr.org/backgrnd/theissue.htm (accessed Mar. 7, 2006).

116 *Id.*

117 Animal Welfare Inst., *supra* n. 114, at http://www.awionline.org/pubs/Quarterly/05_54_2/542p45.htm.

months worth of fuel to the United States.[118] Further, they claim that oil field development, including gravel mines, air and noise pollution, and toxic waste, will pollute and destroy the wildlife's feeding and breeding habitats.[119] Accordingly, opponents assert that such a small amount of oil is not worth destroying "the wildest place left in America."[120]

Because past efforts to pass oil-drilling bills and provisions have been successfully filibustered in the Senate,[121] this year legislators attached their drilling provision to Congress's Budget Resolution, which cannot be filibustered.[122] This tactic proved successful in avoiding a filibuster of a similar pro-drilling provision in 1995; however, Bill Clinton ultimately vetoed that provision.[123] Now, with a pro-drilling President in office, legislators again tried to pass pro-drilling legislation as part of the filibuster-proof Budget Resolution.[124] Much to the legislators' surprise, however, while the Senate passed the Resolution with the pro-drilling provision, the House objected to the inclusion of the provision and stripped it from the final Budget Resolution.[125]

Senator Stevens' amendment to the Defense Appropriations Bill was a last-ditch attempt to pass pro-drilling legislation in 2005.[126] Stevens hoped opponents to drilling would refrain from blocking a bill that financed American troops in Iraq.[127] Many Senators were offended that Stevens would jeopardize the important military spending bill by including his controversial Arctic Drilling Amendment in it.[128] Ultimately, the Senate decided drilling legislation did not belong in a defense appropriations bill and voted down the Amendment thereby saving ANWR and its wildlife from oil drilling for another year.[129]

B. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

On August 10, 2005, President Bush signed into law H.R. 3, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A

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118 Humane Socy. U.S., *DoD Appropriations Bill*, *supra* n. 6, at http://www.hsus.org/hsus_field/animal_fighting_the_final_round/appropriations_bill_proves_hostile.html.

119 *Id.* Indeed, a similarly structured Alaskan oil complex, Prudhoe Bay, emits more pollution than Washington D.C. Adam M. Roberts, *Wildlife Refuge or Oil Industry Haven?* 50 Animal Welfare Inst. Q.2 (Spring 2001)(available at http://www.awionline.org/pubs/Quarterly/spring2001/anwr.htm).

120 Defenders of Wildlife, *Help Save the Arctic National Wildlife Refuge, Learn More*, http://www.savearcticrefuge.org/learnmore.html (accessed Mar. 7, 2006).

121 *All Things Considered*, *supra* n. 110.

122 *Id.*

123 *Id.*; Stolberg, *supra* n. 109, at A33.

124 *All Things Considered*, *supra* n. 110.

125 Stolberg, *supra* n. 109, at A33.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

Legacy for Users (SAFETEA-LU).[130] The Act provides $286.5 billion of funding for our nation's highways and transit systems through 2009.[131] Although the Act contains some environmentally unsound provisions, it also includes more wildlife protection than any previous highway bill.[132]

One of the most detrimental effects of highways on wildlife is road kill.[133] Wildlife-vehicle collisions are the number one human cause of wildlife mortality[134] and threaten the very existence of some rarer species.[135] Wildlife-vehicle collisions not only cause millions of wildlife deaths each year[136] but also result in hundreds of human deaths and tens of thousands of human injuries.[137]

A large percentage of road kill results from the highways' fragmentation of wildlife habitats.[138] As more roads are built throughout America, the natural habitats of wildlife are being dissected into smaller and smaller areas.[139] Because these areas are often too small to support the needs of the wildlife populations, animals are forced to cross busy highways to find food, shelter, and mates.[140] The drastic effects of habitat fragmentation can be reduced by including wildlife passages in highway designs.[141] Wildlife passages are corridors designed to safely funnel wildlife across or under major highways.[142] The passages shield the noise of the highway and are made from specific materials designed to entice animal use.[143] SAFETEA-LU contains three provisions that increase the funds available for wildlife passage development.[144]

First, section 1119(m)(3) of the Act provides $10 million per year to improve fish passages under forest roads.[145] Current structures channel the water creating strong currents that some fish cannot swim

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130 Pub. L. No. 109-59, 119 Stat. 1144 (2005).

131 *Id.* at 1153–57.

132 Defenders of Wildlife, *SAFETEA-LU: Conservation Provisions of Interest: Analysis of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for User and its Impacts for America's Wildlife* 1, http://www.defenders.org/habitat/highways/safetea/safetea.pdf (accessed Feb. 28, 2006).

133 Patricia A. White & Michelle Ernst, *Second Nature: Improving Transportation without Putting Nature Second* 3 (Defenders of Wildlife) (available at http://www.transact.org/library/reports_pdfs/Biodiversity/second_nature.pdf) (accessed Feb. 28, 2006).

134 *Id.* at 4.

135 *Id.*

136 *Id.* at 3.

137 *Id.* at 5.

138 *Id.* at 3.

139 White & Ernst, *supra* n. 133, at 5.

140 *Id.*

141 Humane Socy. U.S., *Wildlife Crossings—Wild Animals and Roads*, http://www.hsus.org/wildlife/issues_facing_wildlife/wildlife_crossings_wild_animals_and_roads/ (accessed Mar. 5, 2006).

142 *Id.*

143 *Id.*

144 119 Stat. at 1171–72, 1190, 1221.

145 *Id.* at 1190.

against.[146] Improving these passages is particularly important for anadromous fish that need to enter river systems to breed.[147] Second, section 1113 of the Act increases funding for Transportation Enhancement (TE) activities,[148] which are "federally funded, community-based projects that expand travel choices and enhance the transportation experience by improving the cultural, historic, aesthetic and environmental aspects of our transportation infrastructure."[149] TE funds are only used on projects that include one of the twelve activities listed in United States Code title 23, section 101(a)(35).[150] Activity number eleven allows funding for construction of wildlife passages.[151] Finally, section 1401(3)(B) of the Act opens up funding sources previously unavailable for wildlife passage construction by expanding the definition of "Highway Safety Improvement Project" to include the addition of structures or other means to eliminate vehicle-caused wildlife collisions.[152]

SAFETEA-LU also calls for the Secretary of Transportation to conduct a major study on the causes of wildlife vehicle collisions and methods to reduce the number of collisions.[153] The study will create a blueprint for a best practices manual to be used to train transportation professionals and will hopefully significantly decrease vehicle-caused animal mortalities.[154]

Wildlife-vehicle collisions are not the only harm caused by highways and transit systems.[155] Major highways also create incredible amounts of air, soil, water, and noise pollution that cause a myriad of problems for animals.[156] In the past, highways were planned, funded, and designed before any impact studies were completed.[157] Any environmental concerns were addressed in hindsight.[158] SAFETEA-LU

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146 Defenders of Wildlife, *supra* n. 132, at 5.

147 *Id.*

148 119 Stat. at 1171–72.

149 Natl. Transp. Enhancements Clearinghouse, *TE Basics*, http://www.enhancements.org/TE_basics.asp (accessed Feb. 28, 2006).

150 U.S. Dept. of Transp., *Transportation Enhancement Activities*, http://www.fhwa.dot.gov/environment/te/teas.htm (accessed Feb. 28, 2006).

151 *Id.*

152 119 Stat. at 1221.

153 *Id.* at 1190.

154 Defenders of Wildlife, *supra* n. 132, at 2–3.

155 White & Ernst, *supra* n. 133, at 6. For example, vehicles inundate the surrounding habitats with air pollutants such as carbon monoxide, nitrogen oxides, and hydrocarbons that cause a variety of environmental problems including smog, ozone formation, and acid rain. *Id.* at 7. Vehicles also emit heavy metals such as zinc, cadmium, nickel, and lead, which seep into the earth and contaminate animals' food sources. *Id.* Studies on animals living close to highways have found lead concentration levels high enough to cause death or reproductive problems. *Id.* Highway noise pollution also affects wildlife and can cause changes in animal behavior, particularly in species that use auditory signals. *Id.* at 9.

156 *Id.* at 6–9.

