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# ANIMAL ETHICS AND BREED-SPECIFIC LEGISLATION

**BERNARD E. ROLLIN, PH.D.<sup>1\*</sup>**

## I

By way of orientation: This paper is not intended to assault the reader with a barrage of facts showing breed-specific legislation is ill-conceived, though it would not be hard to adduce such facts: For example, there are five times more people killed by lightning per year (100) or by falling coconuts (150) or by hot tap water (150 in Japan alone) than by dog bites (18 per year). Death by bug bite (54 per year) is three times more likely than dog bite; death in virtue of being struck by a cow also three times more likely (65 per year).<sup>2</sup>

Since I am a philosopher, the paper is conceptual (i.e., philosophers are smart but lazy, and it is easier to reason than to assemble facts.) If you affirm that it is raining and not raining, I don't need to gather weather data to prove you wrong. Similarly, if I can show that there is a moral-conceptual flaw underlying breed-specific legislation, then I don't need to assemble supporting facts. That is what I propose to do in this talk, though I reserve the right to present a fact or two.

Just as 20<sup>th</sup> century science had disavowed any conceptual relationship to ethics, to the detriment of both science and society, so too there is historically a strong tradition of disconnecting law and ethics. Both of these positions are rooted in positivism, the former in logical positivism, the latter in legal positivism.

Legal positivism views the law as determined solely by the conventions through which it is decided — legislative creation or judicial decision. Whether or not this hotly debated thesis is correct, it has furthered the tendency to see law as conceptually separate from morality. Yet it is clear that morality is closely connected with law in numerous ways; what laws are adopted are guided by moral concern, for example the desegregation laws. Similarly, what laws are rejected — for example state laws criminalizing intermarriage between blacks and whites, or prohibitions on certain types of sexual behavior between consenting adults — are rejected on moral grounds. And, as Ronald Dworkin has persuasively argued, hard cases are often decided by reference to moral principles.<sup>3</sup>

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<sup>1</sup> \*\* This article was initially delivered to an ABA symposium on breed-specific laws held at NYU Law school in December 2007. I am grateful to Ledy Vankavage for inviting me to speak and for constructive suggestions. I must also warmly thank Chris Green for his exhaustive commentaries on an earlier draft.

<sup>2</sup> Matt Roper, *Scientists Calculate Odd Ways to Die*, DAILY MIRROR, May 30, 2008, available at <http://www.mirror.co.uk/>.

<sup>3</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

In the 1970's, I was asked to articulate the moral basis for emerging social ethical concern for animals, for it was clear to any student of western societies that these cultures were growing ever-increasingly troubled by the treatment of animals, be they research animals, farm animals, zoo animals, or wildlife. The major puzzle I faced was how to articulate the moral basis for increasing societal concern with animal treatment in a manner that could capture, accord with, and accelerate nascent social thought. I realized that I was free to delineate my own ethic, as Peter Singer did,<sup>4</sup> and that by doing so I would probably garner a certain number of adherents, much as some readers of Singer consequently rejected animal research or the raising of animals for food. But such an exercise, I realized, would certainly not capture most people's feelings on the issue, as it was apparent that the majority of people were not abolitionists. (Ironically enough, neither is Singer, but he was read that way and did little to discourage that reading.)

By and large it appeared to me that people were not so much opposed to the standard *uses* of animals, such as research or animal food production, but rather wanted such use to reflect concern for proper *treatment* of the animals. It was also clear to me that in *no social use of animals were they getting anywhere near the best treatment possible consonant with that use*. Consider industrialized agriculture, for example, which supplanted husbandry agriculture, wherein animals were well-treated because if the animals did not fare well their productivity, and, the producer, suffered.<sup>5</sup> Whereas farmers traditionally needed to respect the animals' needs and natures, as it were putting square pegs into square holes and round pegs into round holes, industrial agriculture instead used technological "sanders" to force square pegs into round holes, i.e, forcing animals into environments where their welfare suffered but their productivity did not.<sup>6</sup> Thus, whereas a traditional agriculturalist could not raise 100,000 chickens in one confined building because they would all die of disease in under a month, the factory farmer could prevent the outcome simply with antibiotics and vaccines. The traditional coupling of welfare and productivity was thus severed.<sup>7</sup>

Similarly, in animal research, animals did not get anywhere near the best treatment possible consonant with their uses. In 1982, when I defended before Congress federal laws colleagues and I had drafted protecting laboratory animals, I could find only two papers on animal analgesia. In other words, animal pain resulting from research procedures wasn't being controlled, even though uncontrolled pain is a stressor, skewing those same research results! Thus, ironically, failure to control pain was not only morally unacceptable, but also harming the very quality of the science in whose name such pain was being inflicted.

In the same vein, zoos were usually harsh prisons for animals. In 1972, I visited a major municipal zoo where a giraffe was kept in a cage too small for him to stand erect! All other uses were similarly morally deficient.

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<sup>4</sup> PETER SINGER, *ANIMAL LIBERATION* (1975).

<sup>5</sup> BERNARD E. ROLLIN, *FARM ANIMAL WELFARE* 6-9 (1995).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

It seemed obvious to me that society would demand improvements in all of these areas. But the question remained – how to articulate this demand in ethical terms?

At that time, the only extant moral principle embodied in the law, i.e., in our articulated social ethic, was the prohibition against deliberate, sadistic, willful, deviant cruelty or outrageous neglect such as not feeding or watering.<sup>8</sup> These laws were in large part based in the Thomistic insight that people who perpetrate such behavior on animals will “graduate” to abusing people, an insight confirmed by many years of research.<sup>9</sup> Even more unsettling, the vast majority of animal suffering, e.g., in agriculture or research, was invisible to the cruelty ethic laws — these laws specifically disavow concern with any areas “ministering to the necessities of man,” as one judge put it.<sup>10</sup>

My approach to articulating a stronger ethic for animals was derived from Plato’s insight that, when dealing with ethics and adults, one could not teach, but rather one needed to remind, i.e., draw on people’s extant moral principles, or, in my metaphor, use judo not sumo.<sup>11</sup> (This had already been done with great success by Martin Luther King.) I reasoned that if society wished to raise the moral status of animals, it would draw upon already accepted moral principles for people and appropriately modify them to conceptualize ideal animal treatment. Society has indeed taken elements of the moral categories it uses for assessing the treatment of people and is in the process of modifying these concepts to make them appropriate for dealing with historically unprecedented issues in the treatment of animals, especially their use in science and confinement agriculture.

What aspects of our ethic for people are being so extended? One that is applicable to animal use is the fundamental problem of weighing the interests of the individual against those of the general public. Different societies have provided different answers to this problem. Totalitarian societies opt to devote little concern to the individual, favoring instead the state or whatever their version of the general welfare may be. At the other extreme, anarchical groups, such as communes, give primacy to the individual and very little concern to the group—hence they tend to enjoy only transient existence. In our current society, however, a balance is struck. Although most of our decisions are made to the benefit of the general welfare, fences are built around individuals to protect their fundamental interests from being sacrificed for the majority. Thus we protect individuals from being silenced even if the majority disapproves of what they say; we protect individuals from having their property seized without recompense even if such seizure benefits the general welfare; we protect individuals from torture even if they have planted a bomb in an elementary school and refuse to divulge its location. We protect those interests of the individual that we consider essential to being human, to human nature, from being submerged, even by the common good. Those moral/legal fences that so protect the

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<sup>8</sup> CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION (Frank Ascione & Phil Arkow eds., Purdue University Press 1999).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> PLATO, MENO.

individual human are called rights and are based on plausible assumptions regarding what is essential to being human.

It is this same notion that society is summoning to generate the new moral conversation regarding the treatment of animals in today's world, where cruelty is not the major problem, but rather where the vast majority of animal suffering results from such laudable general human welfare goals as increasing efficiency, productivity, knowledge, medical progress and product safety. People in society are seeking to "build fences" around animals to protect the animals and their interests and natures from being totally submerged for the sake of the general welfare and are trying to accomplish this goal by going to the legislature. In husbandry, this occurred automatically; in industrialized agriculture, where it is no longer automatic, people wish to see it legislated.

It is necessary here to stress here certain things that this ethic, in its mainstream version, is not and does not attempt to be. As a mainstream movement, it does not try to give human rights to animals. Since animals do not have the same natures and interests flowing from these natures as humans do, human rights do not fit animals. Animals do not have basic natures that demand speech, religion, or property; thus, according them these rights would be absurd. On the other hand, animals have natures of their own (*telos*) and biological and psychological interests and needs that flow from these natures, and the thwarting of these interests matters to animals as much as the thwarting of speech matters to humans. The agenda is not, for mainstream society, making animals "equal" to people. Rather, it is preserving the common-sense insight that "fish gotta swim and birds gotta fly," and suffer if they do not.

Direct rights for animals are of course legally impossible, given the legal status of animals as property, the changing of which could require a constitutional amendment. But the same functional goal can be accomplished by restricting how animal property can be used. Hence updated laboratory animal laws that require pain and distress control, forbid repeated invasive uses, and require exercise for dogs, etc. In some U.S. states, confining sows in gestation crates and tethering veal calves have been legally forbidden by public referendum or legislation, and both practices are banned legislatively throughout the European Union.<sup>12</sup> This mechanism is the root of what I have called "animal rights as a mainstream phenomenon." This also explains the proliferation of laws pertaining to animals as an effort to ensure their welfare. In 2004 over 2100 bills devoted to animal welfare were floated at the state level.<sup>13</sup> And this is precisely a major focus of the burgeoning field of animal law, taught in 90+ law schools.<sup>14</sup>

Our U.S. laboratory animal laws, passed in 1985 as an Amendment to the Animal Welfare Act and as the Health Research Extension Act, were the test cases

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<sup>12</sup> Colorado SB201, May 2008; Arizona Proposition 204, November 2006; California Proposition 2, November 2008; Oregon SB694, June 2007.

<sup>13</sup> Correspondence from Duane Flemming, DVM, to the author (2006)(on file with author).

<sup>14</sup> *Id.*

for our theory.<sup>15</sup> Once proposed, they garnered overwhelming public support despite powerful opposition from the research community, and they have changed research to the benefit of the animals, particularly as regards control of pain and distress. As high officials in both NIH and USDA said to me when the laws passed, “Congratulations! You have created rights for laboratory animals” (e.g., the right to have their pain controlled).

## II

This revolution in animal law and ethics of course rests on including animals within what has been called the scope of moral concern, the moral arena, the moral circle, and weighing their treatment in moral terms. (Society is still not worried about animal life per se, rather with how it is lived.) In argument for such inclusion, I pointed out the lack of morally relevant differences between people and animals and the presence of morally relevant similarities, i.e., that for sentient animals, what we do to them matters to them — they feel pain, anxiety, fear, loneliness, boredom, etc., as Darwin proclaimed.<sup>16</sup> According to an Associated Press survey, 97% of the public believes that animal’s lives matter to them as much as ours do to us.<sup>17</sup>

A critical point here is that the new ethic is to be applied to individual animals — they are the moral objects of concern. It is clear that the Kantian notion of “ends in themselves” not merely “means to human ends” is seen as relevant to animals by the public. We need to consider their interests in our use, not merely our ends! And the logic of our consensus social ethic for humans, as we saw, is the moral guiding principle, being applied *mutatis mutandis* to animals.

We now reach a pivotal point in our argument. If we attend to the path our social ethic for humans has taken, it is clear and obvious that the trajectory has been towards ever-increasing concern for individuals *qua* individuals rather than *qua* members of a group. It is almost cliché that the original bearers of rights under the US ethico-political system were white, adult, native-born, male, property owners. In other words, group membership counted more than the specific qualities of an individual. The historical evolution of our societal ethic is aptly described as eliminating group designators in our moral treatment and focusing more on individuals. Hence the gradual enfranchisement of black people, immigrants, women, children and so on. And, as we all know, the task is far from being complete — it took 200 years for us to even begin to live up to our creed that “all men are created equal”, and we still have a long way to go.

One of the things we find most appalling about the Nazis was their hideous

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<sup>15</sup> Food Security Act Amendment of 1985, Pub. L. No. 99-198; Health Research Extension Act of 1985, Pub. L. No. 99-158.

<sup>16</sup> CHARLES DARWIN, *THE EXPRESSION OF EMOTIONS IN MAN AND ANIMALS* (Greenwood Press 1969) (1872).

<sup>17</sup> Interview with Richard Reynnells (1996).

consistency. All Jews were to be destroyed, regardless of whether they were Albert Einstein or a child molester. (Though the Nazis in fact could not find a way to determine who was a Jew!) This is the same mad consistency we find in racists and complete sexists – “No black can be worthwhile”; “No woman can be intelligent.”

We as a society are beating our breasts about our history of exclusion of certain human individuals from moral concern, so much so that we refuse to utilize group membership even in morally relevant ways. Common sense says that we need to inspect young Muslim males more carefully when they enter airports than we do an 88 year old wheelchair-bound World War II veteran on his way to a Seabee’s Reunion. Yet I personally watched while the latter was searched for half an hour and the tiny vise grip he used for wheelchair adjustments was taken away from him. The society has spoken unequivocally against “racial profiling.” Any joke based on the group membership of individuals is verboten. Political correctness is rife. And from the perspective of our history, perhaps that is the right thing to do.

The key point, however, relevant to our discussion, is that we are not following this logic with regard to our canine companions, who are widely seen by the vast majority of companion animal owners as, “members of the family.” So much so, in fact, that victims of Hurricane Katrina refused to be evacuated when they were told that their pets could not go with them, thereby risking life and health. I will return to this point as secondary, because it is more about our failure to treat people morally than animals. At the moment, I am concerned with animal ethics.

The moral problem in breed-specific bans — be it pit-bulls, Rottweilers, Dobermans or whatever happens to be the “vicious” dog of the month — was well encapsulated by the late Franklin Loew, dean of both the Tufts and Cornell Veterinary Schools, when he categorized such laws as “canine racism.”<sup>18</sup> This is in fact literally true, since, biologically, breeds of dogs are races. And if one is of the post-modernist mind to deconstruct the concept of race as meaningless, the issue is mooted, since there are then no breeds to ban! We shall shortly see that “pit-bull” is far more amorphous than a breed.

What some such laws are saying, unequivocally, is that any dog that falls into the group in question is deserving of being singled out, extirpated from family, and euthanized simply by virtue of membership in that group. Even if the dog is 10 years old, and for 10 years has cavorted lovingly with family, friends, and strangers, it deserves to die because it belongs to the group deemed to be incorrigibly evil. In other words, the animal’s behavior, personality, and history are considered irrelevant; the only moral consideration is its breed. Truly this is a resurgence of the very wrong-headed moral thinking we are striving to overcome!

Someone might reply that what we do about animals ethically is irrelevant; the thrust of ethical reform concerns people. This claim is, of course, both false and question-begging. It is false insofar as social concern about animal treatment is increasing exponentially. It is question begging in that society *is* in fact applying moral categories derived from human ethics to animals, as we discussed.

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<sup>18</sup> Interview with Franklin Loew (2001).

In sum, then, the creation of breed-specific legislation aimed at certain types of animals is incompatible with the thrust of social ethics towards including individual animals in the moral circle, as well as with the dominant 20<sup>th</sup> century moral theory of judging beings in the scope of moral concern as individuals.

To be sure, there are select occasions and restricted contexts in which we talk in moral terms about groups or classes of animals rather than about individuals — notably with regard to the extinction of species. Thus someone may not cavil at shooting ten Siberian tigers for sport unless they are the last Siberian tigers, and shooting them destroys the species. Such thinking arises about plants as well, and occurs when people confront endangered species. The moral basis of concern for species is not obvious or clear, species being abstract entities, whose reality has been questioned, and what we do to a species does not matter to it. Usually, those whose loci of concern are species base that concern in aesthetic, theological, or prudential (“we don’t know how this might harm the ecosystem”) sorts of considerations. Indeed, the biggest problem for environmental ethics is trying to find a way to accord moral status to non-sentient beings and abstract entities.

The conflict between looking at species and looking at individuals as loci of moral concern was illustrated some year ago on a Denver T.V. station that provided a venue for citizens to express concerns on T.V. during the news. One woman had found a nest of baby foxes and the mother in a lot about to be bulldozed. She demanded that the Division of Wildlife intercede. A representative of the Division appeared the next day and affirmed that “There are plenty of foxes.” The woman came back on and said, in essence, “What an idiot! I’m talking about these foxes!” again illustrating that for common sense, individual animals are what is morally considerable. The only other exception occurs where regulators must kill flocks or herds of animals to prevent disease dissemination that can kill millions of animals or people. This is not the case here, where there is no certainty that any one of the dogs is dangerous.

Let us examine the herd-health public health analogy more carefully. In cases like exotic Newcastle’s disease in poultry or foot and mouth disease in cattle, we do indeed exterminate large numbers of animals who may not be infected. Why then, on epidemiological grounds, not extirpate dangerous dogs in the same preventative fashion? The answer is, first of all, that cattle, or chickens in the above case, carry a known pathogen that can infect all animals of that sort — hence the slaughter of the entire British cattle herd, because we did not know which animals were affected. If one argues that some dogs are similarly dangerous because some will bite, one would be obliged to exterminate all dogs, because there is no known pathogen or gene leading to violence. If one assumes that all pit bulls are dangerous, as some jurisdictions do currently, that logically presupposes that there is an identifiable trait of pit-bullness — which we shall shortly argue does not exist.

In any case, no one was comfortable with exterminating the British herd — that is why Britain has individual animal identification to minimize which animals need to be killed by knowing which animals had contact with infected animals.

Let us also bear in mind that viciousness is not analogous to harboring a

pathogen. Pathogen infection is always deleterious — no one deliberately creates an animal harboring foot and mouth disease except for research or terrorist reasons. Aggression in dogs, on the other hand, is sometimes desirable, as in police dogs, sentry dogs, and guard dogs. Furthermore, humans create or elicit aggression in dogs for specific purposes. Most “vicious” dogs are dogs in whom aggression has been elicited by owners for socially unacceptable purposes. If this is the case, the culpability for aggression lies with the owner, not the dog, and the owner should be sanctioned, as we will later discuss. And if such a dog has demonstrably been created, and has hurt people or animals, I have no problem with seizure of such a dog, even though the dog is not in itself culpable. There is an analogy here with criminals who were badly treated as children. Though we (somewhat) understand the causal chain leading to their behavior, we still punish them.

### III

The preceding discussion is not the only attack that can be launched against targeting certain breeds. There is also a significant argument from human-centered ethics. This is the argument we alluded to earlier regarding the importance of pets to humans. Anyone who doubted the oft-repeated claims that dogs (especially) and cats are perceived as members of the family in today’s society, and who has not seen the research from veterinary schools confirming this, surely cannot deny the evidence emerging from the furor surrounding the pet-food poisonings, or the people who refused to be rescued during Hurricane Katrina and the recent California wildfires if they couldn’t take their pets with them. In essence, people risked their lives for their pets.

The rise of a bond between humans and such animals (rooted not only in mutual symbiotic benefit, but also in something putatively more solid) did not occur until the twentieth century, with companion animals and the new sort of relationship we formed with them. While humans have enjoyed symbiotic relationships with dogs and, to a lesser extent, with cats for some 50,000 years, the bond was, as we saw was the case with agriculture, one largely of mutual practical benefit. Dogs were useful as guardians of flocks, alarms warning of intruders, hunting partners, pest controllers, finders of lost people, haulers of carts, warriors, finders and retrievers of game. In terms of mutual interdependence, dogs were very much analogous to livestock except that they were probably worth less.

In the past 50 or so years, however, dogs (and to a lesser extent, cats and other species) have become valued not only for the pragmatic, economically quantifiable purposes just detailed, but for deep emotional reasons as well. These animals are viewed as members of the family, as friends, as “givers and receivers of love” as one judge put it some 30 years ago;<sup>19</sup> and the bond based in pragmatic symbiosis has turned into a bond based in love. This new basis for the bond imposes higher expectations on those party to such a bond on the analogy of how we feel we should

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<sup>19</sup> *Corso v. Crawford Dog & Cat Hosp.*, 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979).

relate to humans we are bound to by love and family. If a purely working dog is crippled and can no longer tend to the sheep, it violates no moral canon (except, perhaps, loyalty) to affirm that he needs to be replaced by another healthy animal, and like livestock, may be euthanized if the owner needs a functioning animal. (In practice, of course, people often kept the old animals around for supererogatory or “sentimental” reasons, but, conceptually, keeping them alive and cared for when they no longer could fulfill their function was not morally required any more than was keeping a cow alive that could no longer give milk.)

As a society we are morally outraged by incidents where an individual brings harm to another’s beloved companion. When a California woman’s Bichon Frise was grabbed from her lap and thrown into traffic in a fit of “road rage” it became national news. By contrast, a few decades ago, if a farmer had a purely working dog that was shot by a neighbor, that neighbor would only owe the farmer another functional working dog.<sup>20</sup> Today if a neighbor shot a dog that was a farm-child’s companion and best friend, that dog could well be considered irreplaceable and the family could suffer great feelings of loss and pain. As a result we have drastically increased the penalties for such crimes. Where historically such laws did not even apply to companion animals, now 44 states make animal cruelty a felony — punishable by fines in the tens of thousands of dollars and jail terms of several years!<sup>21</sup>

The rise of deep love-based relationships with animals as a regular and increasingly accepted social phenomenon came from a variety of converging and mutually reinforcing social conditions. In the first place, probably beginning with the widespread use of the automobile, extended families with multi-generations living in one location or under one roof began to vanish. At the beginning of the 20<sup>th</sup> century when roughly half of the public produced food for both themselves and the other half of the public, significant numbers of large extended families lived together manning farms. The safety net for older people back then was their family, rather than society as a whole. The novel concept of easy mobility eventually made preserving the nuclear family less of a necessity, as did the rise of the new idea that society as a whole rather than the family was responsible for assuring retirement, medical attention, and facilities for elderly people.

With the concentration of agriculture in fewer and fewer hands, the rise of industrialization, and as the post-Depression Dust Bowl and World War II introduced migration to cities, the extended family notion was further eroded. The tendency of urban life to erode community, to create what the Germans called “Gesellschaft” rather than “Gemeinschaft,” mixtures rather than compounds, as it were, further established solitude and loneliness as widespread modes of being. Correlatively, with egocentricity and self-actualization encouraged as positive values beginning in the highly individualistic 1960s, even the nuclear family concept was eroded; as the divorce rate began to climb, the traditional stigma attached to divorce was erased.

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<sup>20</sup> Maria La Ganga, *Trial Nears End in Case of Dog Thrown into Traffic* LA TIMES, June 19, 2001, at B8.

<sup>21</sup> American Humane Association, [www.americanhumane.org/site/PageServer?pagename=ta\\_state\\_issues\\_cruelty\\_summary](http://www.americanhumane.org/site/PageServer?pagename=ta_state_issues_cruelty_summary).

As biomedicine prolonged our life spans, more and more people significantly outlived their spouses, and were thrown into a loneliness mode of existence, with the loss of the extended family removing the traditional remedy.

In effect, we have lonely old people, lonely divorced people, and most tragically, lonely children whose single parent often works. With the best jobs being urban, or quasi-urban, many people live in cities or peripherally urban developments such as condos. In New York City, for example, where I lived for 26 years, one can be lonelier than in rural Wyoming. The cowboy craving camaraderie can find a neighbor from whom he is separated only by physical distance; the urban person may know no one, and have no one in striking distance who cares. Shorn of physical space, people create psychic distances between themselves and others. People may (and usually do) for years live six inches away from neighbors in apartment buildings and never exchange a sentence. Watch New Yorkers on an elevator; the rule is stand as far away from others as you can, and study the ceiling. Making eye contact on a street can be taken as a challenge, or a sexual invitation, so people do not. One minds one's own business; one steps over and around drunks on the street. "Don't get involved" is a mantra for survival.

Yet humans need love, companionship, emotional support, and need to be needed. In such a world, a companion animal can be one's psychic and spiritual salvation. Divorce lawyers repeatedly tell me that custody of the dog can be a greater source of conflict in a divorce than is custody of the children! Beyond simply soothing the lonely, though, companion animals serve as a socially beneficial extension of one's family. An animal is someone to hug, and hug you back; someone to play with, to laugh with; to exercise with; to walk with; to share beautiful days; to cry with. For a child, the dog is a playmate, a friend, someone to talk to. The dog is a protector; one of the most unforgettable photos I have ever seen shows a child of six in an apartment answering the door at night while clutching the collar of a 200 pound Great Dane, protected.<sup>22</sup>

But a dog is even more than that. In New York, and other big, cold, tough cities, it is a social lubricant. One does not talk to strangers in cities, unless he or she — or preferably both of you — are walking a dog. Then the barriers crumble. On of the most extraordinary social phenomena I have ever participated in was the "dog people" in the Upper West Side of Manhattan. These were people who walked their dogs at roughly the same time — morning and evening — in Riverside Park. United by a mutual and legitimate purpose, having dogs in common and thereby being above suspicion, conversations would begin spontaneously. To be sure, we usually did not know each others' names — we were "Red's owner," "Helga's person," "Fluffy's mistress." But names didn't matter. What mattered was we began to care for each other through the magic of sharing a bond with an animal and those animals (not knowing New York etiquette) then playing with one another. We also cared for each others' animals.

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<sup>22</sup> WILLIAM KOEHLER, *THE KOEHLER METHOD OF GUARD DOG TRAINING* 42 (1967).

Red was a huge German Shepherd owned by Phil (I don't know his last name), a former British commando. Though aggressive with male dogs (Phil put him in a pen alone to run or let him run with females), Red was an obedient angel with people. When Phil had surgery, we all took turns walking Red for the two weeks Phil was in the hospital. We had a key we passed around; though Phil did not know our last names or addresses, he seemed to assume we were worthy of trust. Through the animals, *Gesellschaft* was replaced by *Gemeinschaft*.

Perhaps two years after Phil's operation, I was suffering from chronic asthma, experiencing attacks every night and sometimes multiple episodes in a night. My physician was preparing to hospitalize me indefinitely until the cycle was broken. I mentioned this to Phil one evening. He nodded and said nothing. The next evening he handed me an envelope. "What is this?" I asked. "The key to my cabin in Thunder Bay, Ontario, and a map. Stay there until you can breathe. The air is clean and there is no stress. It beats a hospital."

For more old people than I care to recall, the dog (or cat) was a reason to get up in the morning, to go out, to bundle up and go to the park ("Fluffy misses her friends, you know!") to shop, to fuss, to feel responsible for a life, and needed.

I used to walk my Great Dane very late at night feeling safe and incidentally other people spoke to me: A black woman who had gotten off at the wrong subway station while heading for Harlem and was terrified. With no hesitation, she asked me to walk her a mile to Harlem, where she felt safe. "I'm okay with you and that big dog," she said, never even conjecturing that I could be a monster with a dog!

Most memorably, I recall walking miles to the theater district at 4 AM. At one all-night cafeteria, the prostitutes used to assemble after a night's work. "Helga!" they would shout with delight when my dog approached. I was simply attached to the leash and was addressed only when they asked permission to buy her a doughnut. These guarded, cynical women would hug and kiss the dog with a genuine warmth and pleasure, letting the child in them show through in these rare and priceless moments. I cannot recall these incidents without emotion.

These companion animals then, in today's world, provide us with love and someone to love, and do so unfailingly, with loyalty, grace, and boundless devotion. In a book that should be required reading for all who work with animals, author Jon Katz has chronicled what he calls the New Work of Dogs,<sup>23</sup> all based on his personal experiences in a New Jersey suburban community. Here we read of the dog whom a woman credits with shepherding her through a losing battle with cancer, as her emotional bedrock.<sup>24</sup> Katz tells of the "Divorced Women's Dog Club," a group of divorced women united only by divorce and emotional reliance on their dogs.<sup>25</sup> He tells the tale of a dog who provides an outlet for a ghetto youth's insecurity and rage, and who is beaten daily.<sup>26</sup> He relates the story of a successful executive with

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<sup>23</sup> JON KATZ, *THE NEW WORK OF DOGS* (2003).

<sup>24</sup> *Id.* at 123-36.

<sup>25</sup> *Id.* at 102-123.

<sup>26</sup> *Id.* at 137-50.

a family and friends, who in the end deals with stress in his life only by long walks with his Labrador, totaling many hours in a day.<sup>27</sup> While raising the question of whether we are entitled to expect this of our animals, Katz explains that we do, and that they perform heroically.

Our pets have become sources of friendship and company for the old and the lonely, vehicles for penetrating the frightful shell surrounding a disturbed child, beings that provide the comfort of touch even to the most asocial person, and inexhaustible sources of pure, unqualified love.

The phenomenon just described forms the basis for an argument based in human-centered ethical consideration. Are we as a society going to accept, even endorse, laws that cavalierly can rip an object of love and attention — sometimes the only such object for an old person or a street person — from a person's bosom without their having done anything wrong, merely because they belong to a certain arbitrarily determined class? Indeed, as with the elderly or homeless, that animal may be the sole companion a person has. The mental and physical effects on people bonded to those animals can be catastrophic — that is the reason that some progressive hospitals allow sick people to keep their animals with them in the hospital, and that nearly every veterinary college offers a pet bereavement hotline. What does such an action teach children about ethics, authority and responsibility, when their beloved animal can be taken from them for no valid reason? Such actions fly in the face of common sense and common decency!

#### IV

Thus far we have seen that breed-specific legislation violates emerging animal ethics by focusing on group membership rather than individual traits and by extirpating animals who have not shown themselves to be dangerous and have often done the opposite, thereby undercutting any analogy with disease control. We have also argued that such legislation hurts humans who bond with and love those animals, and for whom the animals may represent a major or even sole focus for their lives. Our next argument is based on the fact that the major target for the most onerous breed specific legislation (such as Denver's) are "pit bulls" and pit bulls are not even identifiable as a breed!

Historically, the term "pit bull" has identified three breeds: the American Staffordshire Terrier, the American Pit Bull Terrier, and the Staffordshire Bull Terrier. If one goes to Google and type in "Find the Pit Bull" one will be presented with images of more than 25 breeds that have been labeled "pit bulls."<sup>28</sup> These include Boxers, Dogues de Bordeaux, Alapaha blueblood bull dogs, Great Swiss Mountain Dogs, Vizslas, Rhodesian Ridgebacks, Dogo Argentinos, Jack Russell Terriers, Labrador Retrievers,

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<sup>27</sup> *Id.* at 82-102.

<sup>28</sup> Google Home Page, <http://www.google.com> (last visited Feb. 15, 2009); Find the Pit Bull, <http://www.pitbullsontheweb.com/petbull/findpit.html> (last visited Feb. 15, 2009).

Bullmastiffs, Fila Brasileiros, Rottweilers, Presa Canarios, American Bulldogs, Cane Corsos, Patterdale Terriers, Olde English Bulldogs, Catahoulas, Bull Terriers, Black Mouth Curs, Alanos Espanol, Boerbols, Ca de Bous, and Thai Ridgebacks.<sup>29</sup>

It appears that a pit bull is a dog that meets someone's a priori notion of a pit bull. There is no genetic test for "pit bull-ness." Thus breed-specific laws targeting pit bulls are reminiscent of a Colorado city ordinance allowing police to shoot a "vicious" dog on sight, where a vicious dog was defined as "One who is vicious." The infamous Denver pit bull ban similarly in fact defines a pit bull as one of the three breeds mentioned earlier, or "any dog displaying the majority of the physical traits of one or more of those breeds."<sup>30</sup>

All of this leaves aside the obvious question of "pit bull cross breeds." Given that all the various purebreds listed above have been misidentified as "pit bulls," what of pit bull mixes? Once again it would seem that it is a pit bull if someone views it as a pit bull. In Iowa, one family's pet Rottweiler was confiscated from their home as a result of an untrained Sheriff's Deputy comparing it to photographs and deciding that "it looked like a pit bull to him." That case was later overturned by the State Attorney General, but it highlights the arbitrariness of how such measures are implemented.<sup>31</sup> Given that there is no quantifiable genetic trait of pit bull-ness and, even if there were, there is no objective way to determine how such pit bull-ness is definitive for being designated a pit bull under restrictive legislation, we consequently find ourselves using pit bull as an emotive/evaluative term that tells us more about our fears than about any objective traits in the animals.

Historically, it stands to reason that pit bulls, as fighting dogs, were culled if they were aggressive to humans, since handlers needed to separate them. That argument in itself says little, as breeds can change in relatively short time. This is manifest when great popularity of a breed eventuates in its deterioration as dogs are bred indiscriminately – this has happened to collies when "Lassie" came out, German Shepherds, Saint Bernards, and others.

An objective measure of temperament is the breed testing done by the American Temperament Testing Society, a non-profit group that evaluates the temperament of dogs by a uniform test. In the 2006 tests, 84.1% of American Pit Bull Terriers passed the test, 83.9% of American Staffordshires, and 85.2% of Staffordshire Terriers. In contrast, only 71.4% of Chihuahuas passed, 79.2 of Collies and 75.5% of Pomeranians passed.<sup>32</sup> This, of course, must be taken with a grain of salt, as the numbers tested of each breed varied widely. But it helps belie the view that all pit bulls are vicious.

In fact, any dog can be made vicious by owners, depending on treatment. Beating the animal, tying them on a short leash, not socializing and many other

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<sup>29</sup> Find the Pit Bull, <http://www.pitbullsontheweb.com/petbull/findpit.html> (last visited Feb. 15, 2009).

<sup>30</sup> *Denver Allowed to Enforce Pit Bull Ban* (Denver 7 News Apr. 8, 2005 ) (available at The Denver Channel.com).

<sup>31</sup> *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001).

<sup>32</sup> *Id.*

ways of managing the animal can make a dog mean or a biter. Breed reputations are garnered largely by public hysteria fueled by the media. At various points Bloodhounds, German Shepherds, Dobermans, St. Bernards were branded as “killer dog of the year.”<sup>33</sup> In fact, I adopted a wonderful Doberman whose owner relinquished her because she was getting older and “everyone knows their brains get too big for their skulls and they get mean.”

All of this gets us to a major point: there is nothing wrong with laws restricting dangerous dogs, as long as such laws required that an individual dog should have demonstrated uncontrolled aggressive behavior before it is seized. Likewise, the system should punish the owner severely, not merely destroy the dog, for it is owners that typically train for aggression, or fail to control it. In fact, recent data indicates that owners who have animals identified as “pitbulls” more often have criminal histories than do owners of any other sort of dog.<sup>34</sup> Such ordinances are not morally or logically sound if they target arbitrarily designated groups rather than problematic individuals. It is the cause that must be treated, not the symptom.

On a personal note: I have had a Rottweiler, two Dobermans, a pit bull cross, and an attack-trained German Shepherd who had been tied up most of his life in a junkyard. He let a turkey sleep on his head. Children rode the pit bull mix. The Dobermans were wonderful with children. The Rottweiler — weighing 160 pounds — approaches all strangers with his ball. The only truly mean dog who hated strangers was my Chihuahua cross, who would have been a true menace had she weighed more than six pounds. Given her size, she was a menace only to grasshoppers. Chronically, every one of these dogs except the Chihuahua could have been seized or destroyed under some breed specific law. That is morally intolerable on all the levels we have described.

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<sup>33</sup> American Temperament Test Society, Inc., [www.atts.org](http://www.atts.org).

<sup>34</sup> DogsBite.org, [www.dogsbite.org/blog/2008/01/pit-bull-owners-more-likely-to-be.html](http://www.dogsbite.org/blog/2008/01/pit-bull-owners-more-likely-to-be.html).

## SHOULD PEOPLE OF COLOR SUPPORT ANIMAL RIGHTS?

ANGELA P. HARRIS<sup>1\*</sup>

*The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of legs, the villosity of the skin, or the termination of the os sacrum are reasons equally sufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? Nor Can they talk? but, Can they suffer?*

– Jeremy Bentham<sup>2</sup>

*And no one, nobody on this earth, would list her daughter's characteristics on the animal side of the paper.*

– Toni Morrison<sup>3</sup>

### INTRODUCTION

People of color are underrepresented in the animal rights movement. To be more precise, and more provocative: The animal rights movement is perceived by many African American people as “a white thing.”<sup>4</sup> In this Essay I want to respond

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<sup>2</sup> JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 310-11 n.1 (1988).

<sup>3</sup> TONI MORRISON, BELOVED: A NOVEL 251 (1987).

<sup>4</sup> Data confirming or refuting these propositions, of course, are difficult to find. Certainly People for the Ethical Treatment of Animals (PETA) boasts affiliations with several prominent African

to these perceptions with two arguments. First, I argue that it is not surprising that people of color<sup>5</sup> are not more active on behalf of animal rights, because advocates for animal rights often fail to recognize the relevance of racism and racial justice to their work. This ignorance yields more than insensitivity. Animal rights advocates, like environmentalists, risk further entrenching white supremacy, in theory and

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Americans, including Dick Gregory, Richard Pryor, and Alice Walker. Nonetheless, in the author's experience people of color, particularly African Americans, are hesitant to identify themselves with the animal rights cause, and an extremely unscientific poll of acquaintances yielded the consensus that "animal rights is a white thing."

Some light may be shed on this empirical question by the literature on African American support for environmentalism, a movement related to the animal rights movement. A study done in Detroit found that African Americans expressed similar levels of concern for the environment as white Americans, but that those concerns were expressed in different ways. Julia Dawn Parker and Maureen H. McDonough, *Environmentalism of African Americans: An Analysis of the Subculture and Barriers Theories*, 31 ENV'T & BEHAV. 155 (1999), available at <http://eab.sagepub.com/cgi/content/abstract/31/2/155>. Other writers seem to assume that people of color are not active in environmental discourse. See, e.g., Joseph Springer, *The Presence of African American Men in the Environmental Movement (or Lack Thereof)*, 6 J. AFRICAN AMERICAN MEN 63 (2002) (suggesting that African American men are underrepresented in environmental discourse).

Paul Mohai sets out the argument that African Americans are not interested in the environment:

Are African Americans concerned about the environment? It has been commonly assumed in the United States that they are not, or at least they are not as concerned as are white Americans. According to this long-held belief, African Americans are preoccupied instead with such high priority issues as improving access to educational opportunities and jobs, fighting crime in their neighborhoods, and overcoming racial barriers. Following this logic, environmental concerns would take a back seat to these other issues -- to the point where a healthy environment would be viewed as a luxury. In fact, measures taken to protect and improve the environment could be seen as antithetical to African American interests because such measures could conceivably put burdens on industries that supply needed jobs and boost local economies.

Paul Mohai, *African American Concern for the Environment: Dispelling Old Myths*, ENVIRONMENT, Jun. 2003 at 11. *But see* KIMBERLY K. SMITH, AFRICAN AMERICAN ENVIRONMENTAL THOUGHT: FOUNDATIONS 8 (2007) (arguing that African American thought contains a rich vein of literature addressing "not how to protect the natural world from human interference but how to facilitate responsible and morally beneficial interaction with nature.").

Certainly the traditional environmental movement has been focused on wilderness preservation and has avoided issues of urbanism, race, and class. See, e.g., ROBERT GOTTLIEB, ENVIRONMENTALISM UNBOUND: EXPLORING NEW PATHWAYS FOR CHANGE 43 (2001) (arguing that traditional environmentalism separates the ecological from the social); Kevin DeLuca & Anne Demo, *Imagining Nature and Erasing Class and Race: Carleton Watkins, John Muir, and the Construction of the Wilderness*, 6 ENVTL. HISTORY 541 (2001). The emergence of the environmental justice movement is typically explained as a response to this failure of traditional environmentalism. The environmental justice movement recognizes care for the environment as inseparable from care for human beings. See LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000).

<sup>5</sup> In this essay, by "people of color" I mean especially native peoples and peoples of African descent, for reasons that will become clear in the next section.

practice, by ignoring the centrality of social justice to questions of the relationship between humans and the non-human biosphere.

Second, I argue nevertheless that people of color ought to support animal rights, just as they ought to support environmentalism. As with environmentalism, however, the connection to an anti-subordination agenda demands a reframing of what “animal rights” means. The version of animal rights that people of color ought to support is rooted in a deep understanding of the linkages between all forms of subordination. Racism and what is sometimes called “species-ism” have a common origin and a common logic. And opposition to racism should lead one to oppose species-ism as well. The relationship between these two -isms, however, is far from the simple parallelism that Bentham’s famous statement, quoted as the first epigraph to this essay, suggests. Rather, anti-subordinationist thought requires that we question both what we mean by “animals” and by “rights.”

Part I of this essay provides a brief history and description of the animal rights movement, and describes some of the recent “animal liberation” campaigns that have caused controversy among people of color. Part II explores some theoretical bases for the objections that people of color have raised against such campaigns. Part III stakes out a critical position from which anti-racist people of color might both support animal rights and challenge the animal rights movement to reframe what “animal rights” mean.

## I.

### a.

The animal rights movement sometimes traces its birth to the mid-nineteenth century, when English and American reformers began to found organizations such as the American Society for the Prevention of Cruelty Against Animals (ASPCA), and promote anti-cruelty or “animal welfare” statutes. Although Jeremy Bentham was not alone in seeing a philosophical case for animal rights, these early statutes were usually justified not on the basis of rights theory but on more pragmatic, human-centered grounds: the need to protect both property (on the theory that animals were property) and public morality (on the theory that cruelty to animals signified moral depravity).<sup>6</sup>

The birth of the “animal rights,” as opposed to “animal welfare,” movement, followed closely upon the birth of the environmental movement. In 1975, five years after the first American “Earth Day,” Peter Singer published his famous book, *Animal Liberation: A New Ethics for Our Treatment of Animals*.<sup>7</sup> Singer used the word “liberation” deliberately:

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<sup>6</sup> See Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement’s Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL’Y & L. 587, 591 (2002).

<sup>7</sup> PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (1975).

The title of this book has a serious point behind it. A liberation movement is a demand for an end to prejudice and discrimination based on an arbitrary characteristic like race or sex. The classic instance is the Black Liberation movement. The immediate appeal of this movement, and its initial, if limited, success, made it a model for other oppressed groups. We soon became familiar with Gay Liberation and movements on behalf of American Indians and Spanish-speaking Americans. When a majority group – women – began their campaign some thought we had come to the end of the road. . . .

We should always be wary of talking of “the last remaining form of discrimination.” If we have learned anything from the liberation movements we should have learned how difficult it is to be aware of latent prejudices in our attitudes to particular groups until these prejudices are forcefully pointed out to us.

A liberation movement demands an expansion of our moral horizons.<sup>8</sup>

Philosophers seldom engender popular movements, but animal rights seems to be an exception. In the wake of several well-publicized protests against the mistreatment of research animals in the 1970s, People for the Ethical Treatment of Animals (PETA) was founded in 1980. Led by Ingrid Newkirk, a colorful and quotable figure, PETA claims to be the largest animal rights organization in the world, with more than 2 million “members and supporters;”<sup>9</sup> And its philosophy draws directly on Singer’s; PETA, in fact, has reprinted and distributed Singer’s book widely. Both PETA and Singer argue that to support animal rights does not mean that animals should have all the same rights as humans (such as the right to vote); that because the touchstone for rights protection is the capacity to suffer, the animal rights movement does not encompass plants or bacteria; and, most importantly, that “to discriminate against beings solely on account of their species is a form of prejudice, immoral and indefensible in the same way that discrimination on the basis of race is immoral and indefensible.”<sup>10</sup>

*b.*

Several years ago, an online story carried by the Pacific News Service and BlackPressUSA.com titled “Campaign Equating the Treatment of Animals and Slaves is Halted” began this way:

The scenes are graphic. The charred body of a Black man is juxtaposed with a burning chicken. A shackled Black leg is shown next to the leg of a

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<sup>8</sup> *Id.* at xii-xiii.

<sup>9</sup> PETA, Mission Statement, *available at* <http://www.peta.org/about/> (last visited December 27, 2008).

<sup>10</sup> Singer, *supra* note 6, at 243.

chained elephant. A woman is branded next to a panel of a chicken getting branded. The message is unmistakable: animals are suffering the same fate as African-American slaves. That's the point of a controversial campaign by the Ethical Treatment of Animals (PETA). The online exhibit has been placed on hold amid a flurry of protests.<sup>11</sup>

The article quoted Dawn Carr, director of special projects for PETA, as defending the exhibit in this way: "Animal Liberation project is about many cruelties: slavery, child labor, oppression of women and Native Americans." John C. White, director of communications for the NAACP, responded, "NAACP is opposed to animal cruelty, but valuing chickens over people is not a proper comparison. . . . PETA shows that it is willing to exploit racism to advance its cause. Is PETA saying that as long as animals are butchered for meat, racists should continue lynching Black people?"

PETA pulled the exhibit pending talks with the NAACP, but reverberations of the controversy continued in the blogosphere. In a posting on Ingrid Newkirk's website, Karen Davis (founder and president of United Poultry Concerns, a nonprofit organization that promotes the compassionate and respectful treatment of domestic fowl) wrote:

African-Americans and other groups have expressed outrage over a PETA exhibit that compares animal slavery with human slavery. Yet not so long ago, anyone who dared to compare black people with white people in my neighborhood provoked similar outrage. As a 1960s civil rights activist, I fought with my parents and others incessantly over this point. Now, as then, I uphold these dreaded comparisons. Reduction of a sensitive being to an object imprisoned in a world outside any moral universe of care links the human slave to the animal slave in laboratories, factory farms, and slaughterhouses in ways that diminish the differences between them. Instead of bickering over who's superior and who's inferior on this planet that evolved all of us, why not own up to the preventable suffering we cause and do what we can to stop it?<sup>12</sup>

Marjorie Spiegel, in articles and a book on "the dreaded comparison," similarly argues that the comparison is apt:

The parallels between the enslavement of animals and humans are innumerable and exist on many levels; they are built around the same basic relationship between oppressor and oppressed, master and slave. . . . The intentional, or sometimes simply thoughtless, destruction of relationships

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<sup>11</sup> Amecia Taylor, *Campaign Equating the Treatment of Animals and Slaves is Halted*, NNPA, Aug 29, 2005, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=2d0b9436b761aae71f5d8a45d62a4690](http://news.newamericamedia.org/news/view_article.html?article_id=2d0b9436b761aae71f5d8a45d62a4690).

<sup>12</sup> Karen Davis, *Is the Dreaded Comparison Unjustified?*, INGRIDNEWKIRK.COM, Sept. 25, 2005, [http://devmt.peta.org/ingridnewkirk.com/2005/09/is\\_the\\_dreaded.html](http://devmt.peta.org/ingridnewkirk.com/2005/09/is_the_dreaded.html).

and families during the antebellum period were rationalized by the view held by most of the white slave-owners that black people were “just animals” who would quickly get over separation from a child or other loved one. In fact, antebellum racist thinkers denied that love among black slaves existed at all. They maintained that “animal lust” and “animal attraction” were responsible for intimate bonding between two slaves. When slaves were brought to auction, children were sold away from their mothers and husband from their wives. Women were bribed or punished into breeding often injuriously vast numbers of children, and permitted no semblance of family structure.

Similarly, in countless ways every day, humans destroy or deny emotional bonds in other animals. In the wild, we randomly shoot the mates of waterfowls, some of which pair for life. Often the surviving mate dies of starvation while mourning. We shoot mother primates in order to capture their infants for displays in zoos or for use in laboratories. We annually produce millions of animals, placed in isolated cages, to provide scientists with “sterile” animals who have never been allowed contact with another of their kind.<sup>13</sup>

In its defense, PETA and its supporters also point out that African American activist and long-time vegetarian Dick Gregory sits on PETA’s board.<sup>14</sup> However, “There is embedded dehumanization in comparing Blacks to animals,” insists one African American academic:

Regardless of who came up with the idea, it’s still a bad one, according to Cassandra Newby-Alexander, associate professor history at Norfolk State University in Virginia. “Comparing humans and animals is like the apples and oranges analogy,” Newby-Alexander states. “You can’t compare

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<sup>13</sup> Marjorie Spiegel, *The Dreaded Comparison*, E: THE ENVIRONMENTAL MAGAZINE, Nov-Dec, 1995 at 40, available at [http://findarticles.com/p/articles/mi\\_m1594/is\\_n6\\_v6/ai\\_17847939](http://findarticles.com/p/articles/mi_m1594/is_n6_v6/ai_17847939); see also THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (1996).

<sup>14</sup> There are also occasionally other African American faces that appear on PETA’s website. For instance, Michael Strahan, who plays for the New York Giants, stars in a recent public service announcement called “Cold Paws” warning of the danger of leaving companion animals outside in winter. See NY Giants’ Michael Strahan Tackles Animal Abuse, <http://www.peta.org/feat/coldog/> (last visited Jan. 10, 2009). Kristoff St. James, an actor on the *Young and the Restless*, and his daughter have a PSA condemning the treatment of circus animals. PETA, Summer Circus Ad—Kristoff St. John, [http://www.petatv.com/tvpopup/Prefs.asp?video=kristoff\\_summer\\_circus](http://www.petatv.com/tvpopup/Prefs.asp?video=kristoff_summer_circus) (last visited Jan. 10, 2009). Montel Williams also has a short interview regarding mistreatment of circus animals. Circuses.com, Montel Williams Talks Tough on Circuses, <http://www.circuses.com/montel.asp> (last visited Jan. 10, 2009). There is a letter on the site which Richard Pryor sent to a regional court magistrate in Pretoria, South Africa, urging the magistrate to impose the maximum sentence on two men for elephant abuse. Circuses.com, Pryor Asks Maximum Sentence for Elephant Abusers, <http://www.circuses.com/pryor.asp> (last visited Jan. 10, 2009).

the systematic deprivation of people's rights, their culture and heritage to animals that don't have an understanding of things. Doing so belittles the legacy and horrors of slavery."<sup>15</sup>

African Americans are not the only group whose treatment and struggles PETA has analogized to the animal rights struggle. As the BlackPressUSA article noted, "PETA offended the Jewish community recently with a "Holocaust on Your Plate" campaign that showcased photos from slaughterhouses and Nazi death camps together."<sup>16</sup> On September 27, 2005, a press release on PETA's website also announced an exhibit to be brought to Los Angeles the following day:

Inspired by the words of civil rights leader Dick Gregory, who said, "Animals and humans suffer and die alike. . . . the same pain, the same spilling of blood, the same stench of death, the same arrogant, cruel, and brutal taking of life," PETA will unveil its thought-provoking "Animal Liberation" display in Los Angeles this week. The huge walk-through exhibit juxtaposes images of once-accepted acts of cruelty to humans with images of present-day cruelty to animals. Why Los Angeles? California's past included some of the worst state-funded genocide of Native Americans in U.S. history. Today we casually exterminate and drive out native wildlife who want nothing more than to continue to make their homes and raise their families on the lands they have inhabited for thousands of years.<sup>17</sup>

So what about the dreaded comparison?

## II.

### *a.*

In 1799, visitors to Dr. John Hunter's Museum in London could view a collection of heads arranged so as to tell a story about the "descent of man."

[The heads were] placed upon a table in a regular series, first shewing the human skull, with its varieties, in the European, the Asiatic, the American, the African; then proceeding to the skull of a monkey, and so on to that of a dog; in order to demonstrate the gradation both in the skulls, and in the upper and lower jaws. On viewing this range, the steps were so exceedingly

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<sup>15</sup> Taylor, *supra* note 10.

<sup>16</sup> *Id.*

<sup>17</sup> Press Release, PETA, Exhibit Comparing Native American Genocide to Animal Abuse Coming to Los Angeles (Sept. 26, 2005) available at <http://www.peta.org/mc/NewsItem.asp?id=7160>.

gradual and regular that it could not be said that the first differed from the second more than the second from the third, and so on to the end.<sup>18</sup>

This exhibit meant to suggest that the Biblical account of human origin, in which man was created separately from the animals and given dominion over them, was wrong; man was an animal among other animals. A century later, Charles Darwin's story about evolution – a story that soon became ubiquitous in Western culture – reiterated this claim about the essential kinship of man and beast. And more than a century after that, scientists were marveling at the discovery that the gorilla and the human genome are approximately 99% identical.

Despite these scientific efforts to deny a bright line between human and animal, however, the demarcation remains fraught with significance. When in Toni Morrison's novel, *Beloved*, Schoolteacher had the plantation master's boys divide the slave Sethe's characteristics into human and animal, listing them on separate sides of the paper, she knew what it meant, just as everyone knew what it meant when officers of the Los Angeles Police Department described black suspects in that city as "gorillas in the mist."<sup>19</sup> To be moved from the human to the nonhuman side of the paper is to be made a being with no moral claims, a being whose body is only flesh, vulnerable to any kind of treatment for any reason, or for no reason. And since the time of the Atlantic slave trade, it has been the African out of all humans who has been placed right on that line between subject and object, person and property, whose supposed kinship with the primates represents the blurred yet essential line between man and beast. Saartje Bartman – the so-called "Venus Hottentot" – was only one of the most celebrated in a long line of people of African descent, male and female, whose bodies were made into a spectacle of the "missing link."<sup>20</sup>

Not only African Americans, but native peoples, as well, have closely been identified with the animal world in Anglo-European culture, with similarly grim results. As Robert Williams and other scholars have noted, the religious dispute over the treatment of non-Christian peoples, from the time of the Crusades to the time of European colonialism, frequently returned to the question of whether "savages" possessed souls to be saved, and the status of those savages not converted to Christianity. Although progressives like Las Casas argued strongly that native Americans should be treated as persons with rights, others argued that, as heathens,

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<sup>18</sup> Christopher Fox, *How to Prepare a Noble Savage: The Spectacle of Human Science, Introduction to INVENTING HUMAN SCIENCE: EIGHTEENTH-CENTURY DOMAINS* 11 (Christopher Fox, Roy Porter, and Robert Wokler eds., 1995) (quoting CHARLES WHITE, AN ACCOUNT OF THE REGULAR GRADATION IN MAN, AND IN DIFFERENT ANIMALS AND VEGETABLES AND FROM THE FORMER TO THE LATTER 41 (1799)).

<sup>19</sup> Seth Mydans, *Los Angeles Force Accused from Within*, N.Y. TIMES, March 29, 1991 at A10.

<sup>20</sup> STEPHEN J. GOULD, THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY 294 (1987). Another example of the longstanding mythology linking not just animal and human, but specifically African and primate, is the theory that HIV was first transmitted to humans by Africans who had had sex with monkeys. See SUSAN S. HUNTER, BLACK DEATH: AIDS IN AFRICA 39 (2003); see also NICOLE ITANO, NO PLACE LEFT TO BURY THE DEAD: DENIAL, DESPAIR AND HOPE IN THE AFRICAN AIDS PANDEMIC 316 (2007).

they were little more than beasts who could be killed with impunity. Similarly, the ideology and practice of “Indian hating” in North America after the American Revolution coupled acts of brutality and genocide against native peoples with the justification that Indians were only “varmints,” brutes in human form whose extermination would cleanse the new land for human habitation and economic development.<sup>21</sup>

Coupled with Indian hating was a sentimentality toward the “noble savage” that also linked native peoples to animals, though with less deadly results. Enlightenment philosophers imagined the Indian as possessing all the good characteristics Europeans feared they themselves had lost in the march toward “civilization,” including a graceful, non-exploitative communion with nature. Indians in this conception were “natural men” who possessed a certain nobility in their wild state, even though they were doomed to fall under the wheel of quickly-evolving capitalism. Indeed, according to this argument “primitive peoples probably apprehended the laws of nature more clearly than civilized man since they were less corrupted by the practices and prejudices of civilization and more creatures of instincts considered natural.”<sup>22</sup> As John Berger quotes György Lukács,

Nature thereby acquires the meaning of what has grown organically, what was not created by man, in contrast to the artificial structures of human civilisation. At the same time, it can be understood as that aspect of human inwardness which has remained natural, or at least tends or longs to become natural once more.<sup>23</sup>

We are back to animals again. As Berger observes, “According to this view of nature, the life of a wild animal becomes an ideal, an ideal internalised as a feeling surrounding a repressed desire. The image of a wild animal becomes the starting-point of a daydream: a point from which the day-dreamer departs with his back turned.”<sup>24</sup> And, like the Indian, the wild animal is imagined in this daydream as always vanishing, always just about to be extinct. Berger observes, “The treatment of animals in 19<sup>th</sup> century romantic painting was already an acknowledgement of their impending disappearance. The images are of animals *receding* into a wildness that existed only in the imagination.”<sup>25</sup> The same was true of contemporary romantic depictions of Indians in popular and high cultural representations; the noble but doomed Indian was a stock figure in novels, plays, and poetry.<sup>26</sup>

These nostalgic associations, like the associations between people of African descent and monkeys, did not go away when the twentieth or even the

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<sup>21</sup> See RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN HATING AND EMPIRE BUILDING* (1980).

<sup>22</sup> Robert F. Berkhofer, Jr., *The White Man’s Indian* 76 (1978).

<sup>23</sup> JOHN BERGER, *Why Look at Animals?*, in *ABOUT LOOKING* 15 (1980).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See generally Berkhofer, *supra* note 21.

twenty-first century dawned. The peculiar use of Indians as sports mascots – still considered unproblematic by many, because it is supposed to be “complimentary” — is a dramatic example. Indian activists have also strongly criticized the industry in indigeneity perpetuated by the New Age movement. Indian ideals, Indian cultural practices, Indian sayings, Indian artifacts are valuable because they stand for an anti-capitalist critique of modernity (of course made available in commodified form). Indians, everyone knows, are (or were, since they are still always vanishing) close to nature; they have an organic relationship with animals, plants, and the entire biosphere that white people have lost access to. In this way, Indians continue to carry the burden of western nostalgia and sentimentality for a pre-modern, pre-capitalist world.<sup>27</sup>

b.

*I am not an animal.*

– John Merrick, *The Elephant Man*.<sup>28</sup>

*America will tolerate the taking of a human life without giving it a second thought. But don't misuse a household pet.*

– Dick Gregory<sup>29</sup>

So there is some kind of link between nineteenth-century depictions of African Americans, of Indians, and of animals. What about this link makes the analogy between Black Liberation, Indian Liberation, and Animal Liberation disturbing?

1. Perhaps it is disturbing precisely because it is telling. The value of the analogy for PETA is the same value that gay activists have made use of in comparing bans on same-sex marriage to bans on interracial marriage.

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<sup>27</sup> Lisa Aldred, *Plastic Shamans and Astroturf Sun Dances: New Age Commercialization of Native American Spirituality*, 24 AM. INDIAN Q. 329 (2000); PHILLIP JENKINS, DREAM CATCHERS: HOW MAIN-STREAM AMERICA DISCOVERED NATIVE SPIRITUALITY (2004).

<sup>28</sup> Quoted in film. THE ELEPHANT MAN (1980). As the quote suggests, there are also close links between animals and people with certain sorts of disabilities. The severely retarded person is often trotted out to be unfavorably compared with a monkey or a dog (Peter Singer, for example, does this). Deaf people have been at various times and places equated with animals, as have the mentally ill. Nora Ellen Groce & Jonathan Marks, *The Great Ape Project and Disability Rights: Ominous Undercurrents of Eugenics in Action*, 102 AM. ANTHROPOLOGIST 818 (2000).

<sup>29</sup> DICK GREGORY, THE SHADOW THAT SCARES ME 371 (James R. McGraw ed., 1968).

The analogy reminds us that, as the bumper sticker says, truth has three phases: universal ridicule, heated controversy, and finally unquestioned fact. The liberal rights project has a constantly moving horizon: as we continually “widen the circle of the we,” we learn to recognize that the social arrangements taken for granted today as normal, natural, and necessary are always historically and socially constructed. What is demanded of us, as Peter Singer argues, is compassion in response: a willingness to relax our impulse to reject unfamiliar rights claims out of hand, and to take as central, not the question of whether a rights claim seems strange and weird, but whether we can discern, connected to it, suffering, which it then becomes our duty as moral beings to alleviate. If this is the source of the objection — and its unfamiliarity — then perhaps PETA is right.

2. But why African Americans? Why Indians? And why the Holocaust? Another objection to the use of these groups and events as anchors for the Animal Liberation movement is that civil rights struggle is not the orderly procession toward moral perfection that these dreaded comparisons suggest. African Americans, in particular, have in the post-civil rights era arguably become “civil rights mascots”: new rights claims are routinely analogized to African American rights claims, and it is invariably suggested that if the treatment being protested were being visited upon black people, it would never be tolerated. What’s wrong with such arguments is their implicit assumption that the African American struggle for rights is over, and that it was successful. The use of analogy misrepresents history — strategically, it must be admitted — as the unfolding of a natural, organic process.
3. What’s wrong, further, is the assumption that rights struggles are at some level all the same. The dreaded comparison(s) erase the specificity — and the seriousness — of each rights struggle. This inflicts a dignitary harm on the group whose struggle is being referenced to support some other struggle. This was the foundation of some African American complaints about the miscegenation/same-sex marriage analogy. It is also the central argument of many Jews disturbed by the casual use of “the Holocaust” as a touchstone for every kind of moral wrong. The Holocaust is not like anything else. To even begin to make the analogy is to misunderstand what was so terrible about the Holocaust. Great moral disasters — like the Middle Passage, like North American genocide, like the Holocaust — demand of us that we recognize their black-hole quality: they are utterly singular, utterly horrific in very specific ways; they signify the breakdown of ordinary politics and ordinary public policy in which this harm can be put in the scale and weighed against that.
4. Finally, what’s wrong with the analogy is that it ignores the history we surveyed in the last section. Indeed, it is tone-deaf in a way that covertly exploits the very racism that animal liberationists claim to reject. Precisely because of the close relationship between colored people and animals in the white imagination, the invocation of the dreaded comparison — the chained

slave next to the chained animal in a sinister visual rhyme — itself calls out the structures of feeling that have undergirded racism for so long.

The comparison implicitly constructs a gaze under which slaves and animals appear alike. This is the sentimental gaze of the privileged Westerner who “saves” those less fortunate, the voiceless masses whether human or animal. Harriet Beecher Stowe exploited this sentimentality shrewdly and to great effect when she published *Uncle Tom’s Cabin*; and many PETA campaigns make the same moves. As Sherene Razack has brilliantly explored, this structure of feeling — which Razack interestingly identifies as “white feminine” in character — is in some ways as central to the racist project as hostility and repulsion.<sup>30</sup> Compassion — the call to alleviate suffering — lies dangerously close to the sentimentality that engages the subject not with the Other but with herself.

Animals notoriously call forth this sentimentality. Domestic pets, as John Berger observes, are often treated as valuable to the extent they are used to mirror their “owner”’s personality:

The pet *completes* [the average owner], offering responses to aspects of his character which would otherwise remain unconfirmed. He can be to his pet what he is not to anybody or anything else. Furthermore, the pet can be conditioned to react as though it, too, recognises this. The pet offers its owner a mirror to a part that is otherwise never reflected. But, since in this relationship the autonomy of both parties has been lost (the owner has become the-special-man-he-is-only-to-his-pet, and the animal has become dependent on its owner for every physical need), the parallelism of their separate lives has been destroyed.<sup>31</sup>

The public outcry that sometimes attends the abuse of pets may coexist with apathy and indifference toward the plight of humans, including or especially people of color; and this is in part because animals can be treated sentimentally, as mirrors or as foils for oneself, in ways that humans (at least, adult strangers) cannot.<sup>32</sup> To the

<sup>30</sup> SHERENE RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* (1998); Sherene Razack & Mary Louise Fellows, *Race to Innocence: Confronting Hierarchical Relations among Women*, 1 J. GENDER RACE & JUST. 335 (1998).