157 Defenders of Wildlife, *supra* n. 132, at 14, 45.

158 White & Ernst, *supra* n. 133, at 14.

will increase development of animal-friendly highways by requiring future projects to include a comprehensive study of the impacts on wildlife and the environment during the planning phase.[159]

Many animal rights groups, including HSUS and the Defenders of Wildlife, applaud the wildlife-friendly provisions in SAFETEA-LU.[160] They recognize that while the Act includes some less than ideal environmental effects, it also marks an important step toward considering wildlife in the future development of American roadways.[161]

C. The Pets Evacuation and Transportation Standards Act

On September 22, 2005, Representatives Tom Lantos (D-CA) and Christopher Shays (R-CT) introduced H.R. 3858, the Pets Evacuation and Transportation Standards (PETS) Act.[162] Presently, state and local authorities must present a disaster preparedness plan to qualify for Federal Emergency Management Agency (FEMA) funding.[163] The PETS Act would require authorities to extend their plans to include arrangements for pets and companion animals during disasters.[164]

Planning for the welfare of animals and pets during disasters will alleviate needless animal and human suffering during disasters while increasing public safety.[165] During Hurricane Katrina, evacuees were forced to abandon their pets to save themselves because neither rescuers nor shelters had made arrangements for animals.[166] Because many people consider their pets family members, this heart-wrenching decision created yet another source of emotional distress for the already devastated evacuees.[167] In fact, many Gulf Coast residents refused to evacuate and leave their pets behind, thereby placing themselves in grave danger.[168] The PETS Act would put an end to this no-win situa-

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159 119 Stat. at 1838.

160 *See* Defenders of Wildlife, *supra* n. 132, at 1 (recognizing that SAFETEA-LU contains "some important, and historic, milestones for America's wildlife"); Humane Socy. U.S., *A Daylight Savings Reminder: The HSUS Reminds Drivers to Give Wildlife a Brake!* http://www.hsus.org/press_and_publications/press_releases/a_daylight_savings_reminder_the_hsus_reminds_drivers_to_give_wildlife_a_brake.html (Oct. 24, 2005) (applauding wildlife-friendly provisions in SAFETEA-LU).

161 Defenders of Wildlife, *supra* n. 132, at 1.

162 H.R. 3858, 109th Cong. (Sept. 22, 2005); *see generally* Christopher Shays, *Animal Welfare: Its Place in Legislation* 12 Animal L. 1, 1–2 (2005) (discussing H.R. 3858 and why the legislation is needed).

163 Press Release, Congressman Tom Lantos, *Lantos Legislation Will Ensure That in Future Disasters, People Will Not be Forced to Abandon Household Pets* ¶ 2 (Sept. 22, 2005) (available at http://lantos.house.gov/HoR/CA12/Newsroom/Press+Releases/2005/PR_050922_Katrina_PETSBill .htm).

164 H.R. 3858, 109th Cong.

165 *Id.*

166 Gina Spadafori, *Including Pets in Evacuation Plans Could Save Human Lives*, Boston Globe C6 (Oct. 13, 2005) (available at http://www.boston.com/yourlife/home/articles/2005/10/13/including_pets_in_evacuation_plans_could_save_human_lives/).

167 *Id.*

168 *Id.*

tion by requiring authorities to consider pets and companion animals in their disaster preparedness plans.[169]

After being introduced to the House, the bill was referred to the Subcommittee on Economic Development, Public Buildings and Emergency Management.[170] At the time of this writing, the bill has eighty-four co-sponsors and no hearing has been scheduled on it.[171]

II. STATE LEGISLATION

A. Hunting

1. Internet Hunting

In late January 2005, John Lockwood helped a friend become the first person to hunt via the internet through Lockwood's website, Live-Shot.com.[172] This triggered a great deal of legislative debate in the 2005 session regarding the issue of internet hunting. Internet hunting, or remote-control hunting, allows a person with an internet connection to use his or her computer to aim and fire a weapon, which has been strategically placed in a game ranch to shoot and kill exotic animals at close range.[173] Someone at the ranch loads and positions the gun at a location where the animal is lured and shot through the click of a mouse.[174] "At its peak, Lockwood's [website] had 350 members," all paying him a monthly fee for his "service."[175] However, the website also managed to draw the attention of groups opposed to the practice, including legislatures, hunting advocacy groups, and animal advocacy groups.[176]

Texas, where Lockwood's ranch was located, was the first state to respond to the website by proposing legislation to ban the practice.[177]

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169 Press Release, Congressman Lantos, *supra* n. 163.

170 Lib. Cong., *Bill Summary and Status for the 109th Congress*, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03858:@@@X (accessed Feb. 28, 2006).

171 *Id.*

172 Humane Socy. U.S., *The Latest Fad in Internet Animal Cruelty: Pay-Per-View Hunting*, http://www.hsus.org/wildlife/wildlife_news/pay_per_view_slaughter.html (Apr. 8, 2005) [hereinafter Humane Socy. U.S., *Pay-Per-View Hunting*].

173 Humane Socy. U.S., *Internet Hunting: Where Does Your State Stand?* http://www.hsus.org/legislation_laws/citizen_lobbyist_center/internet_hunting_state_laws.html (accessed Mar.13, 2006).

174 *Id.* ("The animal is lured to a feeding station within range of the mounted rifle."); Aili McConnon, *Cyber Hunting: Just Click and Shoot, For Real*, http://www.azcentral.com/ent/pop/articles/1207cyberhunt1207-CR.html (Dec. 6, 2005) ("A guide would be on site to load the gun (hooked up to a computer system), ensure its safety and make sure the animal was killed quickly if it was wounded.").

175 McConnon, *supra* n. 174, at http://www.azcentral.com/ent/pop/articles/1207cyberhunt1207-CR.html.

176 *Id.* (Organizations such as the National Humane Society [The Humane Society of the United States], National Rifle Association, and the Safari Club quickly spoke out against the website and lobbied legislatures to ban internet hunting.).

177 Humane Socy. U.S., *Internet Hunting Bills 2005*, http://www.hsus.org/web-files/PDF/Internethunting_StateLaws_2005.pdf (updated Nov. 3, 2005) [hereinafter Humane Socy. U.S., *Internet Hunting Bills 2005*]; *see also* Humane Socy. U.S., *Pay-Per-*

Representative Todd Smith sponsored House Bill 2026, which was signed into law on June 20, 2005, to prohibit computer-assisted remote hunting of animals.[178] Other states followed Texas's lead, and by November 3, 2005 thirteen states had signed bills into law banning some form of internet hunting.[179] The language of the statutes varied as to how the states defined internet hunting, the specific practices the states prohibited, and the types of animals that could not be targeted. Michigan and Virginia, for example, adopted the language of the Texas law, prohibiting a person from engaging in or operating a facility that practiced "computer-assisted remote hunting," which the statutes define as the use of a computer or other device to remotely control a hunting weapon to kill an animal.[180] California and New York prohibit both the use of remote-control hunting devices via an internet connection and the operation of a facility that practices the "online shooting or spearing" of an animal within the state.[181] California additionally prohibits the possession, importation, or exportation of a "bird or mammal" in furtherance of these illegal acts.[182] Minnesota, North Carolina, Pennsylvania, and Virginia passed legislation that prohibits the use or facilitation of computer-assisted remote hunting where the hunter is not physically present at the location of the weapon used to kill the animal.[183] These states specifically identify "wild animals" as the target of the prohibited activity.[184] Virginia would also require the immediate revocation of a hunting license for three to five years upon a conviction for remote hunting.[185]

The remaining four states that passed internet hunting laws in the 2005 session differed more significantly in how the laws barred internet hunting. For example, Maine's statute prohibits any "com-

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View Hunting, *supra* n. 172, at http://www.hsus.org/wildlife/wildlife_news/pay_per_view_slaughter.html (Virginia followed suit behind Texas when bills banning internet hunting were signed by the governor.); Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports*, *Virginia*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=VA (accessed Mar. 13, 2006) (Virginia Governor Mark Warner signing both House Bill 2273, sponsored by Delegate Glenn Oder (R), and Senate Bill 1083, sponsored by Senator Patricia Ticer (D), into law on March 20, 2005).

178 Humane Socy. U.S., *Pay-Per-View Hunting*, *supra* n. 172, at http://www.hsus.org/wildlife/wildlife_news/pay_per_view_slaughter.html.

179 Humane Socy. U.S., *Internet Hunting Bills 2005*, *supra* n. 177, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/internet_hunting_state_laws.html.