<sup>31</sup> Berger, *supra* note 21 at 14-15.

<sup>32</sup> Even wild animals are sentimentalized in contemporary western culture. John Berger recounts this news story:

“London housewife Barbara Carter won a ‘grant a wish’ charity contest, and said she wanted to kiss and cuddle a lion. Wednesday night she was in a hospital in shock and with throat wounds. Mrs. Carter, 46, was taken to the lions’ compound of the safari park at Bewdley, Wednesday. As she bent forward to stroke the lioness, Suki, it pounced and dragged her to the ground. Wardens later said, ‘We seem to have made a bad error of judgment. We have always regarded the lioness as perfectly safe.’”

extent that the animal liberation movement calls forth this sentimentality, it makes plain the situation of people of color: neither accorded equal dignity nor afforded the patronizing sentimentality that at least funnels money and goods towards cute and fuzzy animals. (Indeed, from the perspective of this sentimentality people of color are not worthy of energy and attention, since they are likely to be ungrateful.)

The dreaded comparison also ignores the dynamic relationship between people of color and animals given their historic linkage in the white western mind. In some ways, animals are to people of color — particularly African Americans — as prostitutes (Margaret Baldwin has argued) are to women.<sup>33</sup> The existence of the prostitute creates a dynamic in which the woman, to achieve dignity, must always and constantly dissociate herself from that abject figure. She is set up to seek respectability, to make clear, “I am not that.”

Animals — and for African Americans, especially primates — activate, I think, this urge to disassociate on the part of people of color, based on the intuition that our dignity is always provisional. PETA’s animal liberation campaigns, from this vantage point, are “white.” They assume a comfort in associating oneself with animals and animal issues that people of color can only assume with difficulty. (I have a visceral repulsion reaction to primates that I believe to be in part race-based: the fear of being seen, by whites, as interchangeable with them.) It is, of course, the opposition between woman and prostitute, animal and African that needs itself to be destroyed. But to assume that this opposition-identification is unproblematic, as the dreaded comparison does, is to implicitly code the campaign itself as white.

### III.

*All sites of enforced marginalisation — ghettos, shanty towns, prisons, madhouses, concentration camps — have something in common with zoos.*

– John Berger<sup>34</sup>

So, given all these objections, is it any wonder that the animal rights movement, like the environmental movement, might be dominated by white people? And is there any reason for people of color to be interested in or support animal rights?

I want to argue that people of color can and should support animal rights, but

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tween a man and a sloth of grizzly bears (yes, that is the collective noun) that ends fatally for the man. GRIZZLY MAN (2005).

The sometimes stark juxtaposition of caring for animals and lack of caring for people recalls the lack of interest some abortion rights activists have for the “post-born”: fetuses are wholly innocent and therefore deserving of reverence in a way that the already born, inevitably fallen are not. In Adam’s fall we sinned all; but fetuses have not yet fallen. For an argument exploring this image of the fetus as central to American right-wing ideologies of the 1980s, see LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP* (1997).

<sup>33</sup> Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 *Yale J.L. & Feminism* 47 (1992).

<sup>34</sup> Berger, *supra* note 21 at 24.

should do so in a way that identifies and challenges the animal rights movement's complicity with racism. Just as the environmental justice movement reinvented environmental protection as being not about protecting "nature" from "humans," but ensuring peace, justice, and sustainable political-economic practices for the good of the biosphere, an anti-speciesist position can be constructed that is also anti-racist.

What are the bases of such a case? I will move from the most modest to the most sweeping.

1. There are certainly cultural resources in indigenous American, indigenous African, and African diasporic cultures for respecting animals, as there are such resources available for respecting nature. These cultural resources are linked with material and ideological economic practices that place stewardship and respect rather than exploitation and profit at the center. In this way supporting animal rights could be seen as a practice that is specifically identified with ethnic traditions, but from within those traditions rather than from without.
2. Racism and species-ism share a common history: not only a history of capitalist exploitation under which slaves crammed into ships presage factory farms, but also the history of an episteme under which nature and culture are violently separated and the modern subject emerges, nostalgic about the rupture. Hannah Arendt calls this subject "homo faber," and names his instrumentalization of the world, his confidence in tools and in the productivity of the maker of artificial objects; his trust in the all-comprehensive range of the means-end category, his conviction that every issue can be solved and every human motivation reduced to the principle of utility; his sovereignty, which regards everything given as material and thinks of the whole of nature as of 'an immense fabric from which we can cut out whatever we want to re sew it however we like'; his equation of intelligence with ingenuity, that is, his contempt for all thought which cannot be considered to be "the first step . . . for the fabrication of artificial objects, particularly of tools to make tools, and to vary their fabrication indefinitely"; finally, his matter-of-course identification of fabrication with action.<sup>35</sup>

People of color in the environmental justice movement have identified the convergence between capitalist and racist exploitation as a place from which to resist both. As Robert Collin and Robin Morris-Collin argue:

Industrialism teaches and preaches the rectitude of exploiting the meek, the unskilled, the marginalized, the oppressed, and the disenfranchised. Racism justifies and rationalizes exploitation and degradation of both poor people

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<sup>35</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 305-306 (1998) (1958).

and people of color, just as economic progress justifies and rationalizes exploitation and degradation of nature. The two are twins.<sup>36</sup>

From this perspective, the struggle for reparation — the struggle to transcend our long and continuing history of capitalist exploitation and degradation — must include an accounting of nonhuman as well as human suffering. Consider, for instance, philosophies like Jainism, in which all living beings are considered to contain an immortal essence, or *jiva*, which must be treated with compassion.<sup>37</sup> Although to be embodied in human form gives the *jiva* a special opportunity to reach enlightenment, Jainism sees all *jiva* as equal and thus requires its followers to respect all living things, human or nonhuman. Jainism thus requires its members to be vegetarian, and many are vegan out of concern for cruelty in animal-keeping practices. Other “dharmic” philosophies, such as Buddhism, similarly take as their project not simply “human rights,” but compassion for and lovingkindness toward all living things.

3. The visceral shudder that I, an African American, feel when confronted by an ape — the urge to insist, “I am not that” — is a repulsion reaction that is deeply political. It provokes the gesture of differentiation that, Meg Baldwin argues, every woman potentially finds herself performing: “I am not a whore.” And that is the same gesture that has led, some argue, the organized gay and lesbian political and legal movement to distance itself from “bull dykes,” “flaming fairies,” transsexuals, cross-dressers, and drag queens and to present itself as being about “normal” folks who just want the same things as straights.<sup>38</sup> It is the same gesture that makes contemporary transgender people hesitant to make common cause with disabled people and fight for legal protections under the Americans With Disabilities Act.<sup>39</sup> And it is the same gesture that makes people with physical disabilities hesitant to embrace those with mental and developmental disabilities. The gesture is central to what Regina Austin calls, in the context of the African American middle class, the “politics of respectability”: the effort to make political and social gains for one’s group by shifting the line of abjection just enough to let the most privileged step over to the other side.<sup>40</sup> The trouble with the politics of respectability, of course, is that it compounds suffering by

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<sup>36</sup> Robert W. Collin & Robin Morris Collin, *Sustainability and Environmental Justice: Is the Future Clean and Black?*, 31 ENVTL. L. REP. 10968 (2001).

<sup>37</sup> On Jainism, see, for example, BHRAT S. SHAH, AN INTRODUCTION TO JAINISM (2002); on Buddhism, see, for example, RUPERT GETHIN, THE FOUNDATIONS OF BUDDHISM (1998).

<sup>38</sup> See MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999).

<sup>39</sup> See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS 74 (Paisley Currah, Richard M. Juang, and Shannon Price Minter eds., 2006).

<sup>40</sup> “*The Shame of it All*” *Stigma and the Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUMAN RIGHTS L. REV. 173 (2004).

intensifying the isolation and denigration of those who just aren't normal enough to pass; and it lessens the chances of a transformative political moment like that now represented in the gay and lesbian movement by the shorthand "Stonewall:" when the most despised, instead of slinking into the shadows, suddenly find the means to fight back.

Kendall Thomas suggests another strategy in place of the politics of respectability for transgendered people:

What might it mean for trans activists and their allies to mobilize around a vision of transgender or, better, "transhuman" rights that affirmatively aligns itself with, rather than against, the idea of the *inhuman*? What might it mean to view the human rights culture we seek to create as one in which the call to social justice for transgendered people is voiced as a call to "stand on the side" of the *inhuman*? What might it mean for the transgender movement to conceive the justice it seeks not as a matter of simple inclusion into the existing institutions and ideology of human rights but as a transformation of human rights discourse, and a transfiguration of the human rights imaginary?<sup>41</sup>

As Thomas emphasizes, such a politics would not be about trans people or African Americans declaring themselves to be animals and joining PETA en masse (though that might be an interesting maneuver). To the extent that what Thomas is talking about remains an identity politics at all, it would be based around what Donna Haraway describes as cyborg identity.<sup>42</sup> The cyborg, for Haraway, is a trickster figure that is always neither this nor that, but both-and, and so resists its placement on either side of the paper. A cyborg politics recognizes that there is no pure nature and no pure culture, that the animals and other non-humans that we fight to protect are, like companion animals, already part of the human story and cannot be rescued from it, and that even a politics of "human rights" will always be insufficient because as the line of abjection sweeps across the globe there will always be some suffering entity left in shadow.

Indeed, in the end I think even an attempted politics of cyborg identity ultimately fails.<sup>43</sup> The hardest, but most necessary, struggle is to move from nouns and verbs to adverbs: from moral analyses in which we decide how we should

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<sup>41</sup> Kendall Thomas, *Afterword: Are Transgender Rights Inhuman Rights?*, *supra* note 36, at 312-313.

<sup>42</sup> Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s*, in *THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY* 82 (Steven Seidman ed., 1994).

<sup>43</sup> Consider, for example, the "transhuman" movement, which anticipates a "singularity" moment when humans, with the aid of bio-technology, will evolve into something grander. This movement, it seems to me, turns the politics of cyborg identity into fantasies of transcendence that deny the merely actual. For a critical account of the transhumanists, see DIANA M.A. RELKE, *DRONES, CLONES, AND ALPHA BABES: RETROFITTING STAR TREK'S HUMANISM, POST-9/11* 80-83 (2006).

treat a thing by investigating its characteristics to see if they meet our standards of “personhood” (or “entity capable of cognition,” or even “entity capable of suffering”) to an ethical analysis that forces us to examine not the what but the how of our own actions.<sup>44</sup> Are we interacting in the world with it (whatever it is: human, flower, whale, rock) in a way that is compassionate, that takes care? Or are we behaving as if it (whatever it is) has no importance, no meaning, other than as a reflection of our own needs and desires? We are back not to Bentham exactly but to Kant, perhaps by way of Martin Buber: the ethics of antisubordination requires us to treat everything not as an It but as a (at least potential) Thou.<sup>45</sup> Here, the language of rights begins to reach its limit, as well as the language of identity. Law pushes us toward rights-talk and identitarian thinking, and I have suggested the need to push back in the name of love and compassion. The goal cannot be, however, the one that critical legal studies scholars once suggested: to altogether replace the language of “rights” with a language of “needs.”<sup>46</sup> Rather, as Robin West argues, the goal is a dialogue between law and ethics, love and justice.<sup>47</sup>

So there is an anti-subordination case to be made for animal rights, and that is the germ of truth in the dreaded comparison. Rather than adopting identity-based comparisons and analogies, however, anti-racist activists should embrace animal rights as a practice of justice and love. From this perspective, identity ultimately is irrelevant, except insofar as the grounded experience of identification teaches us the necessity of compassion.

#### IV.

*The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for white, or women for men.*

— Alice Walker<sup>48</sup>

*What if what is “proper” to humankind were to be inhabited by the inhuman?*

— Jean-François Lyotard<sup>49</sup>

People of color are right to be wary of the animal rights movement, as they have been right to be wary of the environmental movement. Caring about animals and about wilderness has often been accompanied by a disregard for — even a

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<sup>44</sup> Tucker Culbertson suggested this grammatical metaphor to me.

<sup>45</sup> MARTIN BUBER, I AND THOU, (Walter Kaufman, trans., 1971).

<sup>46</sup> See Mark Tushnet, *The Critique on Rights*, 47 SMU L REV. 23 (1993); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

<sup>47</sup> ROBIN WEST, *CARING FOR JUSTICE* (1997).

<sup>48</sup> Alice Walker, *Preface to THE DREADED COMPARISON*, *supra* note 12 at 14.

<sup>49</sup> Quoted in Kendall Thomas, *Afterword to TRANSGENDER RIGHTS*, *supra* note 36 at 310.

hatred of — the human, and a lack of interest in objects who are liable to reject pity and sentimental “love.” And the very notion of what is “animal” and what is “wilderness” has been shaped by an European epistemology that has left certain peoples on the wrong side of the paper. PETA’s problematic use of the “dreaded comparison” illustrates how fine the line is between consciousness raising and reinforcing pernicious stereotypes, images, and structures of feeling.

Nonetheless, the dicey-ness of this territory is not a reason for people of color to stay away from animal rights. All of us have an interest in living in a world without antisubordination, and we should be more keenly aware of that interest the more intensely we experience subordination in our own lives and the lives of those we love.<sup>50</sup> People of color, along with other identity groups created by practices of oppression, are among those who should care with a particular passion about eradicating practices of oppression no matter against whom or what they are directed. In the end, however, the case for animal rights rests, as Jeremy Bentham recognized, on the necessity of compassion for all things; it therefore speaks to us as entities with souls rather than as members of particular human social groups. As practitioners of nonviolence such as Gandhi have famously recognized, compassion for suffering requires right action at many levels: peace, justice, and respect for all beings, living or not, animal, vegetable, or mineral.<sup>51</sup> Such compassion-based support for animal rights does not ask whether the entity in question falls on the “suffering” or “not suffering” side of the paper; it does not privilege “innocent” animals over fallen man; it does not treat animals as mirrors, or as the site of nostalgic projections. We can and should use an ethic based in compassion to reduce the suffering of animals and of humans, and we can and should do so without reducing one to the other.

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<sup>50</sup> Cf. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>51</sup> MOHANDAS K. GANDHI, *GANDHI AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* (Mahadev Desai, trans., 1993) (1957).

# ANIMAL EQUALITY, HUMAN DOMINION AND FUNDAMENTAL INTERDEPENDENCE

TUCKER CULBERTSON<sup>1\*</sup>

## I. INTRODUCTION

In this essay, I argue that advocacy in the United States on behalf of inhuman animals should emphasize the fallacy of human dominion rather than the propriety of “animals’ rights.”<sup>2</sup> From its origins, modern liberal law, politics, and philosophy have depended fundamentally upon an account of human dominion over the inhuman world. Contemporary descendents of the modern liberal tradition – including present neoliberal and neoconservative systems of governance in the United States<sup>3</sup> – retain their origins’ investments in human dominion, such that effectively advancing the interests of inhuman animals requires radical reconstructive work that goes beyond, and cannot be reconciled with, arguments for equality among human and inhuman animals.

In Section II, I respond to Angela P. Harris’s meditations on the unique yet intersecting systems of and struggles against the subordination of human races and inhuman animals. I offer affirmations and elaborations of Harris’s arguments, as well as those of Taimie L. Bryant, which counsel strenuously against evaluating inhuman animals’ rights based on their similarity to or difference from human animals. I recommend legal, political, and philosophical work aimed at disestablishing ideologies of human dominion over the inhuman world. This recommendation requires much more than a semantic shift. It leads us away from assimilatory animal rights platforms and also unsettles foundational elements of liberal jurisprudence often bound up with ideologies of human dominion — namely, constructions of individual subjectivity and state sovereignty.

To elaborate the connections among human dominion, state sovereignty,

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<sup>2</sup> I use the adjective “inhuman” rather than “nonhuman” when referring to animals not among the human species. I do so because I believe the negative connotations of the former term are central to seemingly neutral, allegedly objective differentiations of the human species from all other beings. By contrast, the term nonhuman can imply a merely descriptive and not hierarchical form of distinction among animal species, thereby backgrounding myths of human supremacy and dominion which are of primary interest to me.

<sup>3</sup> For helpful discussion of the convergences and divergences among neoliberalism and neoconservatism in the contemporary United States, see Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 *POLITICAL THEORY* 690-714 (2006).

and individual subjectivity, Section III offers a brief reading of John Locke's *Second Treatise*. By turning Locke's ultimate theses against his premise of human dominion, I argue that his theories of individual subjectivity and state sovereignty come undone. At end, I suggest that a reconstructive commitment to fundamental interdependence is urged by Locke's contradictory and untenable theory of human dominion, individual subjectivity, and state sovereignty.

Section IV puts forward first thoughts on directions for such a reconstructive commitment to fundamental interdependence. I first engage in a close reading of Karl Marx's unpublished economic manuscripts, which lead me to suggest that we must begin seeing beings (be they human, inhuman, institutional, imaginary, or otherwise) as episodically bound up with other such beings in a shifting, conflicting, but perpetual interdependence. Doing so moves us away from absolutist, essentialist, and unreal denominations and hierarchies of rightful species, autonomous subjects, and sovereign states.

## II. RACES AND SPECIES OF RIGHTS

In *Should People of Color Support Animal Rights?*, Professor Harris argues that – although white supremacy and human dominion are surely distinct – systems of identity subordination are often interrelated, and thus should be opposed *en masse*. However, discovering (as opposed to deducing), nurturing (as opposed to claiming), and negotiating (as opposed to deploying) alliances across political communities is complex. Professor Harris contends that, given the particular cultural histories of racial subordination involving African Americans and American Indians, campaigns by some inhuman animals' advocates which analogize racism and speciesism provoke deep hostility toward "Environmentalism" or "Animal Rights" movements, which in turn perpetuates the disproportionate exclusion of people of color from those movements. As such, Professor Harris counsels resolutely against advocacy which literally or metaphorically analogizes inhuman animals' subordination to that of human races.

While many advocates understandably think and feel that factory farms, concentration camps, and slave ships are morally, legally, and logically equivalent, it is *politically* improper to advance the interests of inhuman animals by analogy to injustices against human races.<sup>4</sup> Coolly gruesome campaigns like PETA's "dreaded comparison" posters — which pair images of African slavery and livestock industries — can be detrimental to engagements among diverse social

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<sup>4</sup> See Harris, *supra*: "What's wrong, further, is the assumption that rights struggles are at some level all the same. The dreaded comparison(s) erase the specificity – and the seriousness – of each rights struggle. To even begin to make the analogy is to misunderstand what was so terrible about the Holocaust. Great moral disasters – like the Middle Passage, like North American genocide, like the Holocaust – demand of us that we recognize their black-hole quality: they are utterly singular, utterly horrific in very specific ways; they signify the breakdown of ordinary politics and ordinary public policy in which this harm can be put in the scale and weighed against that."

justice movements. Such campaigns are either derogatory or reckless because they liken African Americans to animals. As a separate matter, facile comparisons among forms of subordination are fatally one-dimensional and thus deficient as arguments on behalf of inhuman animals. To draw such analogies, one must first wrongly homogenize the experiences of “races” and “animals”, which are actually extremely diverse. Geography, culture, sex, market value, appearance, ability, and other factors which are allegedly external to one’s “race” or “species” are crucial to one’s existence as a multidimensional individual member of a race or species.

Also, the rhetorical content of the PETA campaigns discussed earlier can seem to suggest that the time of racial subordination is past, and that granting legal personhood and civil rights to inhuman animals will necessarily abate or ameliorate their present subordination. Considering the contemporary state of racial injustice in the U.S., despite the grant of legal personhood and civil rights to subordinated human races, one might well wonder what gains could be hoped for from the extension of equal rights to inhuman animals.<sup>5</sup> Robert Garner rightly warns that

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<sup>5</sup> See Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 *ANIMAL L.* 77, 78, 80, 81 (2002):

“ [T]he degree to which the welfare of animals can be sustained and improved is not a determinant of their legal status but is a product of first-order political factors, not the least of which is the prevailing ideological climate. More specifically, it is suggested that a version of liberalism prominent in the West, and particularly the United States, seriously compromises the welfare of animals...

Merely abolishing the property status of animals and granting them rights does not guarantee that they will cease to be exploited. What is required, additionally, is a change in social attitudes toward both humans and animals to ensure that the aim of according rights – to ensure that the recipients are treated with respect and as ends in themselves – is achieved. Of course, the implication of this view is that the property status of animals will only be abolished when social attitudes have changed. The debate around legal status, then, becomes of secondary importance since it is merely a reflection of wider societal attitudes. Moreover, because the formal granting of rights and legal status to humans and animals is secondary to societal attitudes, the need to formally accord rights, of freedom or anything else, becomes redundant once societal attitudes change. In other words, the imposition of formal rights is predicated on the existence of a competitive individualism whereby humans need protecting from each other, and animals need protecting from humans. Remove the cause of this conflict and it is possible to remove the need for formal legalistic notions of rights...

A related point is that the granting of rights is arguably not the best way of identifying responsibility for wrongdoing in the setting of institutional exploitation. In such a setting, the issue of ownership is also confused. Rights are individualistic in the sense that they assume the existence of an agent who can be held responsible. For a case of cruelty to companion animals, this model is usually appropriate because it is possible to identify a distinct transgressor. Such a model is not really appropriate, on the other hand, for the institutional exploitation of animals which occurs mainly on factory farms and in laboratories, since it is difficult, in such cases, to identify who is responsible for the infringement of rights. In the case of animal agriculture, for instance, who is responsible for the plight of animals reared for food? Is it the farm hand, the owner of the farm,

“proclaiming rights does not necessarily mean they will be upheld in practice, and . . . the individualistic language of rights may not be the most suitable vehicle to ensure the protection of animals subject to institutional exploitation in factory farms and laboratories.”<sup>6</sup>

It is also undesirable to advance the interests of inhuman animals by alleging their sufficient similarity to the entire human species. Many inhuman animals’ advocates compare their dignity, autonomy, cognition, genotype, nervous system, emotions, consciousness, and capabilities with those of human animals.<sup>7</sup> Such approaches are unfit because “[t]he very significance of animals — the diversity they contain at the individual and collective levels — is lost in a paradigm that requires their categorization by reference to the qualities by which humans define themselves.”<sup>8</sup> Doing so perpetuates the disingenuous, or else merely unhelpful, progressivist liberal paradigm of equality, which answers calls for justice by considering the similarities and differences among enfranchised and excluded parties, thereby reifying the enfranchised class as the paradigm for the norms and needs of the excluded. Arguments tied to these formalistic analyses of “sameness” and “difference” have been long denounced by anti-subordination advocates. As Taimie L. Bryant notes:

[A]dvocates for animals are traveling a path well-worn by advocates in other social justice movements. Historically, American social justice movements have begun with arguments about (1) the need to expand rights-based protection to include those currently denied rights-holding status or particular rights and (2) those qualities in excluded people that make them worthy of having certain kinds of rights. As in those other movements to

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agribusiness companies who provide the equipment, the retailer of the finished product, or the consumer? In addition, of course, the implication of removing the property status of animals is that it is the owner who is the most likely to infringe the rights of his or her animals.

<sup>6</sup> *Id.* at 91. See also 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, 3 (2001).

<sup>7</sup> See Laurence H. Tribe, *supra* note 5, at 5-6.

[S]earching for a non-intuitive, non-spiritual, wholly objective and supposedly scientifically-based formula for deciding which beings have sufficient autonomy to deserve dignity and hence legal rights is to tilt at windmills. . . . To surmise that our obligation to regard and respect and protect these beings somehow follows from our scientific understanding and is therefore, grounded more firmly than in intuition is to indulge in an impulse I understand, but I think it is a dangerous impulse, one we should resist. . . .

The lesson is that dignity, like the significance of species identity or the relevance of cognitive capacity, is in the eye of the beholder. And trying to erect a truly ‘scientific’ case for animal rights, unhinged from invariably controversial and controverted moral premises, seems to me a fruitless mission.

<sup>8</sup> See Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 173, 167-68 (2006).

address oppression, seeking the extension of rights to animals might appear to be a good means of legally extricating animals from oppression, even if it means protracted arguments about the qualities in animals that make them worthy of rights-holding status. Lawyers expect to engage in debates about legal definitions, so they un-self-consciously engage in this debate, even when they are operating in political settings in which other starting points and emphases may be possible.<sup>9</sup>

The limits of the arguments Bryant critiques — and their availability for redeployment against the interests of subordinated groups — are apparent in the United States' equal protection and antidiscrimination jurisprudence. And so — even though discourses and forces of governance may make comparisons between human and inhuman animals attractive if not compulsory<sup>10</sup> — advocates for inhuman animals would do well to depart from and denounce such analogical liberal progressivism whenever possible, whether the object of analogy is a subordinated race or a superordinated species.

To recap — analogical arguments regarding the subordination of human races and inhuman animals are ill-advised because:

- (1) given both the historical bestialization of peoples of color and the predominately white constituencies of animal rights and environmental movements, analogizing subordinated human races to subordinated inhuman animals makes for not only counterproductive politics, but also emotional assault;
- (2) analogies among subordinated groups perpetuate the homogenizing essentialism of subordinating ideologies, thereby failing to apprehend and intervene against the intersectional multidimensionality of subordinating practices;
- (3) such analogies perpetuate a general progressivist account of justice and a specific ideology of human supremacy by avowing the general privilege and specific attributes of the very species whose supremacy is being challenged.

Rather than analogizing inhuman animals either to subordinated human races

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<sup>9</sup> *Id.* at 143-144 (2006).

<sup>10</sup> *See id.*:

Legal advocates for animals engage in definitional activism for at least three pragmatic reasons: (1) their reliance on the most commonly accepted notion of justice (that like entities should be treated alike) requires them to focus on similarities between humans and animals; (2) their focus on ending animals' suffering, which leads to definitions of animals that rest on animals' capacities to suffer; and (3) their concern that they won't be taken seriously if they don't limit the scope of their advocacy only to those animals who, like humans, can suffer.

or to the entire human species, we ought to challenge ideologies of human dominion which justify inhuman animals' subordination and make such counterproductive analogical strategies attractive.

However, when we do so, our advocacy on behalf of inhuman animals will cease centering on these animals' similarity to or difference from human animals, and will cease being exclusively about animals. Disestablishing human dominion must surely also affect our legal and cultural relations to vegetation, minerals, air, water, ozone layers, ice caps, and the rest of the inhuman world. A reframed approach to advocacy on behalf of inhuman animals might advance a form of social justice that is cognizant of human, animal, and all other beings. For one juridical example, the specific content of inhuman animals' subordination could be as constitutionally relevant for the purpose of due process as the use of species classification could be for equal protection. Obligations incumbent upon human actors might be defined without reference to the beings — and their rights to have rights — which are the objects of human action.<sup>11</sup> As Bryant has argued, these obligations might be defined by “drawing lines derived from examination of our own conduct rather than drawing lines on the basis of qualities in animals or aspects of the environment that do or do not qualify them for rights.”<sup>12</sup>

### III. HUMAN DOMINION, STATE SOVEREIGNTY, AND INDIVIDUAL SUBJECTIVITY

Such an expansive, reconstructive orientation toward our advocacy for inhuman animals is warranted because ideologies of human dominion are so extensive and entrenched in the United States.<sup>13</sup> A deep, seemingly impossible

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<sup>11</sup> Taimie L. Bryant, *supra* note 7 at 146-47:

[W]hile it might seem that rights *must* be established first and that duties to animals must be derived from those rights, it may be possible and preferable that duties be established first. Moreover, I argue against the idea that duties must be linked reciprocally to rights. The reciprocal nature of rights and duties appears necessary from an Anglo-American jurisprudential perspective, but there is no logical or pragmatic necessity to premise duties on rights, other than socio-cultural and historical familiarity with that route... [I]t is possible (and sometimes preferable) for duties to exist even when the entities to which duties are owed are not likely candidates for rights entitlements (for example, future generations of humans or aspects of the environment such as rivers or trees).

<sup>12</sup> *Id.* at 145.

<sup>13</sup> Myths of human dominion ground and hinder international law as well. See Kyle Ash, *International Animal Rights: Speciesism and Exclusionary Human Dignity*, 11 ANIMAL L. 195, 195 (2005):

A convention in international law, and a reflection of a common idea which feeds the foreboding trend of how humans relate to the planet, treats humanity as distinctively separate from the Earth's biodiversity. Though environmental law is beginning to rec-

reconstruction of traditionally liberal law, politics, and philosophy is the proper method for — and the necessary consequence of — advocating the interests of inhuman animals. Put affirmatively, to denounce human dominion is to affirm the interdependence of all beings. Consequently, denouncing human dominion in the interest of inhuman animals requires reconsideration of not only human relations with the inhuman world, but also our constructions of individual subjectivity and state sovereignty.

To develop and engage these concerns, I now turn to a text devoted to matters of dominion, subjectivity, and sovereignty — Locke's *Two Treatises of Government*.<sup>14</sup> In the second treatise, Locke's political theory begins from an account of human dominion. However, Locke's ensuing arguments undo his first principles, thereby urging a reconstruction of his account of human dominion, as well as his derivative theories on individual subjects and sovereign states.

Locke's *Treatises* offer theological and political arguments about the natural freedom of human subjects, the limited sovereignty of governments over such subjects, and the absolute dominion of human subjects over the inhuman world. For Locke and his contemporaries — notably Sir Robert Filmer, to whom the first of the *Treatises* is a response — debates over state formation and rules of law were often matters of biblical interpretation. Filmer argued that absolute hereditary monarchy is proper for a political community because it is derived from Adam's dominion over the Earth and its inhabitants, granted by God the Father, and inherited by Adam's offspring.<sup>15</sup> In Filmer's argument, Adam was granted fee simple absolute over the whole of the inhuman world.<sup>16</sup>

Locke countered that Adam held power not as a named, single beneficiary, but rather as a member of the human species.<sup>17</sup> Dominion over Earth was granted, per Locke, by God to the entire human species.<sup>18</sup> Therefore, though Adam and the

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ognize the necessity of conserving biodiversity, a subjugating conceptualization of other species has inhibited the development, application, and legitimacy of the principle of sustainability. The belittling view of other species in relation to ourselves also creates inconsistencies within international law and undermines the integrity and sophistication of its development. International human rights law is especially affected.

. . . In international law, the primary basis for human rights is that we are not like other animals.

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<sup>14</sup> Locke's full title was: TWO TREATISES OF GOVERNMENT: IN THE FORMER, THE FALSE PRINCIPLES AND FOUNDATION OF SIR ROBERT FILMER, AND HIS FOLLOWERS, ARE DETECTED AND OVERTHROWN. THE LATTER IS AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL-GOVERNMENT.

<sup>15</sup> ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 254-55 (Chapter I, §§3-4) (Thomas I. Cook ed., The Murray Printing Company 1947) (1680); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 7-9 (Book I, Chapter I, §§2-5) (Thomas I. Cook ed., The Murray Printing Company 1947) (1690).

<sup>16</sup> ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 269 (Chapter 2, §8) (Thomas I. Cook ed., The Murray Printing Company 1947) (1680).

<sup>17</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 22 (Book I, Chapter IV, §24) (Thomas I. Cook ed., The Murray Printing Company 1947) (1690).

<sup>18</sup> *Id.*

Divine Kings of Europe might exercise some form of *sovereignty* over other human beings, *dominion* was not theirs to claim. The inhuman world was another matter:

God gave no immediate Power to *Adam* over Men, over his children, over those of his own Species, and so he was not made Ruler or *Monarch* by this *Charter*... God gave him not *Private Dominion* over the Inferior Creatures, but right in common with all Mankind; so neither was he *Monarch*, upon the account of the Property here given him.<sup>19</sup>

This argument is Locke's theological analog to his political theoretical claims against absolute monarchy and most forms of human slavery.<sup>20</sup> However, these very arguments, if considered fully and carefully, undermine Locke's claims regarding collective human dominion, individual human subjectivity, and legitimate state sovereignty.

Locke argues that – with a few important exceptions – no human subject can possess dominion over, or property in, another human subject because none can claim to generate or improve a human being through labor, which is the prerequisite for claiming property:

The Argument, I have heard... is this: That *Fathers have a Power over the Lives of their Children, because they gave them Life and Being*... They who say the *Father* gives Life to his Children, are so dazled with the thoughts of Monarchy, that they do not, as they ought, remember God, who is the *Author and Giver of Life: 'Tis in him alone we live, move, and have our Being*. How can he be thought to give Life to another, that knows not wherein his own Life consists?

...

Can any Man say, He formed the parts that are necessary to the Life of his Child? Or can he suppose himself to give the Life, and yet not know... what Actions or Organs are necessary for its Reception or Preservation? To give Life to that which has yet no being, is to frame and make a living Creature... He that could do this, might indeed have some pretence to destroy his own Workmanship. But is there any one so bold, that dares thus far Arrogate to himself the Incomprehensible Works of the Almighty?<sup>21</sup>

Hence Locke simultaneously condemns absolute monarchy, parental dominion, and most forms of human slavery as hubristic imitations of God's

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<sup>19</sup> *Id.* at 22-24 (Book I, Chapter IV, §§25-26).

<sup>20</sup> Predictably perversely, the latter prohibition comes with many exceptions for Locke, in his work and his life. He himself held stock in the Royal Africa Company and held property in slave colonies. And in the *Treatises* he takes it as given that the winners of wars may enslave or execute the losers. *Id.* at 132-33 (Book II, Chapter IV, §22-24).

<sup>21</sup> *Id.* at 41-42 (Book I, Chapter VI, §§52-53).

dominion. Yet, like Filmer, Locke avows collective human dominion, from which he derives individual human rights to labor and property. However, Locke's preceding assertions are much troubled when we acknowledge the widespread public and private practice of forcing, engineering, and exploiting women's and girls' reproductive labor. For but one example, the creation of matrilineal slave status in the United States — and the consequent incentive and indemnity for raping enslaved women and girls — manifests the very laborious generativity that Locke claims human subjects cannot exercise over others.<sup>22</sup>

Locke also errs by following the arguments quoted above with his claim that the capture and cultivation of inhuman beings (e.g. soil, corn, goats, streams, and trees) is proof and proper use of God's grant of dominion to the human species:

Whatsoever then [Man] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, hath by this *labour* something annexed to it that excludes the common right of other Men.

...

He that is nourished by the Acorns he pickt [sic] up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself. No Body can deny but the nourishment is his.<sup>23</sup>

But every act of laborious improvement by which Man makes an inhuman Thing into private property involves elements over which Man can claim no authorship, and upon which his labors are impotent. Man climbs Tree to pick a piece of fruit and Locke asks: Whose is this fruit if not Man's, without whose labor this fruit would not have been picked, nor eaten, nor valued, nor valuable? Given the labors Tree undertook to branch and bloom and bear, one might argue that this fruit is the property of Tree. But even if Tree's rights to the fruit and meat of its body are unconvincing, Man nonetheless has a specious claim to property or dominion based on his individual labor. Man's labor (planting, tending, climbing, picking) depends entirely upon (for but a few examples) sun, rain, soil, air, and any other number of inhuman elements of which he is clearly not the author, over which he can demonstrate no dominion, and in which he can claim no property. Man's labor — however seemingly independently undertaken — depends upon collaboration with inhuman beings over and of which he often has neither power nor knowledge. Thus we might rightly rebut Locke's parable of the acorn with his own rejoinder to

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<sup>22</sup> See Adrienne Davis, "Don't Let Nobody Bother Yo' Principle": *The Sexual Economy of American Slavery*, in *SISTER CIRCLE: BLACK WOMEN AND WORK* 103 (Sharon Harley ed., Rutgers University Press) (2002); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221 (1999); Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65 (1987).

<sup>23</sup> LOCKE, *TWO TREATISES OF GOVERNMENT* 328-329 (Book II, Chapter V, §27-28).

Filmer: “To give Life to that which has yet no being, is to frame and make a living Creature... He that could do this, might indeed have some pretence to destroy” or, I would add, claim dominion over “his own Workmanship.”

If we are led to reject either Locke’s theological claim regarding collective human dominion, or — and most importantly for my purposes — his analytical claim that Man’s labor with the inhuman world is not tied to powers well beyond his control, then we must also reconsider his related visions of individual subjectivity and state sovereignty. Locke’s human subject is only under the dominion of God; he shares dominion over the inhuman world; he is born free in thought and deed; he manifests his subjectivity by creating private property through labor; he is subject to limited political sovereignty by contracting into states which best protect his property. Locke’s human subject owes others only that which he has sworn to forbear in his assent to the social contract. This subject can revert to natural freedom — including the freedom to kill — if the state fails to protect his property, or if another subject seems to have broken the contract by, for example, an act of theft.<sup>24</sup>

In a parallel theorization, Locke’s political sovereign is limited in its power over its citizen subjects, but as regards foreign political sovereigns, enemies, or aliens, the state has quite different powers of right. Hence Locke’s acceptance of imperial, unprovoked, and pre-emptive war and his allowance for wars’ winners’ enslavement of wars’ losers.<sup>25</sup> Hence too his consistent degradation of the status of criminals and aliens. If we recant the account of human dominion at work in the *Treatises*, we must fully critique and reconstruct the accounts of individual subjectivity and state sovereignty which derive and are indivisible from Locke’s account of human dominion.

#### IV. FUNDAMENTAL INTERDEPENDENCE AND RECONSTRUCTIVE PERSONHOOD

My understanding of Professor Harris’s essay about species, races, and rights prompted my suggestion that we abandon arguing for animal equality in favor of advocating the disestablishment of human dominion. I argued too that such disestablishment must lead us to reconstruct foundational liberal schemas bound up with human dominion, such as individual subjectivity and state sovereignty. To model the ways in which such dominion, subjectivity, and sovereignty are often tethered, and to suggest that these tethered constructs form a foundation for modern liberalism and its contemporary descendants, I engaged in a brief dialogue with Locke’s *Treatises*, which led me to recommend a reconstructive jurisprudence founded on fundamental interdependence.<sup>26</sup>

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<sup>24</sup> *Id.* (Book II, Chapter XVI, §181, 186).

<sup>25</sup> *Id.* at 129-33 (Book II, Chapter III-IV, §16-24).

<sup>26</sup> Michel Serres asserts such interdependence as foundational myth in his monumental text *THE NATURAL CONTRACT*, a summary and update of which can be found at Michel Serres, *Revisiting the Natural Contract*, in *1000 DAYS OF THEORY* (Arthur and Marilouise Kroker ed., Anne-Marie Feenbun-Dibon trans.), at [www.ctheory.net/articles.aspx?id=515](http://www.ctheory.net/articles.aspx?id=515) (uploaded 5/11/2006):

The ultimately meager generative power of the human species — which Locke, despite himself, demonstrates in his arguments against absolute sovereignty and most forms of human slavery — suggests the need for reconstruction regarding our relations with all beings. By turning Locke’s proofs against his thesis, we can imagine an account of limited, episodic, and reciprocal sovereignty and subjection existing among human and inhuman beings, among individual human beings, and among political communities.<sup>27</sup> As such, our arguments in the interest of inhuman animals ought to be also arguments against all claims to dominion (as a matter of right or an absence of duty) by not only species, but also subjects, states, corporations, empires, alliances of the willing, and others.

Such reconstructive declarations of interdependence are, I believe, served well by reading some of Karl Marx’s work.<sup>28</sup> I do not claim that Marx’s analysis is ideal or complete. I offer it only as an aid for developing our advocacy. In Marx’s early economic manuscripts written against Hegel’s spiritual idealism, Marx asserts that we are *objective* beings, by which he means that we exist physically within a world of interdependent physical objects.<sup>29</sup> Every human subject — no matter how

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Can we still call these things objects, and the people who use them subjects?

....

... [T]hose “things” that at first did not depend on us suddenly do now, and increasingly so; *but, in the third act, we ourselves suddenly depend, and increasingly so, on things that depend on actions that we undertake.* Our survival depends on a world that we create with technologies whose elements depend on our decisions.

To the Stoic division, and the Cartesian mastery now succeeds a spiral where mastery and dependency interact and retroact and where obsolete, solitary subjects, are mingled with outdated objects.

... [T]hrough our techniques and their effluents, we *act* on the entire Earth, the climate[,] and global warming. As soon as we act on it, it changes and we change and we no longer live in the same way. All we can do is bet on the consequences of those actions for our survival. Being-in-the-world never acted on the world before.

<sup>27</sup> Kyle Ash, *supra* note 12, at 212, makes the case for international legal reconstruction as follows:

To develop nonhuman animal rights, international law should incorporate the following precepts: Biological evolution did not end with humanity, and biological evolution has no clear purpose. Humanity is a part of biodiversity, and we rely upon its integrity. The ecological footprint of humanity is far greater than that of all other animals. Thus, our governing systems must recognize other animals more profoundly than their systems recognize us. Finally, human law must not find its philosophical basis in the exclusion or subjugation of nonhuman animals.

<sup>28</sup> Karl Marx, *Economic and Philosophic Manuscripts of 1844: Critique of the Hegelian Dialectic and Philosophy as a Whole*, in *THE MARX-ENGELS READER* 106 (Robert C. Tucker ed., W.W. Norton & Company, Inc. 2d ed. 1978).

<sup>29</sup> *Id.* at 115 (emphasis omitted):

A being who is objective acts objectively, and he would not act objectively if the objective did not reside in the very nature of his being. He creates or establishes only objects, because he is established by objects — because at bottom he is nature. In the act

free in conscience or action – is also always a material object, dependent upon and depended on by other objects, such as food, air, and water.<sup>30</sup> Individual subjectivity is itself always an engagement with external objects which are themselves subjects.<sup>31</sup> Thus, individual and collective labors are those of interdependent subject-objects:

Man is directly a natural being. As a natural being and as a living natural being he is on the one hand furnished with natural powers of life. . . . On the other hand, as a natural, corporeal, sensuous, objective being he is a suffering, conditioned and limited creature. . . . That is to say, the objects of his impulses exist outside him, as objects independent of him; yet these objects are objects of his need – essential objects, indispensable to the manifestation and confirmation of his essential powers. . . . To be objective, natural and sensuous, and at the same time to have object, nature, and sense outside oneself, or oneself to be object, nature, and sense for a third party, is one and the same thing. Hunger is a natural need; it therefore needs a nature outside itself, an object outside itself, in order to satisfy itself, to be stilled. Hunger is an acknowledged need of my body for an object existing outside it, indispensable to its integration and to the expression of its essential being.

A being which does not have its nature outside itself is not a natural being . . . A being which is not itself an object for some other third being has no being for its object; i.e., . . . it is a nullity — an un-being.

. . . .

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of establishing, therefore, this objective being does not fall from his state of “pure activity” into a creating of the object; on the contrary, his objective product only confirms his objective activity, establishing his activity as the activity of an objective, natural being.

<sup>30</sup> *Id.* (emphasis omitted):

Whenever real, corporeal man, man with his feet firmly on the solid ground, man exhaling and inhaling all the forces of nature, establishes his real, objective essential powers as alien objects by his externalization, it is not the act of positing which is the subject in this process: it is the subjectivity of objective essential powers, whose action, therefore, must also be something objective.

<sup>31</sup> Serres, *supra* note 25, makes a related argument, though his involves the specificity of post-industrial technologies in the creation of global subject-objects:

The subject becomes object: we become the victims of our victories, the passivity of our activities. The global object becomes subject because it reacts to our actions like a partner.

The earlier Rio and the more recent Kyoto meetings on global warming show the progressive formation of that new collective global subject which is situated facing or inside the new natural global object.

. . . [A]s soon as there are objects outside me, as soon as I am not alone, I am another – another reality than the object outside me. For this third object I am thus an other reality than it; that is, I am its object. Thus, to suppose a being which is not the object of another being is to presuppose that no objective being exists. As soon as I have an object, this object has me for an object. . .<sup>32</sup>

This recognition of human animals' utter and mutual dependence on one another and on the inhuman world can direct visions for law, politics, and philosophy centered on empirical, epistemological, and ethical investments in the fundamental interdependence of all beings. Such visions might lead us toward jurisprudential theories and governmental institutions which advance beyond:

- (1) pragmatically disastrous ideologies of collective human dominion over all the world, which issues of climate change, soil depletion, and water scarcity should clearly dispel;
- (2) the liberal individual subject, legally obligated unto others and the state only because, and so long as, doing so offers the best protection of his property; and
- (3) the corollary nation-state, free to act as brutally lawlessly in the international realm as the imagined liberal individual subject might in a primordial or resurgent state of nature.

Quoting Professor Bryant again is helpful here. She eloquently identifies the daunting scope and pressing need for such an investment in interdependence, and for the ideals and institutions which such an investment might inspire:

The goal of my approach is to stop categorizing animals by reference to whether they are worthy of protection and to encourage reduction in human entitlements to act in oppressive ways. Since the world as a whole is necessary, breaking the world into discrete elements that will or will not be protected misses the point of interrelationship and, once habitats have been destroyed, obviates the possibility of self-determination.

. . . .

Because domestication and human imperiousness with respect to animals

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<sup>32</sup> Marx, *supra* note 27, at 115-116. Marx's ultimate political propositions are unhelpful, however, because his account of foundational interdependence among subject-objects strangely comes to justify his communist humanism and his sanctimonious championing of the "species-being," which wrongly mythologizes human dominion in a manner no more defensible than Locke's. Nonetheless, Marx's account of interdependence among all beings begins to suggest frameworks for reconstruction driven by faith in fundamental interdependence.

and the environment is so deep-seated, it will be necessary to proceed by creating duties in specific, limited contexts through which specific rights can be derived. Nevertheless, the goal should be challenging the underlying arrogance with which humans literally make and re-make the world without regard to its other inhabitants.<sup>33</sup>

There are multiple ways in which a reconstructive jurisprudence of interdependence might direct and be advanced by particular legal, political, and philosophical interventions. My aim here is neither to exhaust such avenues, nor to elect among them. Rather, I will here reference and expand upon one method peculiar to the United States' Constitution which others have suggested might advance reconstruction in the interest of inhuman animals. In the United States, such an investment in interdependence can be advanced constitutionally through the 14<sup>th</sup> Amendment's emphatic enfranchisement of "the person" — a subject who need not be a citizen, a human, an animal, or an individual of any kind.<sup>34</sup> Corporations are persons.<sup>35</sup> Churches have rights.<sup>36</sup> States are persons in the federal order and

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<sup>33</sup> See Bryant, *supra* note 7 at 194.

<sup>34</sup> See Laurence H. Tribe, *supra* note 5, at 2-3:

[I]t is a myth—a myth that is sometimes accepted even by observers as astute as Steve — that our legal and constitutional framework has never accorded rights to entities other than human beings and, therefore, that a high wall must be breached or vaulted if rights are now to be accorded to non-human animals. Adopting that myth helps to dramatize the crusade and makes for a more colorful book—but, and I say this with hesitation and deference, it could complicate our struggle in the long run, because the truth is that even our existing legal system, rickety and incoherent though it often is, has long recognized rights in entities other than individual human beings.

<sup>35</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 520-522 (2d. ed.) (1985):

Constitutional law [in the late nineteenth century] developed in ways quite favorable to big business. . . . As "persons," corporations were under the protection of the 14<sup>th</sup> amendment, the same as flesh-and-blood people, if not more so. The idea that the 14<sup>th</sup> amendment sheltered corporate enterprise was an idea first hinted at in the 1880s. From 1890 on, it became an important constitutional doctrine. . . . The wall had been built, or had seemed to be built, for the protection of blacks; by irony or design, it became a stronghold for business corporations.

<sup>36</sup> See Tribe, *supra* note 5, at 2-3:

Churches, partnerships, corporations, unions, families, municipalities, even states are rights-holders; indeed, we sometimes classify them as legal persons for a wide range of purposes. Broadening the circle of rights-holders, or even broadening the definition of persons, I submit, is largely a matter of acculturation. It is not a matter of breaking through something, like a conceptual sound barrier. With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees, bonobos, and maybe someday of computers that are capable not just of beating Gary Kasparov but of feeling sorry for him when he loses. Just as the Constitution itself recognizes the full equality of what it calls natural born citizens with naturalized citizens, who acquire that status by virtue of Congressional enactment, so the possible dependence of the legal personhood of non-human animals on the enactment

nation-states are persons internationally: they are single members of what are called a union and a family, wherein they hold rights, make agreements, and may personally seek redress for, and the union or family may punish, injustices done to them. As such, many have reasonably argued for the legal personhood of inhuman animals, and indeed, for all of the inhuman world.<sup>37</sup>

However, it is crucial to also assert that the constitutional personhood of inhuman animals must not merely modify the constituency of the class “persons”, but also must reconstruct the jurisprudential function of “personhood” as a constitutional device. Etymologically, such investment in personhood as a radical reconstructive jurisprudential tool is quite apt. The word “person” derives from the Latin *persona* and the Greek *prosōpon*.<sup>38</sup> Both these terms refer to masks worn by actors, masks whose mouthpieces were shaped to project their voices. Thus the original terms literally translate to something like “sounding through”. The masks were often recognizable as particular deities, forces, or other figures. In this sense, a person is a representational signification of an actual entity, the appearance of which provokes a dialogical relation between the audience and the entity sounded through and signified by the person. The person is a representation. Hence the meaning of a directly related term — prosopopoeia — which is quite useful for jurisprudential thinking. Prosopopoeia refers to “a figure of speech in which an imaginary or absent person is represented as speaking or acting.”<sup>39</sup> Although individual parties bring claims to court, or have claims brought against them, these parties — in cases that bear their names — are most often represented and spoken for by lawyers. In constitutional litigation, parties are carefully chosen

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of suitable statutory measures need not be cause to denigrate the moral significance and gravity of that sort of personhood.

<sup>37</sup> Cf. Michel Serres, *supra* note 25:

For centuries, only adult males who belonged to an upper social class could introduce and defend a legal action. . . excluding slaves, foreigners, women and children, the poor and destitute[.] Little by little, some form of emancipation enabled the latter to become legal subjects, that is “of age” in the eyes of the law and other public institutions

. . . .

This entire history ends at least theoretically, with the famous *Declaration of the Rights of Man and the Citizen*, decreed during the French Revolution, and at the end of the last war, with a similar but universal Declaration published by UNESCO.

My book argues that this Declaration is not yet universal as long as it does not determine that all living beings and all inert objects, in short, all of Nature have in turn become legal subjects.

<sup>38</sup> Merriam-Webster’s dictionary lists the etymology of “person” as follows: “Middle English, from Anglo-French *persone*, from Latin *persona* actor’s mask, character in a play, person, probably from Etruscan *phersu* mask, from Greek *prosōpa*, plural of *prosōpon* face, mask.” See MERRIAM-WEBSTER’S ONLINE DICTIONARY, at <http://www.merriam-webster.com/dictionary/person>.

<sup>39</sup> See MERRIAM-WEBSTER’S ONLINE DICTIONARY, at <http://www.merriam-webster.com/dictionary/prosopopoeia>.

to represent similarly situated parties, and these parties' names ultimately signify not the human beings who bear them, but rather the judicial opinions issued about them. In an act much like prosopopoeia, the now absent party stands for a rule of law. For example, the inequality and illiberty attributed to antimiscegenation law was undone by the claims of Mildred and Richard Loving as spoken to by lawyers and judges.<sup>40</sup> The wrongs of white supremacy and the right to civil marriage were *sounded through* the Lovings' bodies and pleas. And their name, *Loving*, now hails not the absent Mildred and Richard, but rather the doctrinal precedent produced by their case. Acknowledging our engagements in this prosopopoeic work could, in the context of constitutional personhood, lead us past the obfuscating jurisprudence on standing and citizen suits, which has severely limited the ability of advocates to litigate constitutional claims on behalf of the environment and the human beings indirectly but inevitably bound up with it.<sup>41</sup> Doing so involves understanding personhood not as a form of individual status inhering in an identity (e.g. species, race, or citizenship) recognized by law, but rather as a relational device entirely created by legal discourse with which we may manage our engagements with the diverse, multitudinous entities upon which we as a political community are mutually dependent. While this interpretation of personhood is certainly unlikely to emerge from constitutional litigation, this sort of radical jurisprudential reconstruction is proper to the unlikely, radical project of disestablishing human dominion.

## V. CONCLUSION

Our constitutional tradition has been built upon a story about the standing of a subject defined variously by species, property, race, sex, and citizenship. Reconstruction of this tradition in the interest of inhuman animals cannot merely enfold them into the privilege of standing. Rather, a proper jurisprudence of interdependence — perhaps, in the United States, spurred by the personhood of inhuman animals and advanced through a reconstruction of the jurisprudential function of personhood — would lead to our analysis and alteration of longstanding legal, political, and philosophical theories and institutions bound up with ideologies of human dominion. In this essay I have tried to show that the disestablishment of such ideologies is necessary for the advancement of inhuman animals' interests, and also necessitates deep challenges to the very ground of modern liberalism and its descendent regimes in a wide array of substantive fields, many of them — such as constructions of individual subjectivity and state sovereignty — seemingly unconnected to the plight of inhuman animals.

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<sup>40</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>41</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

**A NEW CALL TO ARMS OR A NEW COAT OF ARMS?  
THE ANIMAL RIGHTS AND ENVIRONMENTALISM  
DEBATE IN AUSTRALIA**

**OLIVIA KHOO<sup>1\*</sup>**

On the Australian coat of arms is a shield depicting the badges of the six states supported by two native Australian animals: the red kangaroo (*Macropus rufus*) and the emu (*Dromaius novaehollandiae*). These animals were chosen to show the nation moving forward, as the common belief is that neither animal moves backwards easily.<sup>2</sup> Quite apart from this symbolism, the coat of arms is also significant in that it is the formal symbol of the Commonwealth, signifying its authority and indicating its property. The nation is indeed moving forward as far as environmental policy is concerned. The present Rudd government put the signing of the Kyoto Protocol at the top of its agenda after its 2007 election victory and the Environment portfolio was split into two with an attendant increase in resources.<sup>3</sup> In the federal budget for 2008-09, the government pledged \$37 million toward a planned Carbon Emissions Trading Scheme, and there have been ongoing state and federal negotiations to manage the water shortage around Australia, including a national water plan over the Murray-Darling Basin. This momentum toward shaping a more environmentally-conscious future has been propelled and sustained by “ordinary Australians” as well. On March 31, 2007, 2.2 million people participated in the inaugural Earth Hour to highlight the problem of greenhouse gas emissions. Tim Flannery, author of *The Weather Makers*, was named Australian of the Year in 2007 and Lee Kernaghan, country music artist, won the award this year for his “Pass the Hat Around” and “Spirit of the Bush” tours to help drought-affected communities. It would not be an exaggeration to say that in Australia there has been a “call to arms” in respect of the environment. Correspondingly, what has seldom (if ever) been remarked upon in public policy debates is the relationship between animal welfare and the environment; for instance, the environmental impacts of intensive agricultural practices.<sup>4</sup> One of the few connections to have emerged visibly in the media has been the conflict between drought-affected pastoralists and native fauna,

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<sup>2</sup> Australian Government, Department of Foreign Affairs and Trade, [http://www.dfat.gov.au/facts/coat\\_of\\_arms.html](http://www.dfat.gov.au/facts/coat_of_arms.html) (accessed May 21, 2008).

<sup>3</sup> Peter Garrett was appointed as Minister for the Environment and Penny Wong as Minister for Climate Change and Water. Ratification of the Kyoto Protocol came into effect on March 11, 2008.

<sup>4</sup> See, e.g., TIM FLANNERY, *THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH* (Atlantic Monthly Press 2006), which contains only a few pages addressing the role of agriculture on climate change.

such as the kangaroo, said to be destroying pastoral land.<sup>5</sup> How is it that Australia's national icon has come to be viewed as one of the country's most persistent pests? Is it in fact possible to instigate a "call to arms" for the future of animal welfare and animal rights in Australia *within* these growing environmental concerns?

This paper seeks to consider the relationship between current animal rights and animal welfare positions and the environmental ethic that has overtaken Australia's national consciousness and which has gained momentum publically and officially in the last two to three decades. It will consider the place of the law as a codification of public sentiment and as an indication of the future of this debate in Australia. Part I outlines the current legal framework on environmental matters relating also to animals in Australia; Part II explores key case studies that have emerged in this area, including proposed kangaroo culling schemes; and Parts III and IV discuss the philosophical underpinnings to the rift between environmentalism and animal liberation and outlines various strategies that have been posited to bring the two together and evaluates their success. I do not intend to devote a significant amount of time to the history of the rift between the two causes, which has been long fought-out and documented, but to focus instead on those areas of potential overlap and productive dialogue. Significantly, most of the scholarship in this area has been produced in a North American context. Whilst much of this writing remains relevant to Australia, it is important to consider the specificity of Australian case studies and approaches.

One final introductory point on terminology: I use the term *animal welfare* throughout this paper to refer to an ethical consideration toward sentient animals (who, because they are sentient, can suffer and therefore have interests). An animal rights position takes a slightly different perspective based on the concept of subjecthood and therefore holds different criteria for value and moral considerability.<sup>6</sup> Although there are important distinctions between the two positions and their criteria of intrinsic value, at various points throughout this paper I bring them together to converge on a focus on the individual sentient animal in contrast to environmental ethics which focuses on entire species. Where the distinction between animal welfare and animal rights is relevant, I will use specific terminology.

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<sup>5</sup> *Landline* and *7:30 Report* (Australian Broadcasting Corporation).

<sup>6</sup> As Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 277, 278 (Cass R. Sunstein & Martha C. Nussbaum, eds., Oxford University Press 2004), puts it:

The animal welfare perspective does not ground rights, understood as claims that cannot be overridden simply by appeal to the greater aggregate interests of others. In accord with utilitarian logic, animals may be sacrificed to advance total welfare. . . .

Advocates of animal rights hold that the fundamental criterion for moral considerability . . . is subjecthood. To be a subject requires not simply sentience, but the capacity to have propositional attitudes, emotions, will, and an orientation to oneself and one's future. . . . In accord with deontological moral theories, these rights cannot be overridden by the aggregate interests of humans or any other beings.

See also TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (University of California Press 1983) (discussing the animal rights position).

## I. CURRENT LEGAL FRAMEWORK IN AUSTRALIA ON ENVIRONMENTAL MATTERS AND ANIMALS

### *Environmental Law and Animal Law*

As D. E. Fisher writes in his introduction, “[e]nvironmental law is one of those areas of the law that is identified by its underlying philosophy and by its subject matter rather than by the nature of the source of the rights and obligations that sustain it.”<sup>7</sup> Environmental law developed in part as a way of extending ethical consideration to the environment; it began with theory and jurisprudence, followed by legal concepts, doctrine, and then statute when the common law failed to provide any real protection to the environment.<sup>8</sup> Fisher notes further that ethical consideration often exists as a precondition to legal consideration. The question facing the nascent environmental movement in the mid-twentieth century was how to ascribe *value* to the environment- to something that is essentially value-neutral or devoid of value. Christopher Stone’s important article, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, was one of the first to seriously address this issue. Stone observed:

It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either, nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems.<sup>9</sup>

Environmental law, which had developed into a fairly coherent body of principles around the 1950s and 60s, effected a profound shift in man’s anthropocentric point of view. Where it did not go far enough was to produce a consideration of the value in other living beings (in this case, sentient animals).

Animal law, as a fairly new discipline, aims to address some of the related and neglected issues that have plagued environmental law, including the issue of standing. Stone identified this question as a significant barrier to progress through the courts. As Megan Senatori writes, “[a]nimal law bridges the gap left by the environmental law movement by challenging our perception of our relationship with non-human animals. The fact that a social movement for the protection of non-feeling and non-suffering natural objects emerged prior to one for the protection of sentient beings is incredibly perplexing.”<sup>10</sup> Animal law has developed in much the

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<sup>7</sup> D.E. FISHER, *AUSTRALIAN ENVIRONMENTAL LAW* 1 (Lawbook Co. 2003).

<sup>8</sup> *Id.* at 233-34.

<sup>9</sup> Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 464 (1972).

<sup>10</sup> Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and*

same way as environmental law: initially through theory and jurisprudence, as a way of addressing our ethical obligations toward a group (animals) that also cannot legally “speak” for themselves. While environmental law made some headway toward a consideration for animals, the law has stopped short at conservation/wildlife management and the protection of endangered species. Despite the obvious overlaps between the two areas of law, shared concerns have on the whole been left fairly separate.

One reason for this is what Senatori calls the “human interest factor”.<sup>11</sup> Conservationists are primarily concerned with the environment as a resource for the furtherance of human interests according to the promulgation of human values. We protect endangered species for *our* enjoyment in their continued existence, not necessarily for the animal’s intrinsic value. Senatori notes that “[the] failure to recognize inherent value in animals means that in the absence of human interest in a particular species that species is *entirely* devoid of value in our legal system.”<sup>12</sup> While there are many different forms of conservationism, anthropocentric conservationism is by far the most dominant.<sup>13</sup> This form of environmentalism sees value ascribed from a human perspective, rather than attributing any intrinsic value in the “thing” itself. It is this form of environmentalism against which I am writing. As Kate Rawles writes, “. . . accepting the challenge of sustainable development means rethinking our values. In particular, it means critically reassessing the values and priorities that underpin modern, industrialized societies and lifestyles.”<sup>14</sup> This means not seeing the environment purely as a set of resources. If such a shift can occur where the environment is concerned (at the *expense* of profits, as illustrated by Australia’s proposed carbon trading scheme), might a corresponding shift in values allow us to consider animals not merely as resources, more than “things” to be exploited, too?

### *Legislative Framework*

The current legislative framework in Australia concerning animals and the environment reflects the current set of values for which change is urgently required. Environmental legislation in Australia in relation to animals exists at two

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*Environmental Law*, in ENVIRONMENTAL ETHICS AND LAW 625, 639 (Robert J. Goldstein ed., Ashgate 2004).

<sup>11</sup> *Id.* at 640.

<sup>12</sup> *Id.* at 640.

<sup>13</sup> Robert Garner notes that this may well explain the higher profile of the conservation movement compared to animal rights or animal protection movements (except where companion animals are concerned). ROBERT GARNER, ANIMALS, POLITICS AND MORALITY 151 (Manchester University Press 1993).