180 Mich. Comp. Laws Ann. § 750.236a(1)–(2) (Westlaw current through P.A. 2006, No. 1-25) (defining the term as "computer-assisted shooting"); Tenn. Code Ann. §§ 70-4-501 to 70-4-502 (Supp. 2006); Tex. Parks & Wildlife Code Ann. § 60.002(a)–(c) (Supp. 2006).

181 Cal. Fish & Game Code Ann. § 3003(a)–(b) (West Supp. 2006); N.Y. Envtl. Conservation L. § 11-1906(1)–(2) (McKinney current through L. 2006, chs. 1–6, 8).

182 Cal. Fish & Game Code Ann. § 3003(c)–(d).

183 Minn. Stat. § 97B.115 (Supp. 2006); N.C. Gen. Stat. § 113-291.1A (Supp. 2006); 18 Pa. Consol. Stat. Ann. § 7641 (Westlaw current through Act 2005-96 (End)); Va. Code Ann. § 29.1-530.3 (Supp. 2006).

184 Minn. Stat. § 97B.115; N.C. Gen. Stat. § 113-291.1A; 18 Pa. Consol. Stat. § 7641; Va. Code Ann. § 29.1-530.3.

185 Va. Code Ann. § 29.1-530.3(B).

mercial large game shooting area" from operating a "website or a service or business . . . to shoot . . . any large game . . . in this state through the use of a . . . remote-control device when the [hunter] . . . is physically removed from the immediate vicinity of the . . . animal."[186] The statute, unlike other states' internet hunting laws, does not prohibit a person from *using* the website. West Virginia prohibits a person from hunting unless the person is in physical proximity to the wildlife.[187] Similarly, Wisconsin passed a law that requires physical possession of the weapon to legally shoot a farm-raised deer or a wild animal.[188] Furthermore, Wisconsin facilities that allow a person to hunt farm-raised deer or wild animals are responsible for requiring that the hunter be in physical possession of the weapon.[189]

Finally, Vermont passed a statute that barred "remote-control hunting" with language similar to the Texas statute.[190] The Vermont statute prohibits a person from using a remote-control hunting device and from operating a remote-control hunting site in the state.[191] Additionally, Vermont followed California in prohibiting the possession, importation, or exportation of an animal for the purpose of remote-control hunting.[192] But, unlike the other internet hunting laws passed in 2005, Vermont passed an exception to the bar against remote-control hunting for persons "physically impaired" such that the person cannot otherwise hunt in accordance with the restrictions.[193] Of the thirteen states that passed internet hunting legislation, only Vermont has included this type of exception.

2. Right to Hunt

Although hunting is legal in most states, there is a movement to amend state constitutions to include a "right to hunt."[194] For many hunters, the movement is a response to the perceived threat from animal rights organizations.[195] Pro-hunting groups like the U.S.

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186 7 Me. Rev. Stat. Ann. § 1347 (Supp. 2005).

187 W. Va. Code § 20-2-5(1) (Supp. 2005) (The West Virginia statute makes it unlawful for a person to "[s]hoot at or to shoot any wild bird or animal unless it is plainly visible to him or her."); *see also* Humane Socy. U.S., *Internet Hunting Bills 2005*, *supra* n. 177, at http://www.hsus.org/legislation_laws/citizen_lobbyist_center/internet_hunting_state_laws.html (summarizing multiple state laws).

188 Wis. Stat. Ann. § 95.55(5)(bn) (Westlaw current through 2005 Act 60, published 12/30/05) (regarding farm-raised deer); Wis. Stat. Ann. § 169.09(1m) (Westlaw current through 2005 Act 60, published 12/30/05) (regarding captive wild animals).

189 Wis. Stat. Ann. §§ 95.55(bn), 169.09(1m).

190 Vt. Stat. Ann. tit. 10, § 4715(a)–(c) (Supp. 2005).

191 *Id.*

192 *Id.* at § 4715(d).

193 *Id.* at § 4715(e) (The person has to apply for the permit and submit "certification from a licensed physician describing the person's limitations.").

194 St. Envtl. Resource Ctr., *Issue: "Right to Hunt and Fish" Laws*, http://www.serconline.org/huntandfish.html (accessed Mar. 13, 2006).

195 Patrik Jonsson, *'Right to Hunt' vs. Animal Rights: What's Fair Game?* Christian Sci. Monitor (Apr. 3, 2002) (available at http://www.csmonitor.com/2002/0403/p01s04-ussc.html).

Sportsmen's Alliance have lobbied for legislative and constitutional provisions to protect "our heritage" of hunting, trapping, and fishing.[196] It is no surprise then that in the 2005 legislative session, several states passed legislation to promote or guarantee the right to hunt, fish, and trap by amending their state constitutions, imposing a duty on a state agency to focus on hunting, or strengthening a perceived gap in a pro-hunting constitutional amendment. However, it should be noted that the impact of this legislation is unclear, and both pro-hunting groups and animal rights organizations are unsure about the strength of the legislation.[197]

a. Georgia and Indiana

In the 2005 legislative session, legislation was introduced in Georgia and Indiana that would amend the state constitutions to include a right to hunt and fish.[198] Both resolutions easily passed in the state legislatures.[199] Georgia Senate Resolution 67 may be ratified in the upcoming 2006 election.[200] Indiana House Resolution 4, on the other hand, must be passed by a second general assembly before it will be placed on a ballot for ratification.[201] In both states, sponsors of the bills argued that the right to hunt and fish were under attack and this legislation was necessary to protect this "historic right."[202] The legisla-

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196 James A. Swan, *The Right to Hunt*, http://www.nationalreview.com/swan/swan111902.asp (Nov. 19, 2002, 9:35 a.m.).

197 St. Envtl. Resource Ctr., *supra* n. 194, at http://www.serconline.org/huntandfish.html (discussing whether the right-to-hunt legislation may interfere with pro-animal and environmental laws and regulations); Swan, *supra* n. 196, at http://www.nationalreview.com/swan/swan111902.asp (discussing how Rick Story, vice president of the U.S. Sportsmen's Alliance, questions the effectiveness of the constitutional amendments).

198 Ga. S. Res. 67, 148th Gen. Assembly, 2005–2006 Reg. Sess. (May 9, 2005); Ind. H. Jt. Res. 4, 114th Gen. Assembly, 1st Reg. Sess. (Jan. 4, 2005).

199 Nancy Badertscher, *Georgia Beat: A Blog as Local as the Politics*, *Hunting and Fishing Amendment to Appear on Ballot*, http://www.ajc.com/metro/content/custom/blogs/georgia/entries/2005/03/17/hunting_and_fishing_amendment_to_appear_on_ballot.html) (Mar. 17, 2005, 12:54 p.m.) (The Senate President Pro Tem Eric Johnson (R) sponsored Senate Resolution 67, which passed unanimously in the Georgia House.); Mary Lee Pappas, *Animal Welfare Legislation, Trapping Could Be Added to Constitution*, NUVO (Mar. 30, 2005) (available at http://www.nuvo.net/archive/2005/03/30/animal_welfare_legislation.html) (The Indiana Senate passed House Resolution 4, sponsored by John Ulmer (R).).

200 Badertscher, *supra* n. 199, at http://www.ajc.com/metro/content/custom/blogs/georgia/entries/2005/03/17/hunting_and_fishing_amendment_to_appear_on_ballot.html.

201 *See* Ind. Gen. Assembly, *Bill Drafting Manual*, http://www.in.gov/legislative/session/manual/chap04/index.html#jointresolutions (accessed Mar. 14, 2006) (requiring that constitutional amendments "must be agreed upon by two separately elected general assemblies").