<sup>14</sup> Kate Rawles, *Sustainable Development and Animal Welfare: The Neglected Dimension*, in ANIMALS, ETHICS AND TRADE: THE CHALLENGE OF ANIMAL SENTIENCE 208, 212 (Jacky Turner & Joyce D’Silva eds., Earthscan 2006).

levels: federal and state.<sup>15</sup> The Commonwealth has no express powers under the Constitution to deal with environmental matters, although it can call upon a range of heads of power including the trade and commerce power (s 51(i)), the corporations power (s 51(xx)), the external affairs power (s 51(xxix)), and the quarantine power (s 51 (ix)). At the federal level, the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) is the most significant statute. The EPBC Act radically changes the national environmental framework, reflecting the development of Commonwealth environmental powers since the High Court decision in *Commonwealth v Tasmania* (the “Tasmanian Dam Case”).<sup>16</sup> It was enacted to provide an overall framework dealing with environmental protection, management and impacts between a number of stakeholders (governments, the community, landholders and indigenous peoples). The Act includes new standing rules which means that governments, environmental organisations and private individuals can (and have) successfully asserted the rights of natural objects (I discuss *Booth v. Bosworth*<sup>17</sup> below).

At state and local government levels, there is further legislation and policy dealing with animals (domestic, agricultural and wild). Regarding agricultural animals, there are laws regulating what a livestock owner must do to manage the impact on the environment of rearing animals. These mainly concern the management of animal effluent, regulation of carbon emissions released by animals and their effect on climate change, the protection of soil structures, noise, odour and visual impacts of farms located close to cities and townships.<sup>18</sup> In the latest issue of the Australian Law Reform Commission journal, *Reform*, one of the issues discussed by Kathleen Plowman et. al. focused on the Model Code of Practice for pig welfare as an example. The authors noted that while debates around the Code recognised the need to provide more housing space for pigs and new bedding arrangements such as straw, there was also concern over the impact this would have on the effluent system and the fact that straw is expensive and in shortage in drought conditions. The result is that while (some) pork producers may strive to meet national standards they sometimes face local government planning requirements and other laws that make attaining their welfare aspirations difficult.<sup>19</sup>

In respect of wild animals, individual States are responsible for wildlife management within their state boundaries. For example in New South Wales wild animals are ‘protected’ by the *National Parks and Wildlife Act 1974* (NSW) (NPWA). Under this Act, the focus is on environmental conservation and any animal welfare considerations tend to be incidental. There are only a few sections in the NPWA

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<sup>15</sup> There are also relevant international treaties and organizations such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention for the Regulation of Whaling (and the International Whaling Commission), but an examination of these is outside the scope of this paper.

<sup>16</sup> *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

<sup>17</sup> *Booth v. Bosworth* (2001) F.C.A. 1453 (Austl.).

<sup>18</sup> Kathleen Plowman, Alan Person & John Topfer, *Animals and the Law in Australia: A Livestock Industry Perspective*, 91 REFORM25, 26-28 (2008).

<sup>19</sup> *Id.* at 28.

that refer to animal welfare and these references are always qualified in relation to the conservation of the species as a whole: for example, in relation to emergency transfer programs (as guided by the NSW Wildlife Rehabilitation Policy); in relation to captive breeding programs (as part of a species recovery program); and in relation to the management of commercial trade in protected fauna.<sup>20</sup> Species are the primary mode of classification, not the individual animal. (This can be compared to animal welfare legislation such as the *Prevention of Cruelty to Animals Act 1979* (NSW)).

This distinction between the species and the individual founds the main point of contention between environmental ethics and animal rights, which is that the former is concerned with 'wholes': species, biotic communities and ecosystems, whereas proponents of animal rights are interested in the individual animal. Thus, there may be a welfare cost to environmental conservation such as when animals are moved, culled, or bred in captivity but such actions are considered acceptable when they are taken for the overall 'good' of a population or species. Animals in Australia do not have adequate legal rights, nor are their welfare needs always taken into consideration.

The main problem with a two-tiered (federal/State) system of environmental protection is that welfare issues (in particular cruelty issues) are left to the States. Where national schemes have been imposed, on the whole welfare considerations have not been given priority. This lack of a *national* animal welfare approach requires attention. Where a national approach has been taken in one significant respect is in relation to kangaroos. The federal government has overall responsibility for the welfare of kangaroos killed for commercial purposes and State Kangaroo Management Programs become part of an overall National Plan of Management for kangaroos.<sup>21</sup> The Draft Code of Practice for the Humane Shooting of Kangaroos and Wallabies (the Draft Code) has also taken a national approach but so far it demonstrates extremely antiquated ethical responses in relation to the welfare of this national icon.

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<sup>20</sup> See, e.g., Threatened Species Management Policy and Procedure Statement No. 9: Policy for the Translocation of Threatened Fauna in New South Wales, NSW National Parks and Wildlife Service, (Oct. 2001); see also Trade in Fauna Policy, NSW National Parks and Wildlife Service, (endorsed Oct. 2001, modified July 2002).

<sup>21</sup> Each of the relevant States (Qld, NSW, SA and WA) develops a Kangaroo Management Program which is subject to review by Environment Australia in consultation with the Minister's Committee for Sustainable Use, before going to the Minister for his consideration and approval. Tony Pople & Gordon Grigg, *Commercial Harvesting of Kangaroos*, Ch. 1 (Aug. 1999), <http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/harvesting/roobg-01.html>. The Department of Environment and Conservation has released a Management Plan for Commercial Kangaroo Harvest in New South Wales (2007-2011). Commercial Kangaroo Harvest Management Plan 2007-2011, Department of Environment & Conservation NSW, available at <http://www.environment.gov.au/biodiversity/trade-use/sources/management-plans/kangaroo-nsw/pubs/nsw-kmp.pdf>.

## II. CASE STUDIES

### *a. Kangaroos: Culling and the Draft National Code*

“We need a Mabo decision for Australia’s wild animals, a legal recognition of their special status as original residents of Australia, alongside its original inhabitants.”<sup>22</sup>

There are two aspects to this brief case study on kangaroos. The first concerns pest control and conservation (culling), and the second concerns sustainable yield harvesting – that is, killing for commercial purposes. Relevant to both of these are welfare issues, some of which are inadequately addressed by the Draft National

Code of Practice for the Humane Shooting of Kangaroos and Wallabies.  
*‘The Draft Code’*

Kangaroos, like most native Australian wildlife, are considered “protected fauna” under the *National Parks and Wildlife Act 1974* (NSW) and equivalent State and federal legislation. What this means in practice is that a licence is required to kill kangaroos commercially.

The Draft Code, once finalised, will be the nationally-endorsed animal welfare standard for the commercial harvesting of kangaroos.<sup>23</sup> Although the Draft Code is voluntary, any kangaroo sold commercially must have been shot in compliance with the Code.<sup>24</sup> As noted in various submissions against the Code, it is very difficult to ensure general compliance given the conditions in which kangaroo shooting takes place (in the dark, often with just a single shooter and with a very small target given the size of the head of the kangaroo).<sup>25</sup> Particularly disturbing, as a national welfare standard, are the provisions for how to treat pouch young and dependent, at-foot joeys when their mother is killed.<sup>26</sup>

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<sup>22</sup> Peter Singer, *Foreward* to KANGAROOS: MYTHS AND REALITIES 9 (Maryland Wilson & David Croft eds., 3rd ed. 2005).

<sup>23</sup> The current Code of Practice for the Humane Shooting of Kangaroos was published and implemented in 1985 and last updated in 1990. The shooting conditions that apply to the commercial harvesting of kangaroos also apply to ‘most non-commercial situations’ (clause 4) under the Draft Code.

<sup>24</sup> Australian Government, Department of Environment, Heritage, Water and the Arts, Draft National Code of Practice for the Humane Shooting of Kangaroos and Wallabies., 3rd ed., cl. 3 (Sept. 10, 2007).

<sup>25</sup> See, e.g., Maryland Wilson, Review of National Code of Practice for the Humane Shooting of Kangaroos, Aug. 23, 2004, <http://awpc.org.au/submissions/submission19.htm>; see also Voiceless, Submission on the Draft National Code of Practice for the Humane Shooting of Kangaroos and Wallabies, Mar. 2008, [http://www.voiceless.org.au/images/stories/submissions/KANGAROO\\_CODE\\_FINAL\\_5\\_MAR\\_08.pdf](http://www.voiceless.org.au/images/stories/submissions/KANGAROO_CODE_FINAL_5_MAR_08.pdf).

<sup>26</sup> For small furred pouch young, euthanasia is by a heavy blow to the head ‘with force sufficient to crush the skull and destroy the brain’ (for example with the tow bar of a vehicle or a steel water pipe), and for small furless pouch young, decapitation by rapidly severing the head from the body with a sharp blade. Draft National Code of Practice for the Humane Shooting of Kangaroos and

Other animal welfare issues relevant to the Draft Code include the non-commercial killing of kangaroos (the various States all have different systems, issuing non-commercial licences for recreation, sport, and damage mitigation (occupiers' licences)). For non-commercial shootings, shotguns may be used, which makes it even more difficult to attain accuracy, and under the Draft Code non-commercial shooters do not have to pass a competency test (clause 4.1). Thus, it is almost impossible to gauge the extent of compliance with the Code.<sup>27</sup> Given these conditions, this is more or less a self-regulating industry. The Draft Code demonstrates a genuine attempt to take a national approach that will maintain consistency, however animal welfare considerations remain frighteningly absent.

### *Conservation and Culling*

In news headlines during mid-2008, there was public outcry (as well as support) over the proposed culling of approximately 500 eastern grey kangaroos (*macropus giganteus*) at the Belconnen Naval Transmission Station in the Australian Capital Territory. These kangaroos were said to be threatening native grasslands and endangered species such as the grassland earless dragon (*tympanocryptis pinguicolla*), an extremely rare type of lizard. Although a decision was initially reached to call off the cull and to translocate the kangaroos to New South Wales, this plan was abandoned because it was deemed to be too expensive.<sup>28</sup> The news has reached an international audience, some of whom have expressed dismay that Australians could treat their national icon in this way.<sup>29</sup> Australia in fact has the largest wildlife cull in the world.<sup>30</sup> Over 30 million kangaroos and wallabies have been killed lawfully in Australia in the last ten years.<sup>31</sup> These figures do not include those injured, orphaned or left to die, for either commercial or non-commercial purposes.

If animals had rights, every one of these abundant eastern grey kangaroos would be as 'valuable' as every rare lizard sharing the same grasslands; the life of one could not be traded for another as conservationists mandate. As an 'alternative' to simply destroying the kangaroos, a group of conservationists on ABC's *Landline*

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Wallabies, n 6, cl. 6.

<sup>27</sup> See RSPCA Australia, Kangaroo Shooting Code Compliance, July 2002, <http://www.environment.gov.au/biodiversity/trade-use/publications/kangaroo-report/introduction.html>.

<sup>28</sup> See *Belconnen Kangaroo Cull Begins*, ABC NEWS, May 19, 2008, <http://www.abc.net.au/news/stories/2008/05/19/2248923.htm>; see also Yuko Narushima, *Welfare Groups Outraged as Kangaroo Cull Starts*, SYDNEY MORNING HERALD, May 20, 2008, <http://www.smh.com.au/news/national/animal-welfare-groups-outraged-as-kangaroo-cull-starts/2008/05/19/1211182703329.html>.

<sup>29</sup> *Roo Cull Fight Goes Global*, ABC NEWS Mar. 12, 2008, <http://www.abc.net.au/news/stories/2008/03/12/2186998.htm>.

<sup>30</sup> PAUL & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 241 (1981).

<sup>31</sup> The quota for the commercial harvesting of kangaroos in 2007 was 3.6 million. In addition, New South Wales has a special quota above the national quota (in 2007 this was 940,756). Australian Government, Department of Environment, Heritage, Water and the Arts, Kangaroo and Wallaby Harvesting Statistics (2007), <http://www.environment.gov.au/biodiversity/trade-use/wild-harvest/kangaroo/stats.html>.

program suggested commercially farming them instead. Again, it is money that talks. The kangaroo meat and skin industry is a multi-million dollar export industry. Over 3 million kangaroos are processed each year, resulting in \$200 million per annum.<sup>32</sup> Maryland Wilson, President of the Australian Wildlife Protection Council, has suggested abolishing the industry in favour of developing a more profitable tourism industry (for example creating wildlife corridors for tourist viewing).<sup>33</sup> The fact that a more peaceable outcome could have been reached for the Belconnen kangaroos but was not eventually taken demonstrates that governments need to think more creatively in order to advance the goals of both the environment *and* the animals involved, at least until animal rights are more fully realised.

### *b. The Flying Fox Case*

Flying foxes have been considered a ‘pest’ in several Australian states. In April 2001, the Royal Melbourne Botanic Gardens began a campaign to shoot its resident population of grey-headed flying foxes (*Pteropus poliocephalus*). Shooting continued for nine weeks until an agreement was reached with the Humane Society for Animal Welfare and other interested parties. What was astounding about this situation was the lack of transparency in the process; no information was released on the number of bats culled and there was no ceiling limit on the number that could be killed. Animal welfarists claimed “ecological fascism” while there was outcry by environmentalists and others over a statement made by an animal welfare ‘fringe group’ threatening to retaliate by killing one tree for every bat killed.<sup>34</sup> It took several months for an agreement to be reached between the various groups but by then it was too late for many of the bats.

In Queensland around the same time the bats gained an important victory in the Federal Court in *Booth v Bosworth* (the Flying Fox case)<sup>35</sup>, which was the first full trial under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The respondent, who operated a lychee fruit and sugar cane farm in North Queensland, had erected electric grids to mass cull the Spectacled Flying Fox (*Pteropus conspicillatus*). Over 2000-2001, he succeeded in killing approximately 20% of the Australian population of Spectacled Flying Foxes. It was estimated that at that rate, within five years the foxes would be an endangered species in the area. On 8 December 2000 the applicant, Dr Carol Booth, filed an application seeking an injunction under the EPBC Act to restrain the respondent from causing the death or injury of flying foxes on his farm. It was alleged that his

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<sup>32</sup> JOHN KELLEY, KANGAROO INDUSTRY ASSOCIATION OF AUSTRALIA, KANGAROO INDUSTRY BACKGROUND, <http://www.kangaroo-industry.asn.au/morinfo/BACKGR1.HTM#7> (2008).

<sup>33</sup> Wilson, *supra* note 25.

<sup>34</sup> 7:30 Report: Flying Fox Culling Proposal Angers Animal Rights Groups (Australian Broadcasting Corporation television broadcast Mar. 21, 2001) (transcript available at <http://www.abc.net.au/7.30/stories/s264023.htm>).

<sup>35</sup> *Booth v. Bosworth* (2001) FCA 1453.

actions, causing the deaths of the Spectacled Flying Foxes, was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area. One of the objects of the EPBC Act is the conservation of biodiversity and a dramatic decline in the population of a species, so as to render that species endangered, is considered a significant impact.<sup>36</sup>

Justice Branson of the Federal Court granted an injunction to restrain the killing of Spectacled Flying Foxes by electrocution unless the respondents obtained approval from the Commonwealth Environment Minister under the EPBC Act (which was denied). The Flying Fox case is important because it tested the new offence provisions for matters of national environmental significance under the EPBC Act. Barrister Chris McGrath suggests that “one wider political and administrative aspect of the case that is not found in the judgment is the challenge that the case makes to the role that politics play in the prosecution of environmental offences and listing of threatened species, particularly where agricultural interests are involved. . . .”<sup>37</sup> The electric grid had operated for 15 years with the tacit approval of the Queensland Parks and Wildlife Services (QPWS) before the injunction was brought. However, after the court decision in this case, the Queensland Minister for Environment and Heritage announced that the QPWS would no longer issue damage mitigation permits for the electric grids under the *Nature Conservation Regulation 1994* (Qld), effectively outlawing their operation.<sup>38</sup> The respondents’ application to have the injunction dissolved was rejected *Bosworth v Booth*.<sup>39</sup>

The case also draws attention to the importance of open standing for public interest litigation to protect the environment. The EPBC Act provides new standing rules that may allow environmentalists to bring such claims forward. The implications of the case are not so clear where animal welfare objectives are primarily involved. Whilst this is a landmark decision bringing together animal welfare and environmentalism, it is still based on a model of protection of the species as a whole (particularly endangered species) and limited to areas of national environmental significance such as world heritage areas or wetlands areas.

### *c. Live Exports and the Environmental Defence*

Another example of the debate between animal rights and environmentalism where commercial interests are involved is the recent case of *Rural Export & Trading (WA) Pty Ltd v. Hahnheuser*.<sup>40</sup> The Federal Court found that an animal rights campaigner, Ralph Hahnheuser, and Animal Liberation South Australia, did not contravene s 45DB of the *Trade Practices Act 1974* (Cth) when they placed processed pig meat into the

<sup>36</sup> *Id.*

<sup>37</sup> Chris McGrath, *The Flying Fox Case*, 18 ENVTL. & PLANNING L. J. 540 at 2 (2001).

<sup>38</sup> Statements of Dean Wells, Minister for Environment, Debates of the Legislative Assembly, Queensland Parliamentary Hansard, Aug. 8, 2001 at 2331-2333.

<sup>39</sup> *Bosworth v. Booth* (2004) FCA 1623. An appeal against that decision was also refused.

<sup>40</sup> *Rural Export & Trading (WA) Pty Ltd v. Hahnheuser* (2007) FCA 1535.

feed trough of sheep bound for live export to the Middle East because their conduct was substantially related to environmental protection and not to industrial action.<sup>41</sup>

Section 45DB of the *Trade Practices Act 1974* (Cth) provides:

- (1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australian and place outside Australia.

There were three issues involved in the case: i) whether the first applicant, Rural Export, was hindered or prevented from engaging in its trade and commerce; ii) whether this was trade and commerce “involving the movement of goods between Australia and places outside Australia”; and iii) whether s 45DB does not apply to either respondent because of the defence in s 45DD(3) – that the dominant purpose of the alleged action was substantially related to “environmental protection” and was not industrial action. It is this latter issue which is of most relevance to this paper.

Regarding the s 45DD(3) defence, there were two further issues to contend with: i) whether the purpose was to be objectively or subjectively determined, and ii) whether the prevention of cruelty to, and the suffering of, animals is to be considered “environmental protection” within the terms of the section. On the first point, the court found, following *Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees’ Union*, that the ‘purpose’ referred to in s 45D(1) is a subjective purpose.<sup>42</sup> It was clear from the facts that Hahnheuser’s subjective purpose for engaging in the conduct was to stop the sheep being exported to the Middle East.<sup>43</sup> Although the court found that only a subjective dominant purpose was necessary and that there was no need for objective demonstration that the sheep would suffer harm if shipped to the Middle East, the court did engage in interesting obiter dicta (which sadly they did not take far enough):

There can be little doubt that the conditions in which sheep are placed on ships during live export are disadvantageous to the sheep, when compared with the conditions in which they would generally be placed on farms. In general, sheep would have a much greater opportunity to wander over wider areas, and to eat live vegetation, when on farms than they do when on ships ... These are the sorts of issues that courts ought not to be called upon to determine, because they are matters of opinion.<sup>44</sup>

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<sup>41</sup> The consumption of pig meat renders the sheep unsuitable for export to Muslim countries because they do not meet Halal requirements.

<sup>42</sup> *Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees’ Union* (1979) 42 F.L.R 331, at 348-349.

<sup>43</sup> This was garnered through media interviews held directly after the incident and a video recording of the event where signs were displayed and T-shirts worn stating ‘Ban Live Exports’.

<sup>44</sup> *Rural Export & Trading (WA) Pty Ltd v. Hahnheuser* (2007) FCA 1535.

It was for that reason that the court rejected the need for objective demonstration.

On the second issue, the court noted that the expression “environmental protection” is left undefined in the Act, leading to an inference that the term is meant to be interpreted broadly.<sup>45</sup> “The absence from the *Trade Practices Act* of a definition of ‘environmental protection’ is both deliberate ... and significant in demonstrating an intention that the phrase should be used in its ordinary sense.”<sup>46</sup>

Once this is accepted, it is clear that the environment for the purposes of the phrase ‘environmental protection’ in s 45DD(3) of the *Trade Practices Act* includes sheep generally. It is clear that the environment comprehends living things, including animals, and the conditions under which they live... Farm animals are as much a part of the environment as are wild animals, feral animals and domestic animals. There is no reason why the protection of the conditions in which farm animals are kept should be excluded from the concept of environmental protection.<sup>47</sup>

This case is important because it demonstrates, albeit in the possibly limited context of trade practices legislation that animals *are* a part of the environment and protecting animals is part of protecting the environment, thus expanding the bounds of environmental action. This does not mean that animal rights activists are free to do whatever they want; there are still criminal laws to contend with, such as trespass, but it does show that a company cannot use the *Trade Practices Act* to deal with political opponents.<sup>48</sup> It is also important for the wide definition given to the ‘environment’ to include animals and the conditions under which they live. The next step is for courts and legislatures to push this definition to include the protection of *individual* animals and the (environmental) conditions under which they live.

### III. ENVIRONMENTAL ETHICS AND THE PLACE OF ANIMAL LIBERATION

“Environmentalists cannot be animal liberationists. Animal liberationists cannot be environmentalists. ... Moral obligations to nature cannot be enlightened or explained — one cannot even take the first step — by appealing to the rights of animals.” — Mark Sagoff, “Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce”.<sup>49</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> The applicants could not charge Hahnheuser for trespass to Samex’s sheep because trespass to goods is limited to direct and immediate interference with possession of a chattel. There was no evidence that he interfered directly with the sheep.

<sup>49</sup> Mark Sagoff, *Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce*, in

The examples discussed in Parts II and III demonstrate some of the divergent positions courts and legislatures have taken on issues concerning the environment and animal welfare/animal rights and, in certain specific contexts, rare instances where some common ground has been found. Environmental philosophers and animal activists have also addressed this rift from several different theoretical perspectives. The decisive words uttered above by Mark Sagoff join a chorus of voices by some of the world's leading environmentalist ethicists and animal activists that the two simply do not go together. While reiterating the important distinction between animal welfare and animal rights, and the differing views of philosophers such as Peter Singer and Tom Regan, in this section I will give a broad survey of the debate using the term 'animal liberation' since it is this term which the environmental philosophers have on the whole taken issue with.

With the publication of Peter Singer's *Animal Liberation* in 1975, by the end of the 1970s animal liberation was becoming firmly established in public consciousness and in academia.<sup>50</sup> Environmental ethics was also emerging around the same time and it was up for grabs as to how that would eventually be defined. The philosopher J. Baird Callicott perceived the animal liberation movement to be threatening the identity of this nascent environmental ethics and he wrote an inflammatory article, "Animal Liberation: A Triangular Affair" in 1980 in an attempt to separate the two areas resolutely.

Baird Callicott took as his leading premise Aldo Leopold's dictum from *A Sand County Almanac* that "a thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community."<sup>51</sup> Baird Callicott's version of nature conservation was based on a holistic ethic where only the land as a whole (and other wholes pertaining to the land such as ecosystems) were morally considerable. He was pointed in stating that the goal of (an environmental) ethics is to maintain the natural order, *not* to avoid suffering of sentient animals.

The three elements in Baird Callicott's 'triangular affair' are ethical humanism (anthropocentrism or human-centered ethics which values liberal individualism and human superiority to nature), the animal rights movement (or humane moralism, which extends the individualism of anthropocentrism to sentient animals), and environmental ethics, or adherents to the land ethic, which Baird Callicott supported. In the first two, the primary focus of ethical concern is on *individuals*, whereas Baird Callicott's land ethic was focused only on wholes. The exclusionary nature of Baird Callicott's environmental ethics meant that many animal liberationists abandoned it in favour of a theory of individual rights. Regan, for example, calls the overriding of human and animal rights to pursue an environmental ideal a form of "ecofascism".<sup>52</sup>

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ENVIRONMENTAL PHILOSOPHY: FROM ANIMAL RIGHTS TO RADICAL ECOLOGY 87-96 (Michael E. Zimmerman ed. Prentice Hall 2001) (1984).

<sup>50</sup> PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (Random House, Inc. 1975).

<sup>51</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC: AND SKETCHES HERE AND THERE* 224 (Balantine Books 1970) (1949).

<sup>52</sup> TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 361-2 (University of California Press 1983). Regan

The resistance to including animal rights and animal welfare issues as part of an environmental agenda can be attributed to a number of factors. Environmentalists have often worried about a loss of credibility by being associated with animal liberationists, who have been considered ‘unscientific’, or worse, sentimental and romantic.<sup>53</sup> (As I will later discuss, a little sentiment and romance can go a long way in raising public awareness and hence in supplying legitimacy. Empathy, through emotions, can sometimes move people more than scientific data). Environmentalists have also been quick to distance themselves from being associated with so-called ‘fringe’ elements (that is, ‘radical’ or violent protest groups). However, as Megan Senatori notes, if environmentalists do not take animal welfare into account they will “ultimately undermine their goal of protecting the whole environment because sacrificing the parts [individual animals included] to do so continually creates imbalance.”<sup>54</sup>

Despite the dominant theoretical rift between environmentalism and animal rights, there are some ‘individual’ environmental ethics positions, and conversely animals are still morally relevant to some “‘holistic’ environmental ethics,” as I will outline below.<sup>55</sup>

#### IV. RECONCILING ANIMAL LIBERATION AND THE ENVIRONMENTAL ETHIC: A “HOLLYWOOD ROMANCE”?

Even J. Baird Callicott has sought to distance himself from his earlier views in “A Triangular Affair” and has attempted to reconcile animal liberation with environmental ethics after his initial divisive remarks. In an article entitled “Animal Liberation and Environmental Ethics: Back Together Again”, he acknowledged acknowledges in retrospect that some of this these comments might have been “irresponsible.”<sup>56</sup> Now, he writes, “Personally [. . .], I am not unmoved by the pain and suffering of individual sentient animals and believe that we ought to extend them moral considerability, if not rights.”<sup>57</sup> In doing so, Baird Callicott proposed attempted to find “a coherent theory that would provide at once for the moral considerability of individual animals . . . [. . .] on the one hand . . . and for species

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calls holism ‘environmental fascism’ because the value of all individuals is a function of their contribution (or lack therefore) to the ecosystem’s health. That is, individuals are valued for their instrumental value rather than for their intrinsic value.

<sup>53</sup> GARY E. VARNER, IN NATURE’S INTERESTS? INTERESTS, ANIMAL RIGHTS, AND ENVIRONMENTAL ETHICS 102 (Oxford University Press 1998).

<sup>54</sup> Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and Environmental Law*, in ENVIRONMENTAL ETHICS AND LAW 643 (Robert J. Goldstein ed., Ashgate 2004).

<sup>55</sup> Clare Palmer, *An Overview of Environmental Ethics*, in ENVIRONMENTAL ETHICS 25 (Andrew Light and Holmes Rolston III eds., Wiley-Blackwell 2002).

<sup>56</sup> J. BAIRD CALLICOTT, *Animal Liberation and Environmental Ethics: Back Together Again* in ENVIRONMENTAL ETHICS 29 (Robert Elliot ed., Oxford University Press 1995).

<sup>57</sup> J. BAIRD CALLICOTT, BEYOND THE LAND ETHIC: MORE ESSAYS IN ENVIRONMENTAL PHILOSOPHY 146 (State University of New York 1999).

and ecosystems.”<sup>58</sup> Despite these grand claims, his resulting model is less than inspiring.

Baird Callicott conceives of concentric moral communities or spheres of responsibility with human communities at the centre, human-animal domestic communities in the next ring, and the biotic community as a whole (the ‘land ethic’) as the outer ring. These are “nested communities”, with diminishing ethical obligations to fields further away from the core.<sup>59</sup> While this attempt at moral pluralism is admirable, it is still an anthropocentric (and hierarchical) model, with humans having “strong” rights and animals having “weaker rights”.<sup>60</sup>

Similar to Baird Callicott’s idea is Eric Katz’s formulation of an environmental ethic where the primary principle of this environmental ethic should be the moral consideration of ecological systems (protecting habitats or communities), but the secondary goal is the protection of individual animals.<sup>61</sup> According to Katz, the environmental ethic is about balancing these two forms of moral consideration. Again, there is a hierarchy in place with the animals losing out through a form of diminished consideration.

A more inclusive and radical theory (in terms of shaking up the current way of thinking) is provided by Gary Varner, who suggests that we must rethink both moral and legal standing to consider nature and other non-human entities as having ‘interests’.<sup>62</sup> Environmental ethicists have tended to avoid appealing to nature’s interests because only individuals have interests whereas the dominant trend of environmentalists environmentalism has been to consider wholes. Varner questions if the truism that appeals to the interests of individuals does not provide an adequate basis for an environmental agenda.<sup>63</sup> On the contrary, Varner argues that appealing to nature’s interests will be a useful rhetorical device on which to formulate an ethics that impacts on the interests of individuals amongst various affected parties. In fact, he argues that the strongest reasons for pursuing an environmental agenda will be based on the satisfaction of interests: “To say that a being has interests is to say that it has a welfare, or a good of its own, that matters from a the moral point of view. This is why the satisfaction of interests constitutes a fundamental moral value.”<sup>64</sup>

Varner refers to himself as a “practical holist” rather than an ethical holist, in that he does not consider ecosystems themselves to be morally considerable (although this view is almost hegemonic among environmentalists and environmental philosophers).<sup>65</sup> How do systems have intrinsic value, and hence moral standing, apart from simply aggregating the welfare of individuals in that community? What

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<sup>58</sup> *Id.* at 147.

<sup>59</sup> *Id.* at 153.

<sup>60</sup> *Id.* at 153.

<sup>61</sup> ERIC KATZ, *Is there a Place for Animals in the Moral Consideration of Nature?* in ENVIRONMENTAL ETHICS 90 (Andrew Light and Holmes Rolston III eds., Wiley-Blackwell 2002).

<sup>62</sup> GARY VARNER, IN NATURE’S INTERESTS? INTERESTS, ANIMAL RIGHTS, AND ENVIRONMENTAL ETHICS 6 (Oxford University Press 1998).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.*

Varner proposes is a theory of biocentric individualism. This is a minority view amongst environmental ethics philosophers, which suggests that all (and only?) living beings count. In this schema, environmentalism and animal rights can be compatible — “they can — contrary to the conventional wisdom in both areas — be grounded on in the same interests-based moral individualism.”<sup>66</sup>

One of the arguments against biocentric individualism is that the sheer multitude of interests makes this theory untenable — how can we extend moral consideration to every living thing? As a counter to this argument, Varner extends Ralph Barton Perry’s principle of ‘inclusiveness’, which sees some human interests as having priority over those of animals.<sup>67</sup> His first principle is that the death of an entity that has desires is worse than the death of an entity that does not.<sup>68</sup> (This does not, however, mean that you can do anything you want to a desireless creature). The second principle is that satisfaction of human interests is more important than the satisfaction of the desires of animals.<sup>69</sup> Varner argues that the extension of moral standing to non-human animals is only plausible when you can still defend human interests as a priority.<sup>70</sup> Thus, Varner’s is not strictly a rights based theory, nor does he employ the concept of moral obligations. He does, however, believe in the value of the lives of individual sentient organisms and attempts to marry this to the moral standing of non-sentient organisms including the environment.<sup>71</sup> Despite the fact that Varner’s “biocentric individualism” is still “axiologically anthropocentric”, it does provide a number of interesting insights that can allow for a reconfiguration of dominant value systems based on the notion of interests.<sup>72</sup>

Another significant philosopher who wants to see environmental ethics and animal liberation reconciled is Dale Jamieson. Where Baird Callicott sees a “triangular affair” and Mark Sagoff anticipates a “quick divorce,” Dale Jamieson envisages the potential for a “Hollywood romance.”<sup>73</sup> Jamieson states clearly that animal liberation *is* an environmental ethic.<sup>74</sup> Like Varner, in *Morality’s Progress* Jamieson outlines the theory of value inherent in animal liberation and shows how this is consistent with strong environmental commitments.<sup>75</sup> Firstly, there is the basic fact that non-human animals, like humans, live in environments: “environmental ethicists have no monopoly on valuing such collectives as species, ecosystems, and the community of the land.”<sup>76</sup> It has only assumed seemed that “they do because

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<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.* at 77-78; See RALPH BARTON PERRY, GENERAL THEORY OF VALUE, (New York: Longman’s, Green and Co., 1926).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, at 123.