202 Jim Stinson, *Amendments to Constitution Worthy of Some Extra Watching*, Gary Post-Tribune A3 (Jan. 24, 2005) (Representative John Ulmer argued that "anti-hunting groups and the Humane Society" were attacking the right to hunt.); Badertscher, *supra* n. 199, at http://www.ajc.com/metro/content/custom/blogs/georgia/entries/2005/03/17/

tion is also viewed as being essential because of the importance of hunting and fishing both to the states' economies and as a traditional and popular pastime.[203] Both bills amend the state constitutions to grant an explicit right to hunt to the citizens of the state.[204]

b. Alaska and Maryland

The Alaska legislature enacted House Bill 75 to promote "sport hunting" in the state by amending the Fish and Game Code.[205] The enacted legislation places on the Commissioner of Fish and Game a duty to "promote fishing, hunting, and trapping and preserve the heritage of fishing, hunting and trapping in the state."[206] In Maryland, Delegate Michael Weir (D) sponsored House Bill 1086 and Governor Ehrlich signed it into law on May 10, 2005.[207] The enacted legislation requires the Department of Natural Resources to keep lands managed by the Department open for hunting activities unless they must be closed "for reasons of public safety, fish or wildlife management, or homeland security, or as otherwise required by law."[208] The law further requires the Department to manage state lands in a manner that ensures no net loss of land open to hunting[209] and, in general, to conduct its management activities in such a way as to promote hunting.[210] The bases for these imposed duties are the findings of the General Assembly regarding the importance of hunting and hunters to the state.[211]

c. Montana

In a recent lawsuit, a district judge issued a permanent injunction against all forms of hunting on particular private lands because a

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hunting_and_fishing_amendment_to_appear_on_ballot.html (Senate President Pro Tem Eric Johnson stated that "[t]here are activist judges and future legislatures . . . that could restrict our heritage and our historic right to hunting and fishing.").

[203] *See* Ga. H. Daily Rpt. No. 8, 147th Gen. Assembly, 2004 Reg. Sess. (2004) (stating that the legislation's authors pointed to the $170 million annually generated by hunting and fishing and "the fact that the traditions of hunting and fishing are much a part of this state as Georgia red clay"); Craig Rimlinger, *Codifying Right to Hunt Lawmakers Push Changes to State Constitutions*, Fort Wayne J. Gazette 11 (Dec. 5, 2004) (available at 2004 WLNR 13580026) (describing hunting as "an institution in the Midwest" and citing a 2001 study indicating that Indiana received $846 million from hunting).

[204] Ga. Sen. Res. 67, 148th Gen. Assembly, 2005-2006 Reg. Sess. (May 9, 2005); Ind. H. Jt. Res. 4, 114th Gen. Assembly, 1st Reg. Sess. (Mar. 29, 2005).

[205] Alaska H. 75, 24th Legis., 1st Sess. § 1 (Jan. 18, 2005).

[206] Alaska Stat. § 16.05.050(a)(19) (Supp. 2005).

[207] Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, Maryland*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=MD (accessed Mar. 14, 2006).

[208] Md. Nat. Resources Code Ann. § 10-212(b)(1) (Supp. 2005).

[209] *Id*. at § 10-212(b)(3).

[210] *Id.* at § 10-212(b)(2).

[211] *Id.* at § 10-212(a) (listing reasons for the importance of hunting).

neighbor feared for his safety due to the increased hunting.[212] The decision in the case brought into question Montana's constitutional right to hunt.[213] In response to the ruling, the Montana legislature proposed House Bill 225 to protect hunting on private property.[214] The enacted legislation allows the owner of land to hunt on his private property as long as the hunting does not violate any state laws or regulations.[215] The need for this legislation in Montana raises many questions about the significance and extent of these hunting rights amendments once they have been passed. Rick Story, vice president of U.S. Sportsmen's Alliance, has stated that many of the state constitutional amendments include language that could leave hunting vulnerable to being restricted through regulations.[216]

B. Animal and Ecological Terrorism Legislation

In the aftermath of September 11, 2001, anti-terrorism measures have been implemented at both the state and federal levels.[217] In this politically tense climate, two organizations have pushed model legislation that targets animal rights and ecological terrorist organizations.[218] The American Legislative Exchange Council (ALEC) and the U.S. Sportsmen's Alliance (USSA) drafted the Animal and Ecological Terrorist Act (AETA) as a model to be used by states to write and pass legislation targeting animal and ecological terrorism.[219] Although ALEC and the USSA argue that the AETA primarily targets allegedly violent groups such as the Animal Liberation Front (ALF), the AETA has a broad definition of animal or ecological terrorist organization: "any association, organization, entity, coalition, or combination of two or more persons with the . . . primary or incidental purpose of supporting any . . . activity through intimidation, coercion, force, or fear that is intended to obstruct, impede, or deter any person from participating in

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212 Gordy Megroz, *Outside Online, Today's Top Stories, Tom Brokaw Wins Injunction against Hunting around His Montana Ranch*, http://outside.away.com/outside/news/20041110_1.html (Nov. 10, 2004).

213 Mont. Const. art. IX, § 7; Mark Henckel, *Montana Outdoors: Brokaw Dispute Poses Tough Questions*, Billings Gazette (Montana) (Nov. 24, 2004) (available at http://www.billingsgazette.com/newdex.php?display=rednews/2004/11/25/build/outdoors/35-mt-outdoors.inc) (questioning the rights of a landowner to hunt within his property).

214 Gary Marbut, *Mont. Shooting Sports Assn., News, Two Bills up Thursday*, http://www.mtssa.org/legisupdates.phtml?legupdate_id=59 (Jan. 11, 2005).

215 Mont. Code Ann. § 87-2-121 (2005).

216 Swan, *supra* n. 196, at http://www.nationalreview.com/swan/swan111902.asp.

217 Michael Satchell, *Legal Concerns: ALEC Looks to Turn Animal Activists into Domestic Terrorists*, http://www.hsus.org/about_us/about_hsus_programs_and_services/eye_on_the_opposition/legal_concerns_alec_looks_to_turn_animal_activists_into_domestic_terrorists.html (accessed Mar. 14, 2006).

218 *Id.*

219 U.S. Sportsmen's Alliance, *Legislators' Association Gives Nod to Model Terrorism Bill*, http://www.wlfa.org/interactive/features/Read.cfm?ID=1006 (accessed Mar. 14, 2006).

a lawful animal activity, animal facility, [or] research facility . . . ."[220] This definition may be interpreted to include animal rights organizations that use peaceful, legal, non-violent methods.[221] The language of the AETA could be construed to include activities such as signing petitions, protesting, and holding demonstrations.[222] In the 2005 legislative session, Arizona, Ohio, and Pennsylvania followed the AETA model to introduce legislation adding the definition of animal and ecological terrorism to their statutes.[223]

1. Arizona

Governor Janet Napolitano signed Senate Bill 1166, sponsored by Senator Thayer Verschoor (R), into law on May 20, 2005.[224] The new legislation "defines 'animal terrorism' or 'ecological terrorism' as a form of racketeering . . . ."[225] However, the statutory language was limited from its original scope because Governor Napolitano had vetoed a previous bill with broader language.[226] The statute covers acts by "three persons acting in concert" to inflict damage to property greater than ten thousand dollars with the use of a deadly weapon or the intent to cause physical harm to a person.[227] Perhaps due to Governor Napolitano's resistance to the earlier drafts, the Arizona ecological terrorism bill is not as broad as the AETA model legislation or the bills introduced in both the Ohio and Pennsylvania legislatures.

2. Ohio

Ohio Senate Bill 9, sponsored by Senator Jeff Jacobson (R), was signed into law on January 11, 2006.[228] The enacted legislation adds the definition of animal or ecological terrorism to the state's criminal

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220 U.S. Sportsmen's Alliance, *The Animal and Ecological Terrorism Act*, http://www.wlfa.org/interactive/features/Read.cfm?ID=1129 (accessed Mar. 14, 2006).

221 Ginger A. Otis, *State Law Would Pin the T-Word on Animal Rights and Eco Protesters*, Village Voice (Nov. 12–18, 2003) (available at http://www.refuseandresist.org/police_state/art.php?aid=1134).

222 St. Envtl. Resource Ctr., *Watchdog Alert*, *Terrorism Bill Used to Attack Civic Activism*, http://www.serconline.org/watchdog/watchdog2003/watchdog29.html (accessed Mar. 14, 2006).

223 U.S. Sportsmen's Alliance, *Lawmakers Nationwide Open Eyes to Dangers of Eco-Terrorism*, http://www.wlfa.org/interactive/features/Read.cfm?ID=1634 (accessed Mar. 14, 2006).

224 Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, Pennsylvania*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=PA (accessed Mar. 14, 2006).

225 *Id.*

226 *Legislative Briefing: Ecoterrorism*, 2004 Ariz. Daily Star (May 13, 2004) (available at http://www.azstarnet.com/sn/preps/21884.php) (Governor Napolitano vetoed Senate Bill 1081 describing the bill as "overbroad, unnecessary and susceptible to a host of unintended negative consequences.").