<sup>73</sup> DALE JAMIESON, MORALITY’S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE 211, (Oxford: Clarendon Press, 2002).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup>

parties to the dispute have not attended to the proper distinctions.<sup>77</sup> Jamieson further argues that there is a distinction between the source and content of values (the source being sentience in the case of animal welfare).<sup>78</sup> Jamieson distinguishes between primary and secondary, and between intrinsic and non-intrinsic value.<sup>79</sup> We intrinsically value something when we value it for its own sake, even when it does not give you something in return (that is, where there is no derivative value). Non-sentient features of the environment, which are of derivative value, can also be valued intrinsically. Thus, animal liberationists can value these things intrinsically even while they are of derivative value.

[A]nimal liberationists can hold many of the same normative views as environmental ethicists. This is because many of our most important issues involve serious threats to both humans and animals as well as to the non-sentient environment; because animal liberationists can value nature as a home for sentient beings; and because animal liberationists can embrace environmental values as intensely as environmental ethicists, though they see them as derivative rather than primary values.<sup>80</sup>

Peter Singer provides an example of this when he notes that defending endangered species is *also* about defending individual animals.<sup>81</sup> Singer proposes that we should “increase the importance we give to individual animals when discussing environmental issues, and not to decrease the importance we presently place on defending animals which are members of endangered species.”<sup>82</sup>

Thus, while Jamieson acknowledges there is much *theoretical* divergence between animal liberationists and environmental ethicists, he also points out a strong case for political and practical *convergence*. “Not only is animal liberation an environmental ethic, but animal liberation can also help to empower the environmental movement.”<sup>83</sup> Obviously, as Jamieson himself notes, his theory does not deal with specific issues that divide the two groups (such as the culling of animals for the ‘good’ of a population).<sup>84</sup> Some of these issues may be irresolvable, as are certain divisions within the two groups themselves. Meeting halfway, Jamieson notes that “Animal liberation is not the only environmental ethic, but neither is it some alien ideology.”<sup>85</sup> Rather [ . . . ] animal liberation is an environmental ethic and should be welcomed back into the family.<sup>86</sup>

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<sup>77</sup> *Id.* at 204.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 209.

<sup>80</sup> *Id.*

<sup>81</sup> PETER SINGER, *Not for Humans Only: The Place of Nonhumans in Environmental Issues*, in Andrew Light and Holmes Rolston III eds., ENVIRONMENTAL ETHICS 63 (Boston Wiley-Blackwell, 2002).

<sup>82</sup> *Id.*

<sup>83</sup> Jamieson, *supra* note 73, at 211.

<sup>84</sup> *Id.*

<sup>85</sup>

<sup>86</sup> *Id.* at 212.

*An Australian Romance?: Public Sentiment and Legitimacy*

As noted at the beginning of this paper, most of this theoretical and philosophical debate has been fought in a North American context, both within and outside academia. It is important to remember that the environmental movement has also to a large degree been propelled by public sentiment, using popular media such as film to reach a global audience. Former U.S. Presidential candidate Al Gore's documentary *An Inconvenient Truth* was a phenomenal success in bringing environmental concerns to an international audience. Disappointingly, the only reference made in the film to the impact of global warming on non-human animals was a brief animated sequence about a polar bear that drowns because having to swim greater distances to find food as the ice melts. Nevertheless, the success of Gore's film reminds us not to underestimate the power of the media. In this fairly new debate concerning the rights of animals (in Australia at least), one of the main ways in which the personal and philosophical ethics outlined in the previous section can be translated into public (and legal) policy, and ultimately into practice, is to circulate those values through the media so that they are taken up by the popular consciousness and turned into political action (Tim Flannery's *The Weathermakers* did something equivalent for the environment in the form of books). There has been much empirical research conducted on the relationship between public opinion and public policy, particularly in the context of democratic theory.<sup>87</sup> Public opinion can often prompt elected officials to enact laws that correspond to the general sentiment of the people. Environmentalism and animal rights are both visible movements but they may not have been perceived in the same way by public officials or by the public at large.<sup>88</sup> It is *factual* ignorance that allows the continuation of many cruel practices against animals — if we knew what was going on, we simply could not condone it. It was Al Gore's aim to dispel this factual ignorance by giving his slideshow presentation to as many people around the world as he possibly could.

Australia has had its own versions of *An Inconvenient Truth* in two highly successful animated films: *Babe* (Chris Noonan, 1995) and *Happy Feet* (George Miller, 2006).<sup>89</sup> Both of these films are targeted at children meaning that the next generation may be wiser although it may take some time for any substantive changes to occur. *Babe* spawned Animal Australia's successful 'Save Babe' campaign and the film is (jokingly yet truthfully?) said to have caused a whole generation of children

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<sup>87</sup> See BENJAMIN I. PAGE AND ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC* (Chicago: University of Chicago Press, 1992).

<sup>88</sup> Mahalley Allen, *The Nature of Public Opinion on Animal Rights and the Environment*, Paper Presentation at the Annual Meeting of the Western Political Science Association, Las Vegas, 8 March 2007, [http://www.allacademic.com/meta/p176562\\_index.html](http://www.allacademic.com/meta/p176562_index.html) (last visited Jan. 7, 2009).

<sup>89</sup> *Happy Feet* includes many Australian and American stars such as Robin Williams, Elijah Wood and Nicole Kidman voicing characters; *Babe* received seven Academy Award nominations in 1995. These two films join high profile American films such as *Free Willy* (Simon Wincer, 1993), *Charlotte's Web* (Charles A. Nichols, Iwao Takamoto, 1973; remade by Gary Winick, 2006), and the U.K. film *Chicken Run* (Peter Lord, 2000).

to become vegetarians.<sup>90</sup> *Happy Feet*, on the other hand, has been alternately praised and criticised for its ‘flaunting’ of environmental issues such as global warming, overfishing and pollution.<sup>91</sup> Glenn Beck of CNN News referred to *Happy Feet* as an “animated version of *An Inconvenient Truth*” and branded it “propaganda.”<sup>92</sup> Despite this criticism, both films are also love stories of sorts: about finding your “heart-song” (*Happy Feet*) or following your heart (*Babe*). Obviously, the two films cannot bridge the wide divide between animal liberation and environmentalism on their own. However, they do make happy endings seem possible and maybe there is a lesson or two to be learned from them.

### *Babe*

*Babe* (Chris Noonan, 1995) is a film about a piglet named Babe who was born into an intensive pig farm.<sup>93</sup> His entire family is taken off to be butchered but as a runt he is auctioned off at a country fair where he is won by the farmer Hoggett (James Cromwell). Babe is soon adopted by a sheepdog named Fly and realises that he has a natural affinity to herd sheep. Whilst Mrs Hoggett (Magda Szubanski) would rather eat Babe for Christmas, her husband saves the piglet and enters him into the annual sheepdog trials. Through empathy, Babe convinces the sheep to obey and to file neatly into the sheep pen. As a live action/animation, *Babe* is also interesting for blurring the line between reality (real life drama) and fantasy.

The film begins with a voice-over: “This is a tale about an unprejudiced heart and how it changed our values forever . . . There was a time not so long ago that pigs were accorded no respect, except by other pigs. They lived their whole lives in a cruel and sunless world.” It is a clever tactic to tell this story in the past tense since doing so creates the possibility for a future *perfect*. Farmer Hoggett’s insipid son-in-law constantly tells him: “You should modernise”, but the ‘future’ envisaged by the animals in this film is one where people and animals treat each other with respect, regardless of species, and correspondingly where our values have changed forever.

When Babe discovers that he will like all farmed pigs, eventually be eaten, he decides to run away. The film very clearly shows us that animals have interests and desires, as Gary Varner’s theory posits. The film also takes issue with other forms of ignorance concerning animals, primarily through its inter-titles. One section is titled “Pigs are definitely stupid” (telling us that only stupid animals get eaten) and another is entitled “The way things are.” A cow tells Babe that “the only

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<sup>90</sup> Paul Byrnes, “Babe”, *Australian Screen*, <http://australianscreen.com.au/titles/babe/> (last visited January 19, 2009).

<sup>91</sup> See Andrew Darby, “*Happy Feet* director dodges conservative backlash”, *The Age*, 16 December 2006, <http://www.theage.com.au/news/entertainment/happy-feet-director-dodges-conservative-backlash/2006/12/15/1166162320291.html> (last visited Jan. 7, 2009).

<sup>92</sup> “Beck gives thumbs down to penguin movie *Happy Feet*”, *Media Matters for America*, 21 November 2006, <http://mediamatters.org/items/200611210008> (last visited Jan. 7, 2009).

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way to be happy is to understand that the way things are are the way things are". Luckily, Babe does not listen to these aphorisms but as an *individual*, he finds his own way. Where the film strives to make its 'radical' ideas acceptable is through the domestication of Babe — he is allowed inside the house (with the dogs and cat), although the other farm animals are excluded. Finally, it is public sentiment that turns things around. When Babe enters the sheepdog trials, the crowd bursts into laughter, ridiculing Farmer Hoggett. However when Babe defies their expectations, this laughter is transformed into triumphant cheers and even Mrs Hoggett is overcome. Meanwhile, the other animals on Hoggett farm are also gathered outside the farm house watching the sheep dog trials on television. Such is the power of the media!

### *Happy Feet*

Where *Babe* is primarily concerned with animal welfare and animal rights, *Happy Feet* (George Miller, 2006) has an overtly environmental message. The Emperor penguins (and their related cousins the Rockhoppers and Adelies), whom we get to know by name and through their distinctive personalities, are starving because of overfishing by humans. Like *Babe*, the film appeals to public sentiment by focusing on the fate of one individual, in this case Mumble, an Emperor penguin who cannot sing (necessary to attract a mate), but who instead taps his feet. Mumble is ostracised by his fellow penguins and strikes out on own with the aim of discovering who is taking all of their fish. He learns that it is the commercial harvesting of fish by humans, whom the penguins refer to as 'aliens', which is responsible. The pollution left by humans is also threatening the penguins; a six pack plastic ring holder is slowly suffocating Lovelace the Rockhopper (voiced by Robin Williams).

Mumble tells the elephant seals, "If I could just talk to them [the humans], appeal to their better nature...". The elephant seals, in their broad Australian accents, laugh at him. The fact that animals can communicate, because they have interests, is lost on most of these 'alien' humans. Mumble is captured and taken to an oceanarium. After three months he has almost lost his mind, staring vacantly back at the people looking at him through the glass. When he finds himself tapping his feet again (to the rhythm of a young girl tapping on the glass), a group of scientists decide to follow him back to his colony in Antarctica to find out why the penguins are now tapping their feet: "Why are they doing that?", "We are messing with their food chain!"

The film ends with a fierce debate amongst top government officials in a United Nations-style setting, with some putting pressure on others to stop marine harvesting. Out on the streets, people are holding placards with "no fishing" signs. Although the film is careful to avoid a conclusively 'happy' ending, audiences get to see a healthy debate and dialogue and the possibility of a positive outcome through the efforts of one cool penguin.

*Happy Feet* demonstrates that an environmental ethic can depend on individual moral considerability towards both the environment and the animals that live in it, while *Babe* envisages a return to a happier way of farming that is less stressful on both animals and the environment (again through an appeal to individual sentiment). While they both fall short of a fight for animal rights, they do bring important welfare issues to light.<sup>94</sup> Perhaps the ‘Hollywood romance’ Jamieson was calling for is ultimately unattainable but we can still strive for Australia’s very own version of a love story.

## V. CONCLUSION

In this paper I have sought to outline some of the relevant legal frameworks and case studies concerning the animal rights/animal welfare and environmentalism debate in Australia. I concluded by considering the importance of public sentiment in providing legitimacy, and hopefully, in influencing legal and political change. Animal welfarists and animal rights activists need to use all possible means at hand: litigation, legislation, and influencing public policy by raising awareness, just as the environmental movement has also done.

While there may be deep divisions between the different ethics, there are also breaks *within* the groups themselves. Conflicts can either extend or enrich our value systems and systems of ethical thought. Martha Nussbaum states eloquently:

the richer our scheme of values, the harder it will prove to effect a harmony within it. The more open we are to the presence of value [ . . . ] in the world, the more surely conflict closes us in. The price of harmonisation seems to be impoverishment, the price of richness disharmony.<sup>95</sup>

Elizabeth Anderson also notes that it is impossible to do justice to the values upheld by animal welfare, animal rights and environmental ethics given their conflicts, but also that none of these alone “has successfully generated a valid principle of action that does justice to all the values at stake. The plurality of values must be acknowledged.”<sup>96</sup>

What is important to remember is that we do not have to replace one set of values with another. Similarly, rather than having to live with complete disharmony or competitiveness, we can still strive to find complementary positions, particularly since animals and the environment share many of the same ‘interests’. Much of the debate as I have outlined circulated between the 1980s and 90s in North America.

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<sup>94</sup> See Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement*, (1996) for the incompatibility between welfare approaches and the attainment of animal rights.

<sup>95</sup> MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 75 (1986).

<sup>96</sup> Anderson, *supra* note 6, at 279.

Has the debate progressed? Where do we go from here? Australia is arguably well placed to be at the forefront of defining a renewed debate as we move into the new millennium. Where Australia has moved forward in leaps and bounds on environmental matters, there also needs to be a 'call to arms' for the future of animal liberation in this country. Perhaps in this way, with the two groups working together, change may happen more quickly for all.

## WILDLIFE AND THE BRAZILIAN ABOLITIONIST MOVEMENT

HERON JOSE DE SANTANA GORDILHO\*

### INTRODUCTION

There had been talk about building a society to protect animals. I have a profound respect for animals. I think they have souls, even rudimentary, and they conscientiously revolt against human injustice. I have seen a mule sigh after a severe beating from a driver who had filled his cart with load heavy enough for four horses and wanted the poor animal to pull it.<sup>1</sup>

The black slavery abolitionists were the first to break the absolute silence at the heart of the Brazilian nation. Even the Catholic Church, which had played an important role in the process of the humanization of slavery, had long ignored the suffering of slaves in Brazil.

In the same way, millions of sentient animals, free born, are stolen, captured, mutilated, sold as products, exploited for forced labor or simply killed and eaten, without due process of law.

Although many of them are close to us in the evolutionary chain, few of us worry about their suffering. Do we have the right to treat other species in this way?

By comparing the treatment given to animals with that given to slaves, this paper attempts to demonstrate that animals are treated like slaves who were until recently considered items of property, without any moral or legal status.

Sooner or later, men will have to admit other species into their ethical community, at least those that manage to survive the genocide against them. This genocide takes the form of either the destruction of their natural habitat or simply their extermination.

Some authors have compared animal issues to the Nazi holocaust, inasmuch as animals are treated like the Jews in concentration camps, without any moral dignity or respect.<sup>2</sup>

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OSVALDO ORICO. *O Tigre da Abolição*. Tecnoprint 200 (1988). Patrocínio was a pharmacist, journalist, writer and politician, and one of the most distinguished activists in the movement against black slavery in Brazil.

<sup>2</sup> J.M. Coetzze & Marjorie Garber, *Reflections*, in *THE LIVES OF ANIMALS* 81 (Amy Gutman, ed.,

Over the course of history, slaves and animals have been submitted to similar violations. However, with the exception of some primitive peoples, man does not normally eat the meat of his prisoners. Like prisoners of war or slaves, animals are used to satisfy the desires of the winners. Millions of them die daily as a result of wildlife trafficking, are killed for food, for materials for the fashion industry, religious sacrifices, cultural manifestations or scientific experiments. Other millions are tamed and used as pets or to guard property, for entertainment in zoos and circuses, or as forced labor.

This essay attempts to analyze the roots of the discrimination process against species, showing that the concept of soul — *anima* — has been changing throughout history to provide an ethical grounding that excludes animals from all and any moral consideration. Furthermore, we propose a change in the legal status of animals from legal object to legal subject and even confer them legal standing.

*a. The roots of speciesism and the spiritual barriers among species*

There were no echoes that repeated their cries or moans. Everybody ignored the suffering that they felt; everybody thought he was incapable of thinking, and it was ridiculous to say that they could consider freedom.<sup>3</sup>

Speciesism is a term coined in 1970 by the psychologist Richard Ryder to make a parallel between our attitudes towards other species and racist attitudes. Both represent biased behavior or prejudice in favor of interests of the members of our own group against the interests of the members of others.

Although man and animals share birth, death, pain, pleasure, among other things, western tradition identifies huge differences between them, mainly concerning body and soul, instinct and reasoning.

The idea of soul, according to Durkheim, came to primitive people through their dream experience which led to the idea of separating the body from the soul, the latter capable of leaving the body.

For primitive people, representations of the world while awake or sleeping had the same value. This duplicity was only possible if they accepted that the body has a soul, made out of subtle and ethereal material able to pass through pores of the body and go anywhere. Later, primitive man perceived that the dead often participated in their dreams thus giving rise to a third element: the spirit.

Disconnected from any embodied form and free in the space, a spirit — unlike the soul which spends most of the time inside the body — is immortal, and

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<sup>3</sup> LUIS ANSELMO DA FONSECA, *A ESCRAVIDÃO, O CLERO E O ABOLICIONISMO* (1998). Luis Anselmo da Fonseca was born on June 9, 1848 in Salvador, the capital city of Bahia/Brazil. He was professor of the first School of Medicine in Brazil, and in this work he talks about the indifference and omission of the church with the black slavery.

even after death continues, in particular the spirits of men who have special virtues (*mana*).<sup>4</sup>

The idea of linking each soul to its corresponding body (soul as an incarnated spirit) passed into the Greek tradition, and according to Aristotle the soul is conceived as the substance of the body, a vital principle of all living beings. Like sight is to the eyes, the soul is to the body.<sup>5</sup>

Analyzing the faculties of the soul, Aristotle says that feeding is common to all living beings and sensitivity is common to animals, however, only the human soul has intellectual ability (*noûs*), and is able to think and communicate ideas through language. For Aristotle the intellectual soul is the spirit itself, another kind of soul — separate from the body — which can be divided in two parts: the sensitive spirit (receptive) and effective spirit (active), the former functions as matter (potential) and the latter as form (act).<sup>6</sup>

Thus, animals are considered beings with their own life/soul (*anima*), but with no spirit. It is only through involuntary natural impulses that birds build nests and spiders webs. Only the human spirit is able to deliberate. The sensitive spirit is connected to the sensitive soul which transforms matter into thoughts, while the active spirit, unlike other faculties of the soul, is not linked to the body and is therefore immortal. However, thoughts are only born from feeling, and after death the spirit is no longer individual but collective. This refutes the theory of individual soul advocated by Plato.

In short, as well as the physical body (*soma*) and life (*anima*), rational man has a third element which supposedly sets him apart from other living beings: a spirit independent of body and able to learn, understand and make judgments or have opinions based on reasoning, consciousness, thoughts, will, and so on.

Consequently, as Aristotelian ethics are teleological, beings which occupy the lower rungs of the Great Chain of Beings are there to be used by animals which occupy the upper rungs. Therefore animals — like women, slaves and foreigners — are there to be used by rational man.<sup>7</sup>

From this point of view rationality is considered to mark the difference between men and other living beings, nearest genus; animal, and by specific difference, reasoning.

It is by the soul's intellectual function that men locate themselves in the Great Chain of Beings, putting animals below them and God above them. This

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<sup>4</sup> ÉMILE DURKHEIM, *ELEMENTARY FORMS OF THE RELIGIOUS LIFE: A STUDY IN RELIGIOUS SOCIOLOGY* (Joseph W. Swain, trans. 1915).

<sup>5</sup> Laurent Mayet, *Homo intellectus*, HORS-SÉRIE SCIENCES ET AVENIR, Oct.1995 at 58; *Le projet grand singe*, HORS-SÉRIE SCIENCES ET AVENIR, Oct. 1995 at 8.

<sup>6</sup> ARISTOTLE, *DE ANIMA* (2001).

<sup>7</sup> IRVÊNIA LUIZ DE SANTIS PRADA. *A ALMA DOS ANIMAIS* 13 (1997) (“For some of these studios, called mechanist ones, the life would be a product of the functioning of the proper organism, that is, of its physical and chemical activities. For others, the vitalists, the life would be a different thing, to the part. In this case, they admit that the beings livings creature would have, beyond the physical body, the manifestation of the life, as being of another nature. In this case, the life would correspond to the expression *anima*, of the Latin.”) (our translations).

distinction does not function only to differentiate men from animals — like a beak, wings and the ability to fly would distinguish birds from other living beings — but it also proves their proximity to God.<sup>8</sup>

Stoics put moral problems before theoretical problems and with Aristotelian ethics both have had a great influence on western thought. For them, the ideal state is calm suppressing emotions and desires. Unlike animals who act out of instinct, man is guided by reason which enables him to be aware of the immutable rules of natural law. From this Stoic understanding of *logos* (speaking, ability to reason) comes the definition of man as a rational animal (*zoon logikon*) and animals as beings that can not speak (*aloga zoa*).

The Stoic and Aristotelian tradition gave Roman Law and Christianity the notion that non-human animals are not worthy of any moral consideration. These ideas passed into Common Law and Civil Law traditions and remain today.

In the 17<sup>th</sup> century the French philosopher Rene Descartes argued that animal have no soul or minds, they are unable to either think or feel pain. Descartes took the Aristotelian and Stoic traditions to the extreme because animals were conceived as machines (*automata*). This understanding denies any spirituality to animals, considering them as *automata* and this, in turn, was used to justify the economic exploitation of natural resources (including animals) by the emerging industrial society.

This tradition only gave way in 1871, after the publication of *The Origin of Species*, in which Charles Darwin refuted the philosophical basis that supported the idea that only men, created in the image and likeness of God, had an intellectual soul (spirit) that legitimated their dominance over all other animals.

The Darwinian revolution proved that the only difference between man and animals was a matter of degree. Mankind does not occupy a privileged place in the order of creation. This evolutionary theory dismantled the foundations of Aristotelian tradition regarding the immutability of species based on the theory of substance which advocated that there is an ontological structure in the world.<sup>9</sup>

Despite the fact that the modern anthropocentric tradition was rocked by Darwin's ideas, which proved that there is a continuum between man and other species, non-human animals remain excluded from our moral and legal consideration.

For a long time after the publication of *On the Revolutions of the Celestial Spheres* (1543), physicists and mathematicians continued to operate inside the scientific Ptolemaic paradigm. However, with the work of Galileo and others, it finally gave way. Similarly, Darwin's ideas, while accepted in the natural sciences, have yet to be taken on board by the social sciences, legal scholars and philosophers.

There is an increasing body of scientific research nowadays into the mental faculties and genetic attributes of animals, further refuting theories that sustain there are significant differences between men and other animals.

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<sup>8</sup> Mayet, *supra* note 6, at 58.

<sup>9</sup> NICOLA ABBAGNANO, DIZIONÁRIO DE FILOSOFIA 373 (1982).

The primatologist Bernard Thierry, for example, has demonstrated similarities among facial expressions of men and great apes; while the psychiatrist ethologist Boris Cyulnik, following the pioneer works of Konrad Lorenz, has demonstrated that affection helps to build the cognitive abilities of young mammals, demonstrated by the use of tools mostly.

In the 1970's, the American primatologist David Premack, using research carried out with chimpanzees, pigeons and chickens, studied animals' ability to associate colored plastic shapes to objects, and identified the skills of abstraction, so the old opposition instinct and intelligence might be transformed in a museum of curiosities too soon.<sup>10</sup>

Many authors insist on distinguishing man and other species in the place occupied by them in the evolutionary ladder, by affirming that only mankind is able to reason, has linguistic skills, self-consciousness, autonomy, self determination, the skill to choose, capacity to practice actions and assume moral obligations.

The theory of evolution has been used to justify the traditional sight of superiority of men related to non-human animals, inasmuch as the mechanism of evolution-surviving of the most apt make us conclude that killing animals for food and other purposes come from fulfilling our role in the evolutionary chain.

Thus, considering evolution as a progressive process of natural selection of species less able to others more able, only man, placed at the top of the Great Chain of Being, should have special legal and moral status.

If there were some truth in this theory, giving intrinsic value to humans as "the best" in nature, it would force us to also give special status to cockroaches, because, as many scientists have shown, cockroaches could also be considered the best as they are the only species able to survive a nuclear disaster. Being more or less evolved does not confer any special moral value to species. It is impossible to concede moral value to scientific facts although they can be used as factual evidence for ethical arguments.<sup>11</sup>

In truth, what science has shown is that man is merely one more species in the evolutionary chain; there is no characteristic that distinguishes him from animals, because all differences are differences of degree, and not of category.<sup>12</sup>

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<sup>10</sup> Antonio Fischeti & Laurent Mayet, *Le propre de l' animal*, HORS SERIE SCIENCES ET AVENIR, Oct. 1995 at 3.

<sup>11</sup> Thomas G. Kelch, *Toward a Non-Property Status for Animal*, 6 N.Y.U. ENVTL. L. J. 531,563 (1998). ("That humans and other animals share similar mental capacities was recognized by Darwin. He contended that the differences in respective mental capacities were a matter of degree, not kind. Darwin argued that some animals feel pleasure and pain, have most of the complex emotions that humans have, possess imagination and reason to some extent, and may even have memory and reflection on that memory. The mental processes of humans have evolved like all other properties of humans, and are thus just a continuation of the same sort of processes that exist in lower animals.")

<sup>12</sup> CHARLES DARWIN, ON THE ORIGIN OF THE SPECIES BY MEANS OF NATURAL SELECTION OR THE PRESERVATION OF FAVORED RACES IN THE STRUGGLE FOR LIFE (1871) ("In the distant future I see open fields for far more important researches. Psychology will be based on a new foundation, that of the necessary acquirement of each mental power and capacity by gradation. Light will be thrown on

This becomes clearer when we compare man to the great apes. The two belong to the same order (*Primates*) and the same suborder (*Haplorrhini*). The traditional taxonomy classifies man in one family (*Hominidae*), genus (*Homo*), and species (*Homo sapiens*), and the great apes in another family (*Pongidae*), consisting of three genera (*Pan*, *Pongo* and *Gorilla*) and six species: common chimpanzee (*Pan troglodytes*), bonobos (*Pan paniscus*), Sumatran orangutans (*Pongo abelli*), Bornean orangutans (*Pongo pygmaeus*), eastern gorillas (*Gorilla beringei*), and western gorillas (*Gorilla gorilla*). However, recent advances in DNA mapping have allowed a group of scientists to publish research in the American magazine *Proceedings of the National Academy of Sciences* reporting that man and such animals share 98.4% of their genetic codes.

There is already sufficient scientific proof to affirm that man and great apes are in the same family (*Hominidae*) and the same genus (*Homo*), so the great apes should be classified as *Homo troglodytes*, *H. Paniscus*, *H. Abellii*, *H. Pygmaeus*, *H. beringei*, and *H. gorilla*.

Man has always sought to differentiate himself from animals and reinforce these differences through his religions and philosophies as a means of fleeing from his animal essence and domesticating his animal instincts.<sup>13</sup>

However, man cannot free himself completely from his primitive impulses, e. g. sex, gluttony and power. According to Freud, these impulses can at best be repressed or sublimated, through intoxication, displacement or illusion. Furthermore, these impulses sometimes lead people to commit perversions such as violence and cruelty against other people, or even animals.<sup>14</sup>

One of Freud's great contributions was to perceive the paradox of man as a

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the origin of man and his history.”).

<sup>13</sup> Denis Russo Burgierman, *Chimpanzees Are Human*, 190 SUPERINTERESSANTE, July 2003, at 24. Other research indicates a lesser percentage, but either figure allows for the same conclusion. “For many years, most biologists assumed that humans evolved as a separate branch from the other great apes, including the chimpanzees and gorillas. This was a natural enough assumption, given that in many ways they look more like each other than they look like us. More recent techniques in molecular biology have enabled us to measure quite precisely the degree of genetic difference between different animals. We now know that we share 98.4 percent of our DNA with chimpanzees.” PETER SINGER, WRITING ON AN ETHICAL LIFE 80 (2000).

<sup>14</sup> SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS. 91-92 (Joan Riviere trans., Jonathan Cape and Harrison Smith, Inc. 1930). “If civilization requires such sacrifices, not only of sexuality but also of the aggressive tendencies in mankind, we can better understand why it should be so hard for men to feel happy in it. In actual fact primitive man was better off in this respect, for he knew nothing of any restrictions on his instincts. As a set-off against this, his prospects of enjoying his happiness for any length of time were very slight. Civilized man has exchanged some part of his chances of happiness for a measure of security. We will not forget, however, that in the primal family only the head of it enjoyed this instinctual freedom; the other members lived in slavish thralldom. The antithesis between a minority enjoying cultural advantages and a majority who are robbed of them was therefore most extreme in that primeval period of culture. With regard to the primitive human types living at the present time, careful investigation has revealed that their instinctual life is by no means to be envied on account of its freedom; it is subject to restrictions of a different kind but perhaps even more rigorous than is that of modern civilized man.”

social being: we are libidinous, deceitful, and selfish, but we have to live in polite society with others, we have to cooperate, conciliate, and contain our instincts. This makes our mind a place where the conflict between animal impulses and social rules plays out.<sup>15</sup>

In conclusion, as scientific discoveries progress in the areas of psychology and biology, there will eventually have to be changes in the moral and legal realms of our societies. The way we treat animals today will shock future generations.

### *b. The place of wildlife in the Brazilian legal system*

And man's law is man's zoology. The anthropocentrism is so wrong in the former as well in the later. It's a surprise that this is still true today, and it needs to be opened way with a hammer's blow.<sup>16</sup>

It has not been easy for Brazilian academics nor the judicial system to identify the legal status of animals. The question falls under two distinct legal spheres; public and private law. Public law regulates the relationships between man and wildlife, and in this sphere the latter are considered common goods. Private law regulates domestic or domesticated animals, and here animals are considered property.

Given that in the eyes of the law animals have always been considered to be property, thousands are captured and often killed on a daily basis in the animal trade, both legally and illegally.

The issue, however, is not as simple as it initially appears. When we seek to establish the legal status of a wild animal captured for human consumption - for example, a fish captured in Brazilian waters — we have to determine if this act transforms the fish into a private good of the person who caught it or if the State maintains its property rights. Is the fisherman granted a waiver to use and commercialize a public good because it is an animal?

According to the law, a *thing* is a relevant entity to the legal sphere, able to become an object of legal relationships. There were *things*, for example in Roman law, that could not be considered private property (*res extra patrimonium*) and *things* that could not, if considered as a group, become objects of possession (*res extra commercium*).<sup>17</sup>

Things could be *res nullium* (nobody's thing) or *res derelictae* (abandoned thing), available to become part of someone's assets, although the thing had never belonged to another; in other words, while they were not appropriated they could be considered neither public nor private.<sup>18</sup>

*Res nullium* was a kind of public good, excluded from commerce (*res extra*

<sup>15</sup> ROBERT WRIGHT, *THE MORAL ANIMAL - WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 321 (Pantheon Books 1994).

<sup>16</sup> TOBIAS BARRETO, *ESTUDOS DE DIREITO E POLÍTICA* 13 (Rio de Janeiro, Instituto Nacional do Livro, 1962).

<sup>17</sup> JOSÉ CRETELLA JR., *CURSO DE DIREITO ROMANO: O DIREITO ROMANO E O DIREITO CIVIL BRASILEIRO* 151 (Rio de Janeiro: Forense 1999).