227 Ariz. Rev. Stat. § 13-2301(C)(3) (2005).

228 Humane Socy. U.S., *OH S.B. 9 Animal Terrorism*, http://www.hsus.org/legislation_laws/state_legislation/ohio/oh_sb_9_animal_terrorism.html (accessed Mar. 14, 2006).

code.[229] Under the new law, an act of animal or ecological terrorism is one that causes a substantial risk of physical harm to property, involves use of a deadly weapon, or is an act causing serious physical harm to property.[230] Additionally, actions that impede a person from using an animal research facility, conducting research on animals, or hunting may now be considered terrorist acts.[231] Senator Jacobson argued that the legislation will prevent attacks on "lawful animal activities" such as food processing and farming.[232] However, animal rights groups fear that the bill will interfere with many lawful activities, such as peaceful demonstrations or investigations into animal cruelty.[233]

3. Pennsylvania

The legislation proposed in Pennsylvania to increase penalties for acts of ecological and animal terrorism is similar to the language in the new Ohio law.[234] House Bill 213 has currently passed the Pennsylvania House and is pending in the state's Senate.[235] If enacted, a person would be guilty of "ecoterrorism" if that person intimidated or obstructed an individual participating in an "activity involving animals" or "using an animal . . . facility."[236] Anyone convicted under this section could be fined or imprisoned and may owe restitution up to three times the damage assessed.[237] However, the bill also explicitly grants immunity for a person who "exercises the right of petition or free speech" under the United States and Pennsylvania Constitutions.[238] But there is concern that, even with this exception, animal rights organizations may be hindered in engaging in legitimate, peaceful activities.[239]

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229 2005 Ohio Laws File 61 (available in Westlaw at Ohio 2005 Sess. Law Serv. 126th Gen. Assembly).

230 *Id.*

231 *Id.*

232 Carrie Spencer, *Terrorism Bill Would Stiffen Penalties for Animal Rights Threats*, Akron Beacon J. (Ohio) (Mar. 29, 2005) (available at http://www.freerepublic.com/focus/f-news/1374040/posts).

233 *Id.*

234 *Id.*

235 Am. Socy. Prevention Cruelty Animals, *supra* n. 224, at http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=PA.

236 Pa. H. 213, 189th Gen. Assembly, 2005–2006 Reg. Sess. § 2 (Feb. 2, 2005).

237 *Id*.

238 *Id.*

239 *See e.g.* Am. Socy. Prevention Cruelty Animals, *supra* n. 224, at http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=PA ("[The bill] does not define terms such as 'intimidate,' 'coerce,' or 'obstruct,' thus giving insufficient notice of what behavior would be deserving of more severe punishment.").

C. Factory Farms

Factory farms, or Concentrated Animal Feeding Operations (CAFOs), are large scale, industrial livestock operations.[240] Factory farms emphasize high volume production at the expense of "human health, safe food, the environment, humane treatment of animals, and the rural economy."[241] In response to the negative impact of factory farms, the public has begun taking measures to regulate or restrict factory farms near their communities.[242] In the past year, state legislatures introduced legislation addressing two growing concerns regarding factory farms: the impact of antibiotic use on animals and the confinement of animals. Additionally, legislation was introduced to both increase and limit the regulation of factory farms and slaughterhouses. Finally, legislation banning foie gras was recently introduced in four states, indicating a growing concern across the country about the production of the "delicacy."

1. Antibiotics in Factory Farms

The recent rise in the number of antibiotic-resistant bacteria has lead to a closer examination of the use of antibiotics in factory farms.[243] The National Committee for Clinical Laboratory Standards states that the use of antibiotics in farm animals is for the purposes of growth promotion and the treatment, prevention, and control of disease.[244] The Union of Concerned Scientists (UCS) estimated in 2001 that an average of 24.6 million pounds of antibiotics were used on animals for disease prevention and growth production in the 1990s.[245]

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240 Grace Factory Farm Project, *What is a Factory Farm?* http://www.factoryfarm.org/whatis/1.php (accessed Mar. 14, 2006).

241 *Id.*; *see also* Am. Pub. Health Assn., *2003-7: Precautionary Moratorium on New Concentrated Animal Feed Operations*, http://www.apha.org/legislative/policy/2003/ (accessed Mar. 14, 2006) (information on the negative impact of CAFOs on communities, the environment, antibiotic resistance, and CAFO workers); Sierra Club, *Clean Water & Factory Farms, Frequently Asked Questions, What is a CAFO?* http://www.sierraclub.org/factoryfarms/faq.asp (accessed Mar. 14, 2006) (discussing the health, environmental, and economic impacts of CAFOs).

242 *See* Humane Socy. U.S., *Factory Farming: What People are Doing to Fight Back*, http://www.hsus.org/farm_animals/factory_farms/halt_hog_factories/factory_farming_what_people_are_doing_to_fight_back.html (accessed Mar. 14, 2006) (providing recent examples of community actions to restrict factory farms such as referendums and local ordinances).

243 Suzanne Millman, *The Emerging Threat of Antibiotic Resistance: A Hidden Cost of Factory Farming*, 4 All Animals (mag. of the Humane Socy. U.S.) (Spring 2002) (available at http://www.hsus.org/press_and_publications/humane_society_magazines_and_newsletters/all_animals/volume_4_issue_1_spring_2002/the_emerging_threat_of_antibiotic_resistance_a_hidden_cost_of_factory_farming.html).

244 Ian Phillips et al., *Does the Use of Antibiotics in Food Animals Pose a Risk to Human Health? A Critical Review of Published Data*, 53 J. Antimicrobial Chemotherapy 28, 28 (Jan. 2004) (available at http://jac.oxfordjournals.org/cgi/reprint/53/1/28).

245 Margaret Mellon & Steven Fondriest, *Hogging It!* 23 Nucleus (mag. of the Union Concerned Scientists) (Spring 2001) (available at http://go.ucsusa.org/publications/nucleus.cfm?publicationID=168).

Additionally, a UCS report found that seventy percent of the antibiotics commonly used by humans are the same ones used excessively on animals to prevent the outbreak of disease and for growth promotion.[246] In April this past year, a coalition of public health and environmental advocates petitioned the U.S. Food and Drug Administration to bar the use of seven classes of antibiotics on animals for non-therapeutic purposes.[247] This past legislative session, two states introduced legislation addressing the growing concern over the use of antibiotics in animals.

In Maine, Senator Scott Cowger proposed resolution LD 1126 in response to concerns in the medical community over antibiotic-resistant bacteria.[248] Governor John Baldacci (D) signed the Resolution into law on June 3, 2005.[249] The legislation requires the Commissioner of Agriculture, Food, and Rural Resources and the Director of the Bureau of Health to convene a study group to review the use of antibiotics in animal agriculture and report back to the legislature with policy recommendations on how the state should address the impact on humans from such use of antibiotics.[250]

On November 23, 2005, Assembly Bill 837 was introduced in the Wisconsin Legislature by Representative Sondy Pope-Roberts (D).[251] If enacted, the bill would require state agencies and school districts to give preference to "suppliers who provide meat from animals that have not been given antibiotics for other than therapeutic reasons."[252] The bill has been referred to the Assembly Committee on Public Health.[253]

The legislation in Maine and Wisconsin would not ban the use of antibiotics in farm animals for non-therapeutic purposes. Still, the bill and Resolution indicate a growing concern about the rise of antibiotic-resistant bacteria in humans. Although the connection between the rise of antibiotic-resistant bacteria in humans and the use of antibiotics on farm animals is difficult to measure, the prevalence of antibiotic-resistant bacteria in human populations was shown to have declined in

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246 *Id.*

247 Marc Kaufman, *FDA is Urged to Ban Some Farm Antibiotics*, Wash. Post A08 (Apr. 8, 2005) (available at http://www.washingtonpost.com/wp-dyn/articles/A35335-2005Apr7.html).

248 Sharon Kiley Mack, *Lawmakers Stuck on Antibiotics in Meat Decision*, Bangor Daily News B8 (Apr. 15, 2005) (available at LEXIS, News library; BGDRLY file).

249 St. of Me. Legis., *Summary of LD 1126*, http://janus.state.me.us/legis/LawMakerWeb/summary.asp?LD=1126&SessionID=6 (accessed Mar. 14, 2006).

250 2005 ME Acts S.P. 388.

251 Humane Socy. U.S., *WI A.B. 837 Antibiotic Use in Farm Animals, State Legislation, Wisconsin*, http://www.hsus.org/legislation_laws/state_legislation/wisconsin/wi_ab_837_antibiotics.html (accessed Mar. 14, 2006); Wis. St. Legis., *History of Assembly Bill 837*, http://www.legis.state.wi.us/2005/data/AB837hst.html (accessed Mar. 14, 2006) (providing the date the bill was introduced) [hereinafter Wis. St. Legis., *Assembly Bill 837*].

252 Wis. Assembly 837, 97th Leg., 2005–2006 Reg. Sess. (Nov. 23, 2006) (available at WL, WI-BILLTXT).

253 Wis. St. Legis., *Assembly Bill 837*, *supra* n. 251, at http://www.hsus.org/legislation_laws/state_legislation/wisconsin/wi_ab_837_antibiotics.html.

Denmark and the European Union after the use of antibiotics for growth promotion was banned.[254] The same was shown in Germany and the Netherlands following their ban of the use of the antibiotic avoparcin on farm animals.[255] Finally, it is worth noting that it is often the crowded and unsanitary conditions in factory farms that lead to the rise of antibiotic-resistant bacteria in farm animals.[256]

2. Regulation of Factory Farms and Slaughterhouses

The regulation and inspection of factory farms was the subject of several bills introduced in state legislatures in 2005. Michigan and Minnesota legislatures introduced bills that would restrict access to factory farm information and premises.[257] Representative Leslie Mortimer (R) introduced House Bill 4130 which would restrict the ability of the Department of Environmental Quality to enter a factory farm by requiring a warrant.[258] House Bill 2039, introduced by Representative Gregory Davids (R), would classify information about certain areas of a factory farm as non-public.[259] South Carolina Senator Daniel Verdin (R) introduced Senate Bill 304, which will limit the ability of local governments to regulate factory farms.[260] The bills from those three states are all in committees, but may be considered in the 2006 legislative session.[261] Two states did pass legislation regarding the regula-

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[254] David L. Smith et al., *Agricultural Antibiotics and Human Health: Does Antibiotic Use in Agriculture Have a Greater Impact than Hospital Use?* 2 Pub. Lib. Sci. Med. 731, 731 (2005) (available at http://medicine.plosjournals.org/archive/1549-1676/2/8/pdf/10.1371_journal.pmed.0020232-L.pdf).

[255] Frank Moller Aarestrup et al., *Effect of Abolishment of the Use of Antimicrobial Agents for Growth Promotion on Occurrence of Antimicrobial Resistance in Fecal Enterococci from Food Animals in Denmark*, 45 Antimicrobial Agents & Chemotherapy, 2054, 2058–59 (2001) (available at http://aac.asm.org/cgi/content/full/45/7/2054?view=long&pmid=11408222).

[256] Millman, *supra* n. 243.

[257] Humane Socy. U.S., *MI H.B. 4130 Agricultural Facility Inspections*, http://www.hsus.org/legislation_laws/state_legislation/michigan/mi_hb_4130_agriculture_facility_inspections.html (accessed Mar. 14, 2006) [hereinafter Humane Socy. U.S., *MI H.B. 4130*]; Humane Socy. U.S., *MN H.B. 2039 Public Information on Factory Farms*, http://www.hsus.org/legislation_laws/state_legislation/minnesota/mn_hb_2039_public_information_factory_farms.html (accessed Mar. 14, 2006) [hereinafter Humane Socy. U.S., *MN H.B. 2039*].

[258] Humane Socy. U.S., *MI H.B. 4130*, *supra* n. 257, at http://www.hsus.org/legislation_laws/state_legislation/michigan/mi_hb_4130_agriculture_facility_inspections.html.

[259] Humane Socy. U.S., *MN H.B. 2039*, *supra* n. 257, at http://www.hsus.org/legislation_laws/state_legislation/minnesota/mn_hb_2039_public_information_factory_farms.html.

[260] Humane Socy. U.S., *SC S. 304 Factory Farm Regulation*, http://www.hsus.org/legislation_laws/state_legislation/south_carolina/sc_s_304_factory_farm_regulation.html (accessed Mar. 14, 2006).

[261] Humane Socy. U.S., *MN H.B. 2039*, *supra* n. 257, at http://www.hsus.org/legislation_laws/state_legislation/minnesota/mn_hb_2039_public_information_factory_farms.html; Humane Socy. U.S., *SC S. 304 Factory Farm Regulation*, *supra* n. 260, at

tion of factory farms in the 2005 session: Connecticut and Pennsylvania.[262]

a. Connecticut

Representative George M. Wilber (D) sponsored House Bill 5586, which was signed into law by Governor M. Jodi Rell (R) on July 1, 2005.[263] The enacted legislation requires the Commissioner of Agriculture to adopt stricter regulations governing the sanitation standards for "the slaughter of animals, dressing and cleaning of carcasses, holding and handling of carcasses and holding of animals for custom slaughter," as well as setting out health requirements for the animals at such facilities.[264] However, larger slaughter facilities, such as factory farms inspected by the United States Department of Agriculture, are not covered by the new law.[265] The objective of the legislation is to regulate and register small custom slaughterhouses that slaughter animals for their owners, not for resale.[266]

b. Pennsylvania

The Pennsylvania legislature recently passed House Bill 1646 ACRE Initiative.[267] The enacted legislation limits the ability of local municipalities to pass ordinances or regulations that prohibit agricultural practices that are allowed under state law.[268] Under the enacted legislation, an owner of a factory farm may request that the state Attorney General review a local ordinance that regulates factory farms.[269] The Attorney General has the discretion to bring an action in the Commonwealth Court against the local government to invalidate the ordinance or enjoin the ordinance's enforcement.[270] Additionally, a person "aggrieved by the enactment or enforcement of an unauthorized local ordinance may bring an action against the local government . . .

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http://www.hsus.org/legislation_laws/state_legislation/south_carolina/sc_s_304_factory_farm_regulation.html.

[262] *Infra* nn. 263–75 and accompanying text.

[263] Conn. Gen. Assembly, *H.B. No. 5586: Session Year 2005*, "Bill History," http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5586&which_year=2005&SUBMIT.x=11&SUBMIT.y=16&SUBMIT=Search (accessed Mar. 14, 2006).

[264] 2005 Conn. Pub. Act 05-164 (available at http://www.cga.ct.gov/2005/ACT/PA/2005PA-00164-R00HB-05586-PA.htm).

[265] *Id.*

[266] Ct. Env. Comm. Rpt., 2005 Reg. Sess. (Mar. 4, 2005) (available at http://www.cga.ct.gov/2005/jfr/h/2005HB-05586-R00ENV-JFR.htm).

[267] Humane Socy. U.S., *PA H.B. 1646 ACRE Initiative–Removes Local Authority on Allowing or Prohibiting Factory Farming*, http://www.hsus.org/legislation_laws/state_legislation/pennsylvania/pa_hb_1646_factoryfarms.html (accessed Mar. 14, 2006).

[268] 3 Pa. Consol. Stat. Ann. §§ 311–318 (Westlaw current through Act 2005–96 (End)).

[269] *Id.* at § 314(a).

[270] *Id.* at § 314(b).

in Commonwealth Court."[271] This legislation was enacted in response to Pennsylvania township ordinances that prohibit certain farming practices.[272] As originally drafted, Pennsylvania's legislation would have created an Agricultural Review Board to hear disputes.[273] However, neither the environmental groups opposing the legislation nor farmers in support of it trusted the Board to listen to cases objectively.[274] Although the review process was amended to include oversight by the Attorney General, environmentalists feel the new law will greatly hinder the ability of local communities to regulate factory farms.[275]

3. Confinement

Animals in factory farms are forced into an unnatural environment: either immobilized in small crates or cramped inside overcrowded feedlots.[276] Although much of the legislation against factory farms has previously been based on environmental concerns, voters in Florida recently passed a ballot measure that amended the state constitution to regulate large factory farms based on their treatment of animals.[277] Other states may soon be following Florida's example.

In 2005, the Massachusetts legislature had two bills introduced to limit the confinement of animals on factory farms.[278] Senator Steven A. Tolman (D) sponsored Senate Bill 552, and Representative Bradford Hill (R) introduced House Bill 660.[279] The bills are in committee and

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[271] *Id.* at § 315(b).