<sup>18</sup> ORLANDO GOMES, *INTRODUÇÃO AO DIREITO CIVIL* 151 (Rio de Janeiro: Forense 1983).

*commercium*), and subdivided into *res communes* (seas, ports, estuaries, rivers), *res publicae* (lands, public slaves), and *res universitatis* (forums, streets, public squares).<sup>19</sup>

Gaio, however, before Justiniano, divided things in to *res extra patrimonium*, which could be *res divini juris* (divine things) or *res humani juris* (human things). Human things, in turn, could be *res communes*, such as water and air, not able to be private property, although appropriable in specific quantities, *res universitatis*, things belonging to cities, such as stadiums, theatres, and forums, or *res publicae*, things owned by the State for public use (*res publicae usui destinatae*), such as squares, streets, rivers and the things *in pecunia populi*.<sup>20</sup>

In the Roman-German tradition, but also strongly influenced by the Pandects through the Recife School of Law and the individualism and patrimonialism of the Exegese School, the Brazilian Civil Code promulgated in 1917 classified wildlife as *res nullium*, i.e. things that are neither public nor private — not belonging to anybody.<sup>21</sup> However, they can be appropriated, such as in the case of animals caught through hunting and fishing.<sup>22</sup>

As such, hunting and fishing were considered ways to obtain property rights. Ownership was acquired by the hunter or fisherman who caught the animals. After the war, however, liberalism was replaced by the paradigm of the welfare state. This promoted increased state intervention into the legislative realm under the pretext of protecting the weak and restricted — private autonomy without losing its original meaning.<sup>23</sup>

The growth of industrial society's complexity led to a series of special legislations, which among other things canceled certain general principles present in the Civil Code, from the removal of whole subjects from it and transforming them into autonomous legal branches, such as the newly created environmental law.

The Law to Protect Wildlife (Act 5.197 of 1967), for example, modified the legal nature of wildlife, which became property of the state rather than being considered *res nullium*. This law forbids professional hunting, wildlife trafficking, and sale of products and tools used to hunt, pursue, destroy or capture animals. However, sport and scientific hunting is permitted through a state waiver as is hunting to cull animal populations when they present a hazard to agriculture or public health, or when abandoned pets become feral or wild.

Under the idea of animals as property of the state, the law to protect wildlife

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<sup>19</sup> MARIA SYLVIA ZANELLA DI PRIETO, *DIREITO ADMINISTRATIVO* 432 (São Paulo 1998).

<sup>20</sup> JOSÉ CRETILLA JR., *CURSO DE DIREITO ROMANO: O DIREITO ROMANO E O DIREITO CIVIL BRASILEIRO* 165-66 (Rio de Janeiro: Forense 1999).

<sup>21</sup> MARIA HELENA DINIZ, *CÓDIGO CIVIL ANOTADO* 75 (Saraiva ed., São Paulo 1995).

<sup>22</sup> ORLANDO GOMES, *INTRODUÇÃO AO DIREITO CIVIL: OBRA PREMIADA PELO INSTITUTO DOS ADVOGADOS DA BAHIA* 182 (Rio de Janeiro: Forense 1983). According to the former Brazilian Private Code Article. 593. It can be appropriated: I – wildlife, while living in it habitat II – domesticated without signal, if it had lost the costume to go back home, except in the case of article 596 (when the owners was looking for it).

<sup>23</sup> Paulo L. N. Lobo, *Constitucionalização do Direito Civil*, 141 *REVISTA DE INFORMAÇÃO LEGISLATIVA BRASÍLIA*, January-March 99-109 (1999).

has caused much controversy. Many scholars claim that the expression *State* refers to the Union, an interpretation which has predominated in the Brazilian Superior Court of Justice. The federal judges were intend to decide cases concerning crimes against wildlife.<sup>24</sup> However, this precedent was not without controversy in the high courts. The situation was such in case 6.289-3 of São Paulo, decided on December 5, 1982, by the Supreme Court, which Judge Dacio Miranda expressed reservations regarding the precedent, claiming that wildlife did not belong to the Union, but to the State; in other words, to the Brazilian nation.

Therefore, the leading case was removed from the outcome of the jurisdiction conflict between a criminal court of the State of São Paulo and the Federal Court of Justice. Since then, question regarding crimes against wildlife have been the subject of state courts.

The Brazilian Fishing Code dictates that animals and vegetation found in waters belonging to the states or the Union are public goods, although the state can permit professional or commercial fishing, as well as sport or scientific fishing.<sup>25</sup>

In fact, legislation does not bring together the concept of environmental goods, for example, flora is a good of common interest, wildlife is property of the state and fish in public waters are public goods.

With the passing of the article 1 of the Act 9.4333/97, however, water has become a public good of economic value, all waters have become public goods, and surface water belongs to the Union when they cross more then one state or countries, as is the territorial sea, while the rest belong to the state-members. There are no longer private or municipal waters.<sup>26</sup>

As regard domestic or domesticated animals, the new civil code, although it does not deal directly with the issue, rules that animals used in industry or for the industrialization of meat and derivatives can be the object of commercial or industrial guarantee (Civil Code, article 1.447), and that the offspring of animals belong to beneficiaries, in other word, animals belong to the owner of the land. (Civil Code, article 1.387).

In effect, according to the present Brazilian legal system domestic and domesticated animals, including those destined for the food industry, are considered private goods, and can be freely bought and sold, the owner having the right to receive compensation for any damage caused by a third party or by the state itself

The legal concept of the environment can not be understood without taking into account the 1988 constitutional rules, which establish equal legal status for

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<sup>24</sup> The Súmula 91 of the STJ stated that: “the role of Federal Justice to process and judge the crimes practiced against fauna. “ In the same sentence, the reporter cites to VLADMIR PASSOS DE FREITAS & GILBERTO PASSOS DE FREITAS, *CRIMES AGAINST NATURE* 52 (Reviewed Publishing Company of the Courts ed., São Paulo 2000): “As a general rule, these crimes will be the ability of state justice. However, they would be of federal attribution when the crime is practiced within 123 miles of the Brazilian territorial sea (Act 8,617, of April 1, 1993), in the pertinent lakes and rivers of the Union (international or that divides states – CF, 20, inc.II), or in the areas of conservation importance to the Union (example, in the National Park of the Iguaçú).

<sup>25</sup> Act 221/67,art.3º. All animals and vegetables in State-owned waters are of public domain.

<sup>26</sup> VLADMIR PASSOS FREITAS, *ÁGUA: ASPECTOS JURÍDICOS E AMBIENTAIS* 22 (2000).

environmental goods, by defining the environment as a good of public use for people and essential for a healthy quality of life. This status, for many authors, breaks the traditional approach that goods of common use are public goods.

Following this understanding, an environmental good, even if located on private land, will be submitted to limitations that guarantee everybody mediated fruition of the good, as regards for example scenic beauty, production of oxygen, refuge for wildlife, etc.<sup>27</sup>

Thus, the environment can be neither public nor private, but rather occupies an intermediate zone of diffuse interest and belong to everybody at the same time impossible to identify an owner and impossible to divide.<sup>28</sup>

This interpretation is not as simple as it seems, because public use goods have always been considered public goods. The Civil Code itself includes them among types of public goods.

In fact, although the Civil Code should not legislate on public law, it rules that the public goods are inalienable, and while having this status, can be used freely or otherwise, according to the will of the entity responsible for their administration.

It would have been better if the constitution drafters had used the Forest Code<sup>29</sup> and defined environment as a “good of common interest of the people,” or “good of diffuse interest.” These expressions would have more easily characterized it as a hybrid interest, of public soul and private body, transcendental to individual rights and extend to the public, i.e. “pluri-individual,” public relevance, and cultural nature.<sup>30</sup>

Be this as it may, the definition of the legal nature of the environment is still legally controversial and, in these cases, as it deals with principles, it is necessary to construct a value interpretation which would make its wording more flexible and with a view of reaching a new meaning that leads to fairness<sup>31</sup>.

The 1988 Constitution, while guaranteeing property rights (article 5<sup>o</sup>, XXII), imposed an interventionist and collective dimension which required that the law be used for the social function of property principal. This was done to accommodate environmental conflicts with the use of the hermeneutic criterion of proportionality, through the balancing and weighing of rights and interests in conflict.<sup>32</sup>

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<sup>27</sup> PAULO DE BESSA ANTUNES, *DIREITO AMBIENTAL* 68 (2004); CELSO ANTONIO PACHECO FIORILLO, *O DIREITO DE ANTENA EM FACE DO DIREITO AMBIENTAL BRASILEIRO* 117 (2000). Art. 225 of the Constitution, when establishing the legal existence of a thing that if structure as being of use joint of the people and essential to the healthy quality of life, configure a new legal reality, disciplining well that he is not public nor, much less, particular.

<sup>28</sup> LUIS PAULO SIRVINSKAS, *MANUAL DE DIREITO AMBIENTAL* 27 (2002).

<sup>29</sup> According to Antonio Herman V. Benjamin. *Desapropriação, Reserva Florestal Legal e Áreas de Preservação Permanente*; see also Max Limonad, 65 (1998). (“Without being proprietors, all the inhabitants of the Country - it is what the law declares - have legitimate interest in the destination of the national forests, private or public.”).

<sup>30</sup> M.S.Gianini, *La Tutela Degli Interessi Collettivi Nei Procedimenti Amministrativi*, in *LE AZIONI A TUTELA DI INTERESSI COLLETTIVI* (1976).

<sup>31</sup> ANDREAS J. KRELL, *DIREITOS SOCIAIS E CONTROLE JUDICIAL NO BRASIL E NA ALEMANHA: OS (DES) CAMINHOS DE UM DIREITO CONSTITUCIONAL* 82 (2002).

<sup>32</sup> Paulo L. N. Lobo *Constitucionalização do Direito Civil*, in *REVISTA DE INFORMAÇÃO LEGISLATIVA*

It seems, therefore, that the expression *good of common use of the people* must be understood as a good of common interest to the public, and thus the environment belongs to the nation. The use of private property is controlled by social function of the property principle that restricts its use, without eliminating its legal status.<sup>33</sup>

In short, goods of diffuse interest are those that whether public or private satisfy at the same time the interest of the whole community, and must be protected by public prosecutors or other co-legitimated entities.

To return to the issue we set out to examine, to know if a fish, while wildlife, being legally fished stops being a public good, we can claim that public environmental goods remain goods of common use. Although they can not be appropriated as a whole, they can be taken as parts with previous authorization from the State itself.

In fact, although they are not alienable, goods of common use of the people can be used or appropriated by private individuals, as long as it is authorized by the State. In the case of appropriation by authorized hunting and fishing, the environmental good is no longer public and becomes private.

It is worth highlighting that these modifications in the legal nature of wildlife have contributed little towards guaranteeing the physical and psychological integrity of these beings. If before they were considered things belonging to nobody, they now belong to everybody, which is essentially the same.

Additionally, as hunting and fishing is permitted, the Brazilian legal system does not guarantee even the right of life to these animals which continue to be captured and killed, legally and illegally.<sup>34</sup> This makes a mockery of the constitutional rule which prohibits practices that put at risk the ecological function of animals, leading to their extinction or submitting them to cruelty as set forth in article 225, §1, VII.

Neither the government nor civil society has managed to implement the rules that prohibit illegal trading of wildlife. This is partly due to failures on the part of the public services for environmental protection in the formulation, implementation and maintenance of public policies, in the financial resources of the Union, and state and local authorities.<sup>35</sup>

Among the reasons that contribute to the social inefficacy of environmental laws for the protection of fauna, is the fact that the central focus of its protection is not the animal itself, but the sensitivity of man.<sup>36</sup>

On the other hand, these laws state that the will to kill or mistreat animals is a crime, while slaughter, vivisection and the use of animals in public spectacles are supposedly exonerated from the law.

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N ° 141 BRASÍLIA 106 (1999).

<sup>33</sup> RUY CARVALHO PIVA, *BENS AMBIENTAIS* 120 (2000).

<sup>34</sup> JORGE BATISTA PONTES, *ANIMAIS SILVESTRES: VIDA À VENDA* 175 (2003) (“The traffic of wildlife and its by-products are one of the biggest illegal businesses of the planet. Such crimes, according to sources not-officers, would annually put into motion astronomical amounts, that would be behind, in the world of the crime business, only of the traffic of drugs and the one of weapons.”).

<sup>35</sup> ANDREAS J. KRELL, *DIREITOS SOCIAIS E O CONTROLE JUDICIAL NO BRASIL: DESCAMINHOS DE UM DIREITO CONSTITUCIONAL COMPARADO*, Porto Alegre 31-32 (2002).

<sup>36</sup> Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6. N.Y.U. ENVTL. L.J 531 (1998).

Despite the fact that the constitutional rules prohibit acts of cruelty against animals, most interpreters of the law see this as avoiding only unnecessary suffering. However, what this actually means is vague particularly if we put ourselves in the same position.

Finally, the implementation of these laws is deficient, either as a result of lack of resources or lack of political will,<sup>37</sup> and when cases of cruel practice are identified the penalties imposed are very small.

Thirty million animals die every year in scientific experiments and another twenty billion are submitted to degrading living conditions while they wait the moment of slaughter. Despite environmental rules, the sacred character of property rights always prevails over the interests of animals.

However, a movement for the defense of animal rights is beginning to emerge in Brazil, and it counts on the support of sectors of the academic, artistic and cultural world. It has started to call for radical legislative change to grant freedom and equality of treatment to animals in the same way as granted to men. This movement is called animal abolitionism, given the similarities between the emancipation of slaves and animals.

If we take the Brazilian Constitution seriously, animals are already the legal subjects of fundamental rights, and can even have legal standing via legal representatives. An important precedent was the decision in the Habeas Corpus n 833085-3/2005 requested by a group of legal scholars, public prosecutors and animal activists in favor of Swiss, a chimpanzee that lived in the city zoo in Salvador, Bahia. This was the first case that recognized a chimpanzee as a plaintiff, allowing the chimpanzee to achieve standing in a court of law through representatives.<sup>38</sup>

#### *d. The Brazilian abolitionist movement*

Blind people the ones that assume in the abolitionism the last page of a locked up book, a negative form, the suppression of a loser evil, the epitaph of a century iniquity. In the rise, she's a sunrise's song, the motto no more mysterious of an age that begins, the measure of a giant's powers that unfastens.<sup>39</sup>

Many defend the extension of basic rights to animals, along the lines of the Universal Declaration of Animal Rights which should be defended in the same way as human rights.

Philosophers such as Paola Cavalieri and Peter Singer in 1993 launched The Great Ape Project counting on the support of primatologists such as Jane Goodall and intellectuals such as Edgar Morin. They defend the immediate extension of

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<sup>37</sup> *Id.*

<sup>38</sup> See *Suíça v. Dir. of the Bahia State Dept of Biodiversity*, ENVTL. WATER RESOURCE, BRAZILIAN ANIMAL RIGHTS REVIEW (2006). According to the Brazilian Federal Rules of Criminal Procedure, art. 654, any person can petition for a writ of habeas corpus, for himself or on behalf of another person; as well as a public prosecutor.

<sup>39</sup> RUI BARBOSA, O ABOLICIONISMO A VIDA DOS GRANDES BRASILEIROS 268 (2001).

human rights, such as the right to life, freedom, physical wellbeing for the great apes before they become extinct.

Why do we confer legal standing to children, people with special needs or leading a vegetative life, while not granting the same to beings that share up to 99.4% of genetic load with us, and are part of the same family, hominids, or the same sub-order, anthropoids.

Why do chimpanzees, bonobos, gorillas and orangutans face extinction while we grant basic rights to human beings capable of committing the most abominable crimes against humanity itself?

Why do we not respect the principals established in the Universal Declaration of Animal Rights, proclaimed by the International League for Animal Rights in 1978 and submitted to UNESCO and the UN?

Tom Regan in his pioneering work addressed many of these issues, and today many authors have begun to defend the possibility of obtaining legal standing for certain animals.

For this, however, it must be recognized that the great apes have similar intellectual capacities to those to whom we grant legal standings, such as children or people with special needs.<sup>40</sup>

It is on the basis of the utilitarian ideas of Jeremy Bentham that Singer suggests that the capacity to suffer is a vital characteristic capable of conferring to each being the right of equal consideration. It does not matter whether a being is capable or not of reasoning, if it can speak or not: what matters is whether it is susceptible to suffering. According to Singer, a stone, for example, does not have interests; therefore it is incapable of suffering. However, a blow with a stick given to a horse provides “the same amount of pain” as a blow to a child.<sup>41</sup>

For Tom Regan the notion that only human beings are worthy of moral status is mistaken, he defends an inherent value for all individuals that are “subjects of a life.”<sup>42</sup>

Steven Wise has demonstrated that prejudice against non-human creatures is due to the fact they were considered of instrumental value, a kind of slavery that perceives them as property. While his defense of the inclusion of animals into the legal world has left him open to ridicule and marginalization in academia, he compares his position with that of Galileo, denouncing cultural and religious anachronisms which can discourage young judges from acting in accordance with correct principles in the same way that Galileo’s contemporaries forced him to affirm that the earth continued to be the center of the universe, although his experiments had proved the contrary.<sup>43</sup>

David Favre argues that animals can have their interests protected in law, without modifying their legal nature. He uses the traditional common law division of property rights which separates legal title and equitable title, using the contractual

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<sup>40</sup> SCIENCES ET AVENIR, LE PROJET GRAND SINGE 8 (1995) (Fr.).

<sup>41</sup> PETER SINGER, PRACTICAL ETHICS 52 (1979).

<sup>42</sup> TOM REGAN, DEFENDING ANIMAL RIGHTS 43 (2001).

<sup>43</sup> STEVEN WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 73-77 (2000).

model of society trustee, where a person or institution agrees to manage a property and transfers legal title to it, while keeping the equitable title, Favre argues that all animals are retainers of their equitable title.<sup>44</sup>

For the author, in the same way that in the society trustee the administrator (trustee) cannot consider the property as his own, and only deal and keep it in the best interest of the equitable owner, the society trustee has only the legal title of the property, acting more as a guardian, also able to represent the equitable title holder in court.<sup>45</sup>

In this way animals considered property can have their status changed through a private act, such as a declaration or a will, as occurred with the freedom of the slaves in Rome, or slaves in countries such as Brazil and the U.S.A.; or through a public act, i.e., a judgment or a change in law,<sup>46</sup> as occurred with the abolition of the slavery in Brazil.

Many authors, however, refute the possibility of extending human rights to animals, using the argument that the real border that exists between man and some animals lies in the distinction between freedom and determinism.

For these authors, man is the only moral subject in the world; therefore only he is capable of exercising his free will, even if it goes against his instinct. In this way, as animals are not free, they cannot be held morally responsible for anything: they are always innocent.<sup>47</sup>

It does not seem, however, that such arguments are capable of justifying the non-concession of moral dignity to the non-human animals. These arguments are based on traditional Aristotelian ethics that hold that there are insurmountable barriers between man and animals, in spite of evidence that the great apes are endowed with intelligence, moral sense and a social conscience.<sup>48</sup>

Are people with mental illnesses and children not innocent too? Are they not incapable of being conscience of their acts too? However, nobody denies them the capacity to acquire and exert rights through their representatives.

Even among healthy adults, was it not Freud who pointed out that nobody is master in his own house? As we know, only a small number of men and at certain moments acts in accordance to reason.<sup>49</sup>

Prejudice against animals, i.e. specisism is logically inconsistent as both

<sup>44</sup> David Favre, *Equitable Self-ownership for Animals*, 50 DUKE L.J. 473 (2000).

<sup>45</sup> *Id.* at 496-502.

<sup>46</sup> *Id.* at 492-93.

<sup>47</sup> Eduardo Rabenhorst, *Sujeito de Direito: Algumas Considerações em Torno do Direito dos Animais* v.2, n°3, RECIFE 119-130, (Jan-Mar. 1997).

<sup>48</sup> Hervé Ratel, *La Planète des Singes*, 647 SCIENCES ET AVENIR. 50,54 (Janvier 2001) (Fr.) (“We are nowadays in a situation such that is necessary to reexamine famous it “proper of the man”, that it was conceived from our ignorance in relation the primates, affirmed Pascal Picq.”) (Free Translation).

<sup>49</sup> JOHN COEZZE, *THE LIVES OF ANIMALS*, 23 (1999) (“Both reason and seven decades of life experience tell me that reason is neither the being of the universe nor the being of God. On the contrary, reason looks to me suspiciously like the being of human thought; worse than that, like the being of one tendency in human thought.”).

we consider that only man is rational while no animal is, which is not true, and that reason is an instrument of freedom from prejudice, myths, and false opinions and misleading appearances.

In fact, reason can still be understood as the force that frees man of appetites he shares with animals, keeping them measured. Rationality, however, is the ability to perceive and use relationships (relationship rationality) and all we know that the animals can perceive relationships and respond to them. Nevertheless, rationality conceived as auto-analysis, knowing about knowing, i.e. the capacity of speaking about what you say (deliberative rationality), with exception of some great apes, most animals lack.<sup>50</sup>

It is worth noting here that the thesis of the lack of standing has always been the legal mechanism used to exclude people who were not desired in the scope of equality, such as blacks, women, children, and as regards animals has not been different.<sup>51</sup>

Even for positivists like Kelsen, most of the time the law imposes legal obligations without reciprocal rights, for example, when law prescribe a man's behavior towards animals, plants or objects, regardless of any reciprocity, such as not treating animals cruelly. Only when an individual is legally obliged to behave in a specific way towards others, he has a right to demand this behavior. Thus, animals are legal subjects, i.e., they are able to acquire and exercise their rights.<sup>52</sup>

The fact that animals are not able to complain in court has nothing to do with the legal relationship. A claim is completely different from the guarantee that an animal has the right not to be mistreated. Even if reason were an exclusive attribute of man, would this be enough to deny basic rights to animals, such as life and freedom?

Or does this refusal demonstrate that man very rarely uses his reasoning, and though biological determinism acts instinctively, disdaining and destroying everything that does not belong to his social group, tribe, race, religion, nationality, family, social class, or simply the fans of his soccer team?

To affirm that animals feel no pain is another inconsistent argument. Simple observation reveals the gestures and expressions of animals in pain and how similar they are to ours. In fact, some research has been carried out with animals to understand exactly how pain functions and there is scientific proof that animals do feel pain. Even though it can differ in some aspects, it is very similar to pain in human beings.<sup>53</sup>

According to Thomas Kuhn, periods of crisis in science begin when a scientific paradigm (a structure that shapes concepts, the results and processes of scientific activity) accumulates a series of anomalies and difficulties that inhibit

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<sup>50</sup> NICOLA ABBAGNANO, NICOLA DICIONÁRIO DE FILOSOFIA 792 (1982).

<sup>51</sup> SÔNIA T FELIPE, POR UMA QUESTÃO DE PRINCÍPIOS. ALCANCE E LIMITES DA ÉTICA DE PETER SINGER EM DEFESA DOS ANIMAIS 27 (2003).

<sup>52</sup> HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., The Regents of the University of California 2d ed. 1967) (1934).

<sup>53</sup> Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531 (1998).

coherent solution. However, during a period of transition problems can be solved either by the old paradigm or by the new.<sup>54</sup>

Roman law came from the intellectual inheritance of the Greek world, where only a free man was considered a “person,”<sup>55</sup> (i.e. legal subject). For the Romans a person and a man were diverse concepts. Only a man with certain attributes could be a legal subject. Some of these attributes were from nature, for example, perfect birth, (i.e. born alive, to have human form and fetal viability) while others from social status.

In Rome, the *status civile* was divided into *status libertatis*, free men or slaves, *status civitatis*, citizens and non citizens and *status familiae*, completely capable (*pater familiae*), relatively capable (*sui juris*) or fully incapable (*alieni juris*). Thus, only free and fully capable citizens were considered persons, while women, children, slaves, the physically impaired, foreigners and animals were not considered persons.

According to Kelsen, the capacity to acquire rights and the capacity to exercise rights can not be confused. Animals are legal subjects, with a legal title in a secondary legal relationship, as they do not possess the capacity to exercise their rights, in the same way as a child. Children do not have criminal liability, as their behavior is not deemed of sanction. Moreover, those who can not exercise their rights themselves can acquire property rights, for example. Their legal representative assumes the duties in name of the legal subject he/she represents.<sup>56</sup>

For a long time the law has not only privileged human beings but also corporations. Companies as well as other entities resemble legal persons; however, this is through an artificial process of legal fiction and terminology. Furthermore, in Brazil there are legal subjects who do not have legal personhood, such as estates, societies without personality, cohabiting couples, etc.

In this sense an animal or a group of them, while without legal personhood can have standing and be represented by their guardian, by the state or organizations for the protection of animals.<sup>57</sup> The big issue here is not whether animals have legal personhood or not but rather if they can be legal subjects, and enjoy basic rights, such as life, freedom and physical and psychological integrity.

## CONCLUSION

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<sup>54</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 115 (1962). According to Steven Wise in *RATTLING THE CAGE* 72 (2000): “The physicist Max Planck complained that a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” Darwin despaired of convincing even his colleagues of the truth of evolution by natural selection. In the face of attacks upon core beliefs, knowledge tends to advance, in the word of the economist Paul Samuelson “funeral by funeral”.

<sup>55</sup> JOSÉ CRETTELLA JR., *CURSO DE DIREITO ROMANO* 87 (1999).

<sup>56</sup> HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., *THE REGENTS OF THE UNIVERSITY OF CALIFORNIA* 2d ed. 1967) (1934).

<sup>57</sup> **Decree No. 24645 of 10.7.34**, “the animals will be represented in court by representatives of the Ministry Public, their legal surrogates and members of the Society Protection of Animals” (art. 1, para. 3).

The greatness of a nation and its moral progress can be judged by the way its animals are treated. Vivisection is the blackest of all the black crimes that a man is at present committing against God and his fair creation. It ill becomes us to invoke in our daily prayers the blessings of God, the Compassionate, if we in turn will not practice elementary compassion towards our fellow creatures.<sup>58</sup>

In conclusion, this article has attempted to identify the philosophical and scientific bases of speciesism that have been used to legitimate prejudices and cruel practices against animals. Many of these bases started to be undermined by Darwin's theory of evolution and recently by scientific research that has demonstrated that there no identifiable capacities separating animals from man.

On the other hand, it is wrong of those who oppose the abolitionist movement to imagine that it is against humanity. In fact, it attempts to extend the moral sphere to include animals rather than threaten man and thus exalting him.

If we understand cruelty as the act of doing something bad, tormenting or damaging others through insensitive, inhumane, painful acts, all and any cruel practice to animals therefore offends rather than confirms the principle of human dignity.

We recognize moral dignity or legal status for members of our own species who lack intellectual attributes, such as children, companies or depersonalized entities. Why is it so difficult to raise this morality further and include at least beings in close evolutionary terms such as great *apes*?

As the case of *Swiss v. Director of Biodiversity, Environmental and Hydrological Resource Department* from state of Bahia has demonstrated, this can occur, similar to slavery abolitionism, without a constitutional amendment, therefore when article 225, §1º, VII of the Federal Constitution of Brazil ruled that the government and society must protect all animals, "forbidden, in form of the legislation, practices that put in risk their environmental function, increase the extinction of species or submit them into cruelty", it mean that it must have an immediate effect.

Nothing prohibits us from taking a wild animal, unable to return to its habitat, and protect it in sanctuaries or make it part of a family, as a subject not an object, as occurred with Brigitte, a monkey that lived for 19 years with the Zaniol family in Caxias do Sul, a town in the state of Rio Grande do Sul.<sup>59</sup>

In September 2008, the Minister Antonio Herman Benjamin, the Second Class of the Superior Court of Justice (STJ), interrupted the trial of habeas corpus, asking for the file to better examination of an application for habeas corpus brought on behalf of two chimpanzees: Lili and Megh, brought the Zoo of Fortaleza to

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<sup>58</sup> MAHATMA GANDHI, *THE MORAL BASIS OF VEGETARIANISM* (15<sup>th</sup> World Vegetarian Congress) (1957).

<sup>59</sup> *Zaniol v. Brazilian Institute of Environment*, in 2005, the 4th Federal Court decided that Brigitte, a monkey that was take by the Brazilian Institute of Environment, must return to the Zaniol family that raised her for 19 years.

São Paulo to the Shrine Paths of Development, affiliated to the Great Apes Project (GAP) of Brazil) and seized by IBAMA by lack of proper environmental permits.

Being dissatisfied with the decision of the Regional Court in the 3rd Region (TRF3), which determined the animals were reintroduced in nature, a decision which causes the death of primates, since the species do not have habitat in Brazil, the owner of the sanctuary sue an order of Habeas Corpus to keep them under their custody, where they live in freedom. Nevertheless, the abolitionist movement is growing in Brazil and as has occurred with most emancipation movements, activists have perceived the need to create a organized movement made up of politicians, scientists, artists, professionals, lawyers, prosecutors, judges and animal protections associations, so that the systematic defense of animal rights can be assured. We need to be aware that the issue is not only legal, but above all political and that legal scholars must supply the theoretical instruments to be used when circumstances are ready for abolition of animal slavery.

In fact, the social inefficacy of the principles and rules of article 225 of the Federal Constitution occurs because of the social obstacles that Lassalle called real factors of power, such as the animal exploitation industry and the psychological blocks put up by the speciesism ideology, that is the legal factors transform into real factors of power.<sup>60</sup>

However, it will be always possible to demand of the Third Power the compatibility of the inferior norms with the constitutional rules, because the real factors of power have prompted significant changes, as the current environmental crisis and the recent scientific discoveries have demonstrated.

The environmental crisis and factors such as global warming, water pollution by food processing industries, the increase in illnesses due to meat consumption, the number of people joining abolitionism and vegetarian movements has grown throughout the world. This is evidence that things are changing.

A sign of progress in Brazil has been the creation of the Animal Abolitionism Institute, during the 1<sup>st</sup> Brazilian and Latin American Vegetarian Congress at Latin America Memorial. It is an institute that joins the Brazilian Vegetarian Society in its efforts to abolish animal slavery. Furthermore, it will help those who do not have legal support for the philosophical background to take a case to court to defend animals' interests.

The importance of this institute, the first in Brazil, is pragmatic and we will probably hear much talk of it in the future. It is important to say that it has among its founding members some of the biggest thinkers and exponents of this subject in Brazil, people such as Laerte Levai, Marly Winckler, Irvênia Prada, Edna Cardozo Dias, Luciano Rocha Santana among others.

At the same time the institute launched the Brazilian Animal Rights Review, a pioneering journal in Latin American. All of this was a very important step to abolish the last nonhuman slavery on Earth.

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<sup>60</sup> See FERDINAND LASSALLE, ON CONSTITUTIONAL SYSTEM (1863).

Even Peter Singer, who faithful to Jeremy's Bentham positivism refused to talk about animal rights, currently defends the extension of human rights to the great primates, argues that we already have enough evidence to affirm that we are of the same species.

I understand that the abolitionist movement is independent of the legislation under the Federal Constitution that grants corporate entity to the animals, because as well as occurs with condominiums, masses declared insolvent, inheritances in abeyance, unborn children, etc., nothing hinders that, having the Constitution recognized them the basic right of not beings treat to cruel form, nothing hinders that they are admitted in judgment in the condition of depersonalized legal citizens.

In these cases, they would be substituted by the Public Prosecution, or represented for the protective societies or its guards, which would be also authorized to use the available writs.