[272] Charles Lardner, *House Panel OKs ACRE*, Intelligencer J. (Pa.) B 01 (June 24, 2005) (available in LEXIS, Pennsylvania News Sources); *see also* Humane Socy. U.S., *supra* n. 242, at http://www.hsus.org/farm_animals/factory_farms/halt_hog_factories/factory_farming_what_people_are_doing_to_fight_back.html (discussing actions taken by Pennsylvania townships to regulate non-family-owned corporate farms).

[273] Lardner, *supra* n. 272.

[274] *Id.* (The environmentalists thought the Board would favor the farmers, while the farmers thought the Board would be composed of radical environmentalists).

[275] *See e.g.* Sierra Club, *"ACRE" Legislation Seen as Step Backwards*, http://pennsylvania.sierraclub.org/PAChapter/Issues/ACREpassed.htm (accessed Mar. 14, 2006).

[276] Humane Socy. U.S., *Frequently Asked Questions about Factory Hog Farms*, http://www.hsus.org/farm_animals/factory_farms/the_pig_factory_farm/frequently_asked_questions_about_factory_hog_farms.html (accessed Mar. 14, 2006).

[277] Fla. Const. art. X, § 21 (The section will take effect six years after Nov. 2, 2002, the date it was passed by voters.); *see also* Animal Rights Found. Fla., *Voters Ban Gestation Crates! Floridians Use Citizen Initiative Process to Ban Abusive Factory Farming Method*, http://animalrightsflorida.org/initiative.html (accessed Mar. 14, 2006) (Florida became the first state to ban a method of factory farming because of the practice's inhumane treatment of animals); Humane Socy. U.S., *supra* n. 242, at http://www.hsus.org/farm_animals/factory_farms/halt_hog_factories/factory_farming_what_people_are_doing_to_fight_back.html (discussing the passage of the Florida ballot initiative to ban the use of gestation crates).

[278] Humane Socy. U.S., *MA S. 552 & H. 660 Farm Animal Crating*, http://www.hsus.org/legislation_laws/state_legislation/massachusetts/ma_h_660_crating.html (accessed Mar. 14, 2006).

[279] *Id.*

may be considered in 2006.[280] Both bills would prohibit confining a pig or calf for more than one day in an enclosure so small that the animal would be unable to turn around freely.[281] In Arizona, Arizonans for Humane Farms have filed an initiative that would criminalize the tight confinement of young calves or pregnant pigs.[282] Activists are working across the state to obtain the two hundred thousand signatures needed to place the measure on the 2006 ballot in Arizona.[283] If successful, the measure would not take effect until 2012 in order to give the animal production facilities enough time to attain compliance with the new law.[284]

4. Foie Gras

Apparently following California's lead,[285] a significant number of states have introduced measures in the 2005 legislative session seeking to ban the production or sale of foie gras.[286] This demonstrates a growing awareness among state legislatures about the inhumane treatment inherent in producing this "delicacy." In Hawaii, Illinois, Massachusetts, New York, Oregon, and Washington, bills were introduced to ban either the sale or production of foie gras or the force-feeding of ducks.[287] Unfortunately most of the statutes "died" in committee or were not passed in the most recent legislative session.[288] At this time, two states still have pending legislation that would prohibit the practice of force-feeding birds to produce foie gras: Massachusetts and New York.[289]

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[280] *Id.*

[281] Mass. H. 660, 184th Gen. Ct., 2005 Reg. Sess. (Jan. 5, 2005) (available at WL MA-BILLTXT); Mass. S. 552, 184th Gen. Ct., 2005 Reg. Sess. (Jan. 5, 2005) (available at WL MA-BILLTXT).

[282] Chip Scutar, *Initiative Opposes Confined Livestock: Activists Call Practice 'Cruel,'* Ariz. Republic (Sept. 19, 2005, 12:00 AM) (available at http://www.azcentral.com/arizonarepublic/local/articles/0919pigs19.html).

[283] Humane Socy. U.S., *Arizona Humane Groups Launch Statewide Ballot Campaign to Halt the Suffering of Farm Animals on Factory Farms*, http://www.hsus.org/press_and_publications/press_releases/arizona_humane_groups_launch_statewide_ballot_campaign_to_halt_the_suffering_of_farm_animals_on_factory_farms.html (Sept. 6, 2005).

[284] *Id*.

[285] *See* Tamara S. Santelli, Student Author, *2004 Legislative Review*, 11 Animal L. 325, 359 (Joshua D. Hodes ed., 2005) (California was the first state to prohibit the force-feeding of birds to produce foie gras and to ban the sale of foie gras so produced.).

[286] *Infra* nn. 287–89 and accompanying text.

[287] Farm Sanctuary, *Pending Legislation, State*, http://www.farmsanctuary.org/campaign/legislation.htm (accessed Mar. 14, 2006).

[288] *Id.*

[289] Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, New York*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=NY (accessed Mar. 14, 2006); Humane Socy. U.S., *MA S. 498 Force Feeding Birds for Foie Gras*, http://hsus.org/legislation_laws/state_legislation/Massachusetts/ma_s_498_force_feeding_birds_for_foie_gras.html (site no longer available).

D. Breed-Specific Legislation

"Breed-specific legislation" is a term coined by pet owners to refer to laws and regulations that target the "breed of a particular dog, as opposed to the conduct of the specific dog."[290] Many municipalities and some states have enacted breed-specific legislation in response to highly publicized dog attacks on people.[291] Typically, breed-specific legislation has banned or restricted ownership of "Pit Bulls, Rottweilers, Doberman Pinschers, Chow Chows, German Shepards, and Shar-Peis."[292] Additionally, insurance companies have reacted to the "rash" of dog bites by increasing insurance premiums for homeowner policies or denying coverage to owners of specified dog breeds, a practice known as "breed discrimination."[293] In the 2005 legislative session, states began to address the rising costs of breed discrimination. Ten states proposed legislation to prevent insurance companies from denying, adjusting, or terminating insurance coverage based on the breed of a pet.[294] California, on the other hand, passed legislation that amended existing law to allow local municipalities to regulate ownership and require spaying or neutering for certain dog breeds.[295]

1. California Passes Breed-Specific Legislation

The death of a twelve year old boy from an attack by his family's pit bull led San Francisco mayor Gavin Newsom (D) to create a task force to evaluate the dangers of dog attacks.[296] The task force recommended a spaying and neutering program directed at allegedly dangerous breeds of dogs, higher fines for unregistered dogs, and compulsory liability insurance for owners of "specified vicious and dangerous dogs." However, under California law at that time, San Francisco could not enact breed-specific legislation.[297] At the request of San Francisco officials, Senator Jackie Speier (D) sponsored California Senate Bill 861 to allow local municipalities to enact breed-specific leg-

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290 Kenneth Morgan Phillips, *Dog Bite Law: Breed Specific Laws, Regulations and Bans*, http://www.dogbitelaw.com/PAGES/breedlaws.html (last updated Dec. 17, 2005).

291 Larry Cunningham, *The Case against Dog Breed Discrimination by Homeowners' Insurance Companies*, 11 Conn. Ins. L. J. 1, 8 (2004); *see also* Jan Cooper, *Breed-Specific Legislation*, http://www.rott-n-chatter.com/rottweilers/laws/breedspecific.html (accessed Mar. 14, 2006) (listing counties and cities that have enacted bans on, or legislation restricting, specific dog breeds).

292 Cunningham, *supra* n. 291, at 8.

293 *Id.* at 11–14.

294 *Infra* nn. 310–12 and accompanying text.

295 Kate Williamson, *Dog-Law Referendum's Tail Drops*, San Francisco Examiner (Jan. 3, 2006) (available at http://www.sfexaminer.com/articles/2006/01/04/news/20060104_ne02_doglaws.txt) (site no longer available).

296 Cal. Assembly Comm. Analysis on Sen. 861, 2005–2006 Reg. Sess 1 (June 29, 2005) (available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0851-0900/sb_861_cfa_20050628_153621_asm_comm.html).

297 *Id.* at 2–3.

islation.[298] Governor Schwarzenegger (R) subsequently signed the bill into law on October 7, 2005.[299] The legislation allows cities and counties to enact breed-specific ordinances that relate to mandatory spay or neuter programs and breeding requirements.[300] However, the county or city cannot require that a specific dog breed or mixed dog breed be declared as potentially dangerous.[301]

Breed-specific legislation has faced opposition from many organizations since it was initially proposed.[302] Opponents argue that such legislation is unfair to responsible pet owners, difficult to administer, and more costly than the existing California law.[303] After the California bill became law, the Coalition of Human Advocates for K9 Outcasts (CHAKO) attempted, but failed, to collect enough signatures for a referendum to overturn the law.[304] CHAKO is currently attempting to litigate and is also working to place a proposition on the next ballot to overturn the new law.[305] San Francisco has already passed a breed-specific ordinance that may serve as a model for other cities and counties in California.[306]

2. Prohibitions on Breed Discrimination by Insurance Companies

Insurance companies' practice of breed discrimination is largely a response to both highly publicized dog attacks and an increase in payouts for dog bite liability claims.[307] But the impacts on owners of rising insurance costs have been dire, and owners are often forced to choose between obtaining insurance coverage for their homes or keeping their pets.[308] Organizations such as state veterinary associations, HSUS, and other animal advocacy groups have been lobbying states to

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298 Williamson, *supra* n. 295.

299 Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, California*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=CA (accessed Mar.14, 2006).

300 Cal. Health & Safety Code Ann. § 122331 (West 2005).

301 *Id.*

302 Cal. Assembly Comm. Analysis. on Sen. 861 at 5 (noting complaints from 18 organizations and 107 individuals).

303 *Id.* at 3.

304 Coalition Human Advoc. for K9s & Owners, *California Volunteers: We Need You Now!* http://www.chako.org/no861.html (accessed Mar. 14, 2006).

305 *Id.*

306 *Law Allowing Breed-Specific Regulations Takes Effect*, San Jose Mercury News (Jan. 20, 2006) (available at http://www.mercurynews.com/mld/mercurynews/news/breaking_news/13671778.htm).

307 Cunningham, *supra* n. 291, at 6; Brian Sodergren, *Insurance Companies Unfairly Target Specific Dog Breeds*, http://www.hsus.org/pets/issues_affecting_our_pets/insurance_companies_unfairly_target_specific_dog_breeds.html (accessed Mar. 14, 2006) (Insurance companies claim that nearly one-third of claims against homeowner's insurance are from dog bites, forcing the industry to pay $310 million annually.).

308 Sodergren, *supra* n. 307, at http://www.hsus.org/pets/issues_affecting_our_pets/insurance_companies_unfairly_target_specific_dog_breeds.html.

pass legislation banning breed discrimination.[309] In response to this practice by insurance companies, legislation was introduced in ten states.[310]

Connecticut, Maine, Oregon, Vermont, and West Virginia legislatures failed to pass bills that would have limited or prohibited the ability of insurance companies to consider the breed of dogs when offering or renewing homeowner's insurance.[311] Hawaii, Massachusetts, New York, Washington, and Wisconsin have pending bills that may be considered in 2006.[312] Of the five pending bills, Massachusetts House Bill 1565 offers the broadest protection for pet owners. The bill requires homeowner's insurance to cover *all* domestic animals.[313] The bills from the four remaining states limit breed discrimination, but allow insurance companies to deny coverage or increase premiums in certain circumstances. In the New York and Washington legislation, insurers may not deny, refuse to renew, cancel, or adjust premiums of the homeowner's insurance policy solely based on the breed of the dog, unless the breed of dog has been classified as dangerous under the state's law.[314] The proposed legislation in Hawaii and Wisconsin would not allow an insurance company to deny or adjust insurance coverage based on the type of dog the homeowner owns, but the legislation

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309 Bridget M. Kuehn, J. Am. Veterinary Med. Assn. News, *Breed Discrimination Bites Homeowners: Insurance Companies Dropping Home Insurance Coverage for Owners of Large Dog Breeds*, http://www.avma.org/onlnews/javma/may03/030515m.asp (May 15, 2003).

310 *Infra* nn. 311–315 and accompanying text.

311 Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, Connecticut*, http://www.aspca.org/site/PageServer?pagename=lobby_endofsessions&s_state=CT (accessed Mar.14, 2006); Am. Socy. Prevention Cruelty Animals, *2005 End of Session Reports, West Virginia*, http://www.aspca.org/site/PageServer?pagename=lobby_endof sessions&s_state=WV (accessed Mar. 14, 2006); Humane Socy. U.S., *Maine*, http://www .hsus.org/legislation_laws/state_legislation/state-legislation-list.html?state=maine (accessed Mar. 14, 2006); Humane Socy. U.S., *OR H.B. 2584 Prohibits Breed Specific Insurance Denial*, http://www.hsus.org/legislation_laws/state_legislation/oregon/or_hb_ 2684_breed_specific.html (accessed Oct. 25, 2005) (site no longer available); Humane Socy. U.S., *Vermont*, http: // www . hsus . org / legislation _ laws / state _ legislation / state-legislation-list.html?state=vermont (accessed Mar. 14, 2006).

312 Humane Socy. U.S., *HI S.B. 137 Dog Breed Discrimination*, http://www.hsus.org/ legislation_laws/state_legislation/hawaii/hi_sb_137_dog_discrimination.html (accessed Mar. 14, 2006); Humane Socy. U.S., *MA H. 1565 Prohibits Discrimination by Homeowners Insurance*, http://www.hsus.org/legislation_laws/state_legislation/massachusetts/ ma_h_1565_homeowner_insurance.html (accessed Mar. 14, 2006); Humane Socy. U.S., *NY A. 1824 Insurance Based on Breed*, http://www.hsus.org/legislation_laws/state_ legislation/new_york/ny_a_1824_dog_breed_insurance.html (accessed Mar. 14, 2006); Humane Socy. U.S., *WA H.B. 1016 Breed-Specific Insurance*, http://www.hsus.org/ legislation_laws/state_legislation/washington/wa_hb_1016_breedspecific_insurance.html (accessed Mar. 14, 2006); Humane Socy. U.S., *WI A.B. 363 Prohibits Dog Breed Discrimination by Insurance Companies*, http://www.hsus.org/legislation_laws/state_legislation/ wisconsin/wi_ab_363_prohibits_dog_breed_discrimination_by_insurance_companies.html (accessed Mar. 14, 2006).

313 Mass. H. 1565, 184th Gen. Ct., 2005 Reg. Sess. (Jan. 5, 2005).

314 N.Y. Assembly 1824, 228th Leg. Sess. (Jan. 21, 2005); Wash. H. 1016, 59th Leg., 2005 Reg. Sess. (Dec. 28, 2004).

would allow insurance companies to consider the past behavior of the owner's dog.[315]

Although none of the introduced bills passed during the 2005 legislative session, the amount of legislation introduced indicates a probable trend for animal law in state legislatures. Many animal welfare organizations view the trend of breed discrimination as an unjustified excuse for insurance companies to raise premiums.[316] However, some insurance companies argue that it is unfair to create a strict standard when consumers for insurance have choices between companies.[317] While a growing number of insurance companies will bar coverage for specific breeds, some companies will evaluate a customer on a case-by-case basis, and others will allow the customer to purchase a separate liability policy to cover their pet.[318] Yet, in the end, many proponents for the legislation feel that there is something unfair in broadly categorizing people's pets, and this sentiment is likely to be the motivation behind future state legislation aimed at preventing breed discrimination.[319]

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315 Haw. Sen. 137, 23rd Leg., 2006 Reg. Sess. (Jan. 20, 2005); Wis. Assembly 363, 97th Leg., 2005-2006 Reg. Sess. (Apr. 22, 2005).

316 Kuehn, *supra* n. 309, at http://www.avma.org/onlnews/javma/may03/030515m.asp (The AVMA, American Kennel Club, and animal welfare organizations believe that breed discrimination is not scientifically supported because the data on dog bites is inaccurate and incomplete.).

317 Paul Gores, *Insurers Barking over Dog Breed Bias Bill*, Milwaukee J. Sentinel (Aug. 20, 2005) (available at http://www.jsonline.com/bym/news/aug05/349596.asp).

318 Jenny C. McCune, *Homeowners Insurance Is Going to the Dogs*, http://www.bankrate.com/brm/news/insurance/dog-policies1.asp (accessed Mar. 14, 2006).

319 Gores, *supra* n. 317 (Representative John Lehman (D) introduced Wisconsin Assembly Bill 363 after Julie Totsh, a constituent who did not herself own a "controversial breed" of dog, told him about breed discrimination.).