# LEGAL PROTECTION OF ANIMALS: THE BASICS

ELEANOR EVERTSEN AND WIM DE KOK\* \*\*

## 1. INTRODUCTION

Animals in the Netherlands are currently protected by several laws, which are more or less arranged by the functional relationship of animals to humans. There is a law concerning wild animals (*Flora and Fauna Act*) (FFA)<sup>1</sup>, a law concerning laboratory animals (*Experiments on Animals Act*) (EAA)<sup>2</sup>, a law for companion animals and farm animals (*Animal Health and Welfare Act*) (AHWA)<sup>3</sup>. The Minister of Agriculture, Nature and Food Quality<sup>4</sup> is responsible for drafting and enforcing these laws and the accompanying secondary legislation. Responsibility for the EAA is shared with the Minister of Health, Welfare and Sport. The Netherlands is a member state of the European Union (EU), so many rules pertaining to animals are based on the European legislative framework.<sup>5</sup>

Not all human-animal relationships are adequately covered by current legislation. In part this is because certain articles of existing laws have not yet come into effect. Aspects not covered tend to correspond with similar gaps in EU legislation. Under EU rules, member states are allowed to, but not obliged to fill these gaps.<sup>6</sup>

Late in 2005, the former Minister of Agriculture announced his intention

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Wet van 25 mei 1998, houdende regels ter bescherming van in het wild levende planten- en diersoorten, Stb. 402, available at <http://wetten.overheid.nl>.

<sup>2</sup> Wet van 12 januari 1977, houdende regelen met betrekking tot het verrichten van proeven op dieren, Stb. 1996, 565, available at <http://wetten.overheid.nl>.

<sup>3</sup> Wet van 24 september 1992, houdende vaststelling van de Gezondheids- en welzijnswet voor dieren, Stb. 585, available at <http://wetten.overheid.nl> [hereinafter AHWA].

<sup>4</sup> A department comparable to USDA (United States Department of Agriculture) or DEFRA (Department of Environment Food and Rural Affairs) in the UK.

<sup>5</sup> Eugénie C. De Bordes & Eleanor Evertsen, *The Lives of Animals in the European Union*, 22 no. 60 MERKOURIOS 4 (2005). The authors offer some more information on the EU legislative process in general and animal welfare standards in particular.

<sup>6</sup> There are no EU rules concerning the welfare of pets, animals traveling with circuses, dancing bears, racing greyhounds and fighting cocks - to mention but a few subgroups of animals.

to merge several laws within his area of responsibility into one new law in which all aspects of animal health and animal welfare would be regulated coherently and transparently – including rules on animal by-products not intended for human consumption and disciplinary rules for the veterinary profession. The original working title for this project was “Bill on Animals and Animal Derived Products.” In the first official draft, sent to Parliament in March 2008, this was shortened to “Animals Act.”<sup>7</sup> The Animal Health and Welfare Act of 1992 will be repealed. Neither the Flora and Fauna Act nor the Experiments on Animals Act will be integrated in the new law, as the focus is on the economic use of farm animals.

## 2. DEVELOPMENT OF ANIMAL PROTECTION LAW IN THE NETHERLANDS

For a retrospective, we can conveniently start with articles 254 and 455 of the 1886 Criminal Code, in which maltreatment of animals was stated to be a crime and several specific acts were declared minor offences.<sup>8</sup> The reason behind punishing acts of cruelty to animals was the conviction that “maltreatment of animals offended public morals and the decency of man. Because maltreatment was considered a *moral* offence, cruelty against animals committed in public was threatened with heavier sentences than comparable acts committed in private.”<sup>9</sup> As can be inferred from case law, the suffering of the animal victims themselves - mainly dogs and horses used for transportation and other chores, sometimes companion animals or wild animals trespassing on farmers premises - was hardly ever taken into account. In criminal law (as in civil law) animals were considered objects, property, sources of income. Articles 254 and 455 of the Criminal Code were revised several times, to include more aspects of human misbehavior towards animals and to provide for more efficient enforcement, until in the second half of the last century changes in human-animal relations called for a complete overhaul of the system. Especially the ongoing intensification of livestock production presented legislators with a new challenge: how could the law protect vast amounts of animals against suffering, while this very suffering sustained the economy?<sup>10</sup>

The solution was found in the concept of ‘welfare.’ The original European Community (EEC) was all about economics. Legislative efforts were primarily directed at animals kept for farming purposes. As long as a certain (minimal) standard of welfare is guaranteed, daunting numbers of farm animals can legally be bred and

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<sup>7</sup> Een integraal kader voor regels over gehouden dieren en daaraan gerelateerde onderwerpen (Wet dieren), Voorstel van wet, Kamerstukken II, 2007-2008, 31 389, nr. 2. As of yet there is no English version of the draft.

<sup>8</sup> Wet van 15 April 1886 (Wetboek van Strafrecht), Stb. 35.

<sup>9</sup> Eugénie C. De Bordes, *Animal Protection Legislation in The Netherlands: Past and Present*, in *THE HUMAN-ANIMAL RELATIONSHIP: FOREVER AND A DAY*, 200, 201-02 (Francien De Jonge & Ruud Van den Bos eds., 2005).

<sup>10</sup> *Id.* at 204.

raised in regular factory farms. Maltreatment is still taking place, but it is associated mainly - as case law clearly shows - with companion animals or extensively farmed cows.<sup>11</sup> To this day, two distinct approaches can be found in the AHWA — the articles and secondary legislation laying down welfare standards resulting from the application of EU regulations or the implementation of EU directives, the articles 36 on maltreatment and 37 on neglect echoing the old Criminal Law.

In 1981 however, Dutch government introduced a new ethical concept with wide ranging implications. In a policy document entitled “National Government and the Protection of Animals” animals were proclaimed to be more than economic assets: they are living beings, individually embodying a value quite apart from whatever monetary or emotional value humans might derive from them or endow them with.<sup>12</sup> This is an ‘intrinsic value’, as opposed to ‘instrumental value’, and the recognition of this value would henceforth guide and direct government in the vigorous protection of all animals.<sup>13</sup> In legal terms, intrinsic value implies that animals have interests of their own that must be protected against human actions that are detrimental to the animals’ physical and ethological welfare, or otherwise harmful. The permissibility of actions towards animals shall never be taken for granted. The interests of the animals will have to be balanced against the interests of humans, and the balancing should be extricated from the bias towards human interests that has always been our second nature.

The practical consequences of the introduction of this fundamental notion have been debated in the Netherlands ever since. Intrinsic value is mentioned in the preamble of the *Flora and Fauna Act*; in the *Experiments on Animals Act* it is explicitly stated, in article 1a, to be the guiding principle and in the *Animal Health and Welfare Act* it has taken the form of the so-called ‘no, unless’ principle. This means that any action affecting an animal is *forbidden* unless the law or a special regulation expressly permits it; in the *Flora and Fauna Act* this construction has been employed as well. But the meaning of intrinsic value has only been partly clarified<sup>14</sup> and in fact almost all actions involving animals deemed economically necessary are permitted (while some of course are required by EU legislation).<sup>15</sup>

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<sup>11</sup> A typical case is *Gerechtshof 's-Hertogenbosch*, Feb. 2, 2008, nrs. 20-000541-06 and 20-000542-06, available at [www.rechtspraak.nl](http://www.rechtspraak.nl), nrs. BC8289 and BC8291. Case law up to 2004 is presented in EUGÉNIE C. DE BORDES & ELEANOR EVERTSEN, *JURISPRUDENTIE WETGEVING DIERENWELZIJN* (Den Haag: Sdu Uitgevers 2004).

<sup>12</sup> Nota Rijksoverheid en Dierenbescherming, Kamerstukken II, 1981, 16 966, nr. 1 [hereinafter Proposal].

<sup>13</sup> Frans W.A. Brom, *The Use of ‘Intrinsic Value of Animals’ in the Netherlands*, in *RECOGNIZING THE INTRINSIC VALUE OF ANIMALS*, 15, (Marcel Dol et al. eds., 1999).

<sup>14</sup> *Id.* at 15, 16.

<sup>15</sup> AHWA, *supra* note 3. The breeding of foxes and chinchillas for their fur has been banned because their welfare cannot be guaranteed; some mutilations commonly applied in factory farms have been prohibited, often after lengthy debates. The theory that welfare motives are of secondary importance compared to economic interests finds support in the fact that in The Netherlands most offences against the regulations concerning farm animals are punishable on account of the *Economic Offences Act*, Wet van 22 juni 1950, houdende vaststelling van regelen voor de opspor-

Consensus has not been achieved so far and the use of animals has not changed in any other obvious way than by intensification. The legal status of animals in criminal and civil law remains that of objects or commodities. In other words, the protective potential of the concept has yet to be developed.

In article 1.3 of the draft *Animals Act* “the intrinsic value of the animal is acknowledged”, but in the explanatory memorandum not many words are dedicated to this core value. According to the minister, with this acknowledgement officially embedded in the law, current practices can be continued. No changes in the ethical understanding of the use of animals are intended or required.<sup>16</sup> The animals in the title of the draft that is now being debated by Parliament are mostly farm and companion animals; the former are still firmly positioned as (suppliers of) products for the internal and international markets. That in some circles companion animals are also treated as products is surmised, but regulation of breeding and trade is preferably left to human stakeholders.

After analyzing a preliminary draft, in August 2007, more than twenty animal protection societies, united in the Coalition of Animal Welfare Organizations in the Netherlands (CDON)<sup>17</sup>, concluded this sounded distinctly like “business as usual” and decided to publish their view on legislation for animals in a *General Animal Protection Law*. In their opinion, any new legislation should offer animals more protection than the current laws. This would also reflect developments in the EU. Since 1997, animals have been regarded as ‘sentient beings’, originally in the “Protocol on protection and welfare of animals” and lately in the Treaty of Lisbon. In the Protocol it is stated that “[i]n formulating and implementing the Community’s agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”<sup>18</sup> This statement arose from the desire to ensure improved protection and respect for the welfare of animals as sentient beings.<sup>19</sup> The text has been slightly (but in the case of fisheries significantly) amended by the Treaty of Lisbon and in due time a new article shall be inserted in the general Treaty.<sup>20</sup> But

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ing, de vervolging en de berechting van economische delicten, Stb. K 258.

<sup>16</sup> Kamerstukken II, 2007-2008, 31 389, nr. 3, p. 19-21.

<sup>17</sup> Coalitie DierenwelzijnsOrganisaties Nederland (CDON), [www.dierenwet.nl](http://www.dierenwet.nl); [www.al-gemenedierenbeschermingswet.nl](http://www.al-gemenedierenbeschermingswet.nl).

<sup>18</sup> Protocol on Protection and Welfare of Animals, Nov. 10, 1997, OJ C 340 [hereinafter Protocol].

<sup>19</sup> See Tara Camm & David Bowles, Animal Welfare and the Treaty of Rome-A Legal Analysis of the Protocol on Animal Welfare Standards in the European Union, 12 J. OF ENVTL L., 197 (2000); Geert Van Calster, *Animal Welfare, the EU and the World Trade Organization. Member State’s Sovereignty Between a Rock and a Hard Place?*, in THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE, 61 (Anton Vedder ed., 2003). These authors offer a critical analysis of this EU principle.

<sup>20</sup> Protocol, *supra* note 18; Treaty of Lisbon, Dec. 13, 2007, OJ C 306 (amending the Treaty on European Union and the Treaty establishing the European Community), available at [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm). According to the Treaty of Lisbon, an article 6b shall be inserted

quite apart from this European incentive, it is time to keep the Dutch government to its promise, made more than 25 years ago.

### 3. THE ALTERNATIVE: PUTTING FIRST THINGS FIRST

In the alternative to the Animals Act presented here, ‘animal legislation’ is firmly based on ethical principles: acknowledgment of the intrinsic value of animals and the obligation for the government to constantly and unerringly improve the (legal) protection of animals. The *General Animal Protection Act* is aimed at the legislative power. Government is, on account of its authority, obliged to protect animals. The CDON intends to set standards for legislation concerning all possible acts and relations involving all animals and their interests. This resolution can be laid down by adopting the CDON proposal as an official law, or by adding it as a first title to any other pertinent law.

Animals shall finally be done right as sentient, conscious beings, endowed with positive and negative emotions and interests of their own. These interests can be described in terms of respectful treatment, good welfare, good health, integrity, and - where wild animals are concerned - being left in peace.

But to best protect the interests of animals they shall first of all be balanced against human interests, as proposed by the government in 1981.<sup>21</sup> This process shall be applied to all forms of animal use that are now or are proposed to become the subject of regulation, however ‘ordinary’ and accepted they may appear. The ultimate consequence of taking intrinsic value as the central ethical principle is that the use or exploitation of animals can no longer be taken for granted, as if it were a human right. Any infringement on intrinsic value ought to be properly justified. Every way of using animals, traditional or (post) modern, ought to be questioned. Does this particular human interest warrant the accompanying disadvantages to other sentient beings? Are there no alternatives?

We propose to broaden the scope of the 3 R’s to all kinds of animal use: replace, reduce or refine wherever feasible. Practices in which the advantages for people cannot stand up against the disadvantages for the animals involved shall be prohibited. Where the use of animals is deemed to be acceptable, after careful weighing of interests, government must promote those kinds of treatment that are the least damaging to the interests of animals.

Considering the many ways in which animals are used, for many of them protection will probably remain restricted to the protection of their welfare. Legislation is usually lagging years behind recommendations from scientific advisory panels. Therefore we expressly describe it as an ongoing process: at every opportunity

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in the general Treaty, “with the wording of the enacting terms of the Protocol on the protection and welfare of animals; the word ‘fisheries’ shall be inserted after ‘agriculture’, the words ‘and research’ shall be replaced by ‘research and technological development and space’, and the words ‘, since animals are sentient beings,’ shall be inserted after ‘Member States shall’”.

<sup>21</sup> Proposal, *supra* note 12.

government should strive for better protection, based on the latest scientific knowledge. The outcome of current scientific research and recommendations must be the starting point and protection must go wherever possible beyond the minimal welfare standards that just tip the scales in favor of the market.

Human interests are pretty straightforward, as reflected in the idea of animals as goods or commodities. Insofar as they are objects belonging to a natural or legal person, animals enjoy the same protection as all other property. This can be to their advantage, but it does seem to make the appreciation of animals as sentient beings rather difficult. Confiscation orders, for instance, often lead to practical and financial problems because animals, unlike most commodities, have to be fed and cared for.

In the *General Animal Protection Act* these problems are identified and with an eye to the interests of the animals concerned it is proposed to designate the people who are responsible for solving those problems.

Animals will not be raised to the status of legal subjects, but it shall no longer go unnoticed that they are different from lifeless objects. We propose to introduce the ‘animal’ (as a sentient being) in criminal and civil law as well as in animal protection law, as a category in its own right.<sup>22</sup>

#### 4. CHANCES AND CHALLENGES

A coalition of NGO’s has presented politicians and legislators with a tool to protect animals, heading in the direction indicated over 25 years ago by the government itself. The *General Animal Protection Law* reflects the opinions of large numbers of Dutch and European citizens — that animals shall be considered and treated as sentient beings instead of commodities or products.

It will be difficult to convince the responsible legislator, the Minister of Agriculture. Judging from her reactions so far, the Minister is headed in the opposite direction. According to her, the acknowledgement of the intrinsic value of animals does not imply any concrete, normative consequences. It is merely the motive to protect animals.<sup>23</sup> She is not inclined to ask the fundamental questions: against what or whom shall we protect them? How do we go about formulating rules that do not excessively reflect the interests of those, against whose routinely performed actions animals must ultimately be protected?

Drafting a new law provides the perfect opportunity to go beyond habit and to challenge vested interests. The ministers’ current interpretation does neither and comes down to denying the full protective potential of intrinsic value. The Coalition of Animal Welfare Organizations in The Netherlands hopes to engage the

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<sup>22</sup> This proposal has already been realized in Germany, where it is legally acknowledged that animals are not just commodities: “Tiere sind keine Sachen”(Bürgerliches Gesetzbuch, BGBI. I S. 42, § 90a, as inserted by Gesetz zur Verbesserung der Rechtsstellung des Tieres im bürgerlichen Recht von 20. 8. 1990 (BGBI. I S. 1762).

<sup>23</sup> Kamerstukken II, 2007-2008, 31 389, nr. 4, p. 3, 4; nr. 5, p. 6.

legislative powers in a debate where this basic concept of animal protection will finally have its lawful place.

## 5. THE GENERAL ANIMAL PROTECTION LAW

General Act laying down the Principles governing the Legislation concerning Animals, Animal Welfare and Animal Health (General Animal Protection Act)

Having consulted with the Coalition of Animal Welfare Organizations in The Netherlands (CDON), who speak on behalf of all animals which are at any moment or in any way subjected to the jurisdiction of The Netherlands, and who defend the welfare, health and integrity of those animals;

*Based on the generally recognized need for the protection of animals as beings with awareness and sensitivity and from the perspective of animal welfare and health, including the recognition of the intrinsic value of individual animals and, where animal populations in the wild or animal species are concerned, the need for an undisturbed habitat, we consider that it is desirable to give rules relating to animals and human acts involving animals;*<sup>24</sup>

(...):

### *Article 1 [Definitions]*

In this law and provisions founded on it the following definitions shall apply:

*Animal:* every live animal, irrespective of the species it belongs to, whether kept or living in the wild;

*Animal welfare:* a condition of physiological and psychological harmony of the animal with itself and its environment, being the quality of life as experienced by the animal and valued by the animal itself;

*Animal use:* any employment, exploitation or other form of use of animals for human purposes, interests or policies, including the management of nature reserves, execution of government policies and measures as well as the removal of animals from nature, in so far as it can be surmised that by these actions the recognition of the intrinsic value of an animal or animals is violated;

*Animal health:* a condition of complete physical, social and psychological well-being of the animal, and not just the absence of illness or injury;

*Intrinsic value of the animal:* the value an animal possesses and embodies as an individual being with its own life, its own experiences and feelings, simply because it is alive, regardless of any (added) value this animal may hold for humans;

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<sup>24</sup> “We” in preambles to Dutch legislation denotes Her Majesty the Queen.

*Integrity of the animal:* the wholeness and sound condition of the animal and the state of living according to the ways and needs of its species, as well as the ability to sustain itself in a species specific environment;

*Habitat:* areas where wild animals shall be allowed to live as undisturbed as possible, such as nests, burrows, setts or other places used for resting, dwelling or procreation, migration routes and foraging areas;

*Our Minister:* (to be defined);

*Government:* the State, provinces, municipalities, water control authorities and other bodies that may derive statutory powers from the Constitution, including semi-government institutions.

#### *Article 2 [Scope]*

This law applies to all legislation and rules formulated in The Netherlands, relevant to animals or their habitat, whether of national origin or in the context of international or European legal commitments.

#### *Article 3 [Foundations]*

1. In drafting, evaluating and amending legislation concerning animals, recognition of the intrinsic value of the animal is the basic principle.
2. This recognition is expressed in the ‘no, unless’ principle: the use of animals is prohibited, unless its necessity can be argued and justified within the framework of assessment given in article 10.
3. The use of animals as permitted under paragraph 2 will be subject to conditions.
4. The promotion of a respectful treatment of animals will always be a consideration in the drafting, evaluation and amending of legislation concerning animals.

#### *Article 4 [Legal status of animals]*

1. In drafting, evaluating and amending legislation concerning animals it will be taken into account that animals, as sentient beings, have consciousness and feelings.
2. Animals, being creatures with consciousness and feelings, cannot be solely regarded as objects or commodities.
3. Where the interests of the animal and the purpose of this law require, the animal will be attributed a status which distinguishes it from that of ‘object’ under Civil Law or the status of ‘evidence’ or ‘object’ in the Criminal Code, the Code of Criminal Procedure, the Economic Offences Act and the General Administrative Law in case of administrative enforcement.
4. This status will be laid down in the pertinent legislation.

*Article 5 [Interests of the animal: animal health, animal welfare and integrity]*

1. Improvement and enforcement of the legally required level of animal health and animal welfare and the integrity of the animal will be of ongoing concern to the government.
2. The preparation, drafting, evaluation and modification of legislation concerning animals will be aimed at the improvement of animal health, animal welfare and the preservation of the integrity of animals.
3. The opportunities that European regulations and directives and international treaties and conventions provide for the improvement of animal welfare and animal health through progressive national legislation and regulation will be used to the fullest possible extent.
4. Where animals in the wild are involved, improvement and enforcement of the legal standards of animal health, animal welfare and integrity of the animal specifically aim to guarantee that these animals can lead their lives undisturbed, according to their species specific behavior and in their preferred habitat.

*Article 6 [Guarantees of animal health, animal welfare and integrity of the animal]*

1. Legislation concerning animals that are kept will take into account to the fullest extent the following premises and considerations concerning animal health and animal welfare:
  - a. animals shall, at appropriate intervals, receive a sufficient quantity of wholesome food, appropriate to their species and age, to satisfy their nutritional needs;
  - b. animals, irrespective of whether they are kept in buildings or outdoors, shall have access to a sufficient amount of water of appropriate quality;
  - c. animals have to be accommodated well; this implies that — if this meets their social needs — they are to be housed with individuals of the same species, that they have sufficient space in order to move about as needed, have a comfortable resting place where they can groom or withdraw as needed and, where desired, a separate defecation area;
  - d. for animals that are kept in buildings the climate (temperature, air circulation, relative air humidity) will be controlled according to their needs;
  - e. animals that are kept outdoors shall have sufficient access to shelter from adverse weather conditions;
  - f. animals shall be kept in good physical and mental health, which implies the absence of injuries, illness, pain and chronic fear or stress;
  - g. animals shall be able to display their species specific behavior, which means that they can display their normal social behavior; part of which

is play behavior which must be stimulated through the construction of the accommodation and presenting appropriate toys;

- h. animals shall be taken care of by a sufficient number of staff who possess the appropriate skills, knowledge, professional competence and empathy.
2. The premises and guarantees as mentioned in paragraph 1 will be actively promoted by the government.
3. To assess the welfare of the animals and to promote positive effects on behavior through housing and care, sufficiently clear and objective welfare parameters must be used.
4. Legislation concerning animals that are the property of a natural person or a legal person is aimed at defining the responsibilities of owners, keepers and caretakers in order to maximize the premises and guarantees formulated in paragraph 1.
5. New housing systems for animals kept for farming purposes have to be officially tested to see if they can meet the requirements in paragraph 1 before they can be put into practice.

*Article 7 [Guarantees concerning animal in the wild]*

1. Legislation concerning animals in the wild who have no owner is aimed at guaranteeing these animals a life as undisturbed as possible in their natural habitat, in order to guarantee them optimal freedom.
2. The government guarantees that if sanctuary of wild animals is called for, this sanctuary will comply with the principles of article 6.

*Article 8 [Use of Definitions]*

Legislation concerning animals will use the definitions provided in this law as far as possible.

*Article 9 [Evaluation]*

Legislation concerning animals will include the requirement for timely, complete and regular evaluation.

*Article 10 [Framework for the Assessment of Animal Use]*

1. The use of animals is prohibited unless explicitly permitted in legislation.
2. Animal use permitted in legislation will be subject to permanent review, based upon the animals' interests and the principles formulated in this law.
3. The 'no, unless' principle will be explicitly laid down and applied as the basic principle regulating animal use in legislation, particularly where other interests have to be weighed.
4. Where legislation gives provisions on animal use the interests of man and animal will be outlined explicitly, completely and clearly in a legislative Framework for the Assessment of Animal Use.

5. The Framework as mentioned in paragraph 4 lists the interests of man and animal in a balanced and objective way.
6. In establishing the Framework for the Assessment of Animal Use, as mentioned in paragraph 4, the recognition of the intrinsic value of the animal can never by operation of law be made subordinate to the interests of man.
7. The Framework will fully take into account the requirements of this law.
8. If it is not sufficiently clear whether or if so, to what extent a certain treatment of animals will have a negative impact on their welfare, it is assumed that there will be a negative impact, and this precautionary principle will be used as the default position.
9. In addition to paragraph 1, it is also possible to impose a more specific ban on the use of certain animals, animal species or animal categories as regards particular activities.

*Article 11 [Use of alternatives]*

1. In drafting the Framework for the Assessment of Animal Use as mentioned in article 10, the use of animals will be limited by requiring alternatives for animal use wherever possible.
2. Concerning the alternatives mentioned in paragraph 1, legislation involving animals should always fully take into account the possibilities for replacement, reduction and refinement of animal use (the “3 R’s”).
3. Replacement as mentioned in paragraph 2 is preferred to reduction of animal use.
4. The government will stimulate, also through legislation, the use of alternatives.

*Article 12 [Scientific advancement]*

1. Provisions based on this law, particularly on articles 6, 10 and 11, will be founded on current scientific knowledge.
2. Legislation concerning animals will allow room for adjustment based on the latest scientific knowledge in the fields of animal welfare and animal health.
3. In designing the Framework for the Assessment of Animal Use as mentioned in article 10 the development of new scientific views will be fully taken into account.
4. The Framework as mentioned in article 10 will be updated and adjusted as necessitated by new scientific knowledge.

*Article 13 [Legal status and representation of animals]*

1. It should always be evident whether or not an animal belongs to an owner in the legal sense of that term.
2. For every animal it should be evident who has the power of disposal of and the responsibility for that animal, and as clearly as possible what the concrete responsibilities are.
3. In legislation it must be stated unequivocally what the legal status of the

animals concerned is, particularly whether it regards animals that are kept or not and whether man has power of disposal over the animals involved.

4. Legislation involving animals will state where applicable who has the power of disposal of and responsibility for the animals concerned, and what the concrete responsibilities are.
5. If the interests of one or more animals are served by this, organizations who have laid down in their statutes the aim to legally represent animals shall have the opportunity to do so.

*Article 14 [Animal Abuse]*

1. Specific human actions that constitute an infringement on the interests of animals as comprised by animal health, animal welfare and the integrity of the animal, will be prohibited in separate provisions.
2. The prohibitions as mentioned in paragraph 1 will take fully into account the burden of proof, enforceability and possibilities for prosecution, considering that in the case of violation of such prohibitions the animals involved will not be able to provide testimony.

*Article 15 [Help in Need]*

In legislation concerning animals it will be laid down that everyone has the obligation to provide animals in need with the necessary care without delay or provide for this care in case one cannot be reasonably expected to offer it personally.

*Article 16 [Coming into force]*

(...)

*Article 17 [Short title]*

This Act may be cited as the General Animal Protection Act.

# FIDO GOES TO THE LAB: AMENDING THE ANIMAL WELFARE ACT TO REQUIRE ANIMAL RESCUE FACILITIES TO DISCLOSE POUND SEIZURE PRACTICES TO PET OWNERS

JULI DANIELLE GILLIAM

## I. INTRODUCTION

With more people owning pets than ever before and a deepening appreciation of the human-animal bond, it has become increasingly difficult to separate the lab animal from the family pet.<sup>1</sup>

The Humane Society of the United States (“HSUS”) estimates that approximately six to eight million animals are turned in or surrendered to animal pounds and shelters<sup>2</sup> every year. Of those animals, approximately thirty percent of dogs and between two to five percent of cats are reunited with their owners.<sup>3</sup> The future for the remaining seventy percent is not so certain. Three to four million animals are adopted to new homes.<sup>4</sup> Another three to four million are euthanized.<sup>5</sup> What many people do not realize is that there is a third alternative. In many states, impounded animals that are neither adopted nor euthanized may be sold to research laboratories and subject to lives of unregulated experimentation.<sup>6</sup> Today, around 70,000 dogs and 20,000 cats are used for research each year in the United States.<sup>7</sup>

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<sup>1</sup> Douglas Starr, *A Dog's Life, When Scientists at the Tufts Veterinary School Fractured the Legs of Six Dogs to See How they Healed, and Then Euthanized the Dogs, All in the Name of Research, the Ensuing Outcry Reopened the Argument Over How Far is Too Far When it Comes to Using Animals to Advance Medicine*, BOSTON GLOBE, Apr. 18, 2004, at 20.

<sup>2</sup> It should be noted that the terms “pound” and “shelter” are today used interchangeably. Originally, pounds were established and financed by local municipalities while shelters were run by humane societies. F. BARBARA ORLANS, *IN THE NAME OF SCIENCE: ISSUES IN RESPONSIBLE ANIMAL EXPERIMENTATION* 210 (1993). The HSUS estimates that there are between 4,000 and 6,000 pounds and shelters in the United States. HSUS PET Overpopulation Statistics, *available at* [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/pet\\_overpopulation\\_and\\_ownership\\_statistics/hsus\\_pet\\_overpopulation\\_estimates.html](http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html), (last visited January 22, 2009).

<sup>3</sup> HSUS Pet Overpopulation Statistics, *available at* [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/pet\\_overpopulation\\_and\\_ownership\\_statistics/hsus\\_pet\\_overpopulation\\_estimates.html](http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html), (last visited January 22, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> An animal may spend between 7 days and 5 years at a pound before its death. Orland, *supra* note 2, at 212. The Animal Welfare Act regulates husbandry but does not regulate the ways animals are used in experiments. Shigehiko Ito, *Beyond Standing: A Search for a New Solution in Animal Welfare*, 46 SANTA CLARA L. REV. 377, 403 (2006).

<sup>7</sup> USDA, ANIMAL CARE ANNUAL REPORT OF ACTIVITIES 38 (2007), *available at* <http://www.aphis>.

The Animal Welfare Act (“AWA”) was enacted in 1966 to regulate animal experimentation, but the Act did not directly address pound seizure; the process whereby pounds and shelters sell or otherwise release unwanted dogs and cats to research laboratories for experimentation, research or teaching, until it was amended in 1990.<sup>8</sup> The 1990 amendments, dubbed the “Pet Theft Act,” create holding period requirements for shelters and certification requirements for dealers but do not require pounds and shelters to disclose pound seizure practices to pet owners. In this way, the AWA fails to adequately protect both the animals and the owners of animals subject to pound seizure.

This paper relies on both traditional property concepts as well as the inherent value of household pets in arguing that the AWA should be amended to require pounds and shelters to disclose to pet owners surrendering their animals the possibility of seizure under state law. On the one hand, an owner’s property interest in her emotional well-being is damaged when her pet is sold for research without her knowledge. On the other hand, the vulnerable household pet, that has come to depend on humans, both physically and psychologically, is sent off for research.

The first part of this paper summarizes the history of pound seizure. The second part discusses its prevalence in the United States today. The third section examines the AWA as it stands today, while the fourth section identifies its gaps in protection. The paper then proposes an amendment to the AWA based on an analysis of current pound seizure legislation pending in Congress as well as state law statutes regarding notice and disclosure. The proposed amendment includes both a notice provision, which requires signage at shelters, and an affirmative consent provision, which allows owners to exempt their surrendered pet from research. After a discussion of the positive and negative implications of the proposed amendment, the paper concludes that the proposed amendment should be adopted. By arguing in favor of a disclosure provision, this note in no way intends to legitimize or accept the practice of pound seizure. Nor does it conclusively present that purpose-bred animals should be favored in animal research over pound animals. Rather, it attempts to provide one mechanism to ameliorate the unjust effects of pound seizure for as long as the practice continues.<sup>9</sup>

## II. HISTORY OF POUND SEIZURE

The origins of modern pound seizure can be traced to the National Society for Medical Research (“NSMR”), which was founded in the mid-1940s by Dr. A.J. Carlson, Dr. Andrew C. Ivy, and Dr. George Wakerlin in the aftermath of World

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usda.gov/publications/animal\_welfare/content/printable\_version/2007\_AC\_Report.pdf.

<sup>8</sup> Nancy Goldberg Wilks, *The Pet Theft Act: Congressional Intent Plowed Under by the United States Department of Agriculture*, 1 ANIMAL L. 103, 103 (1995).

<sup>9</sup> Starr, *supra* note 1, at 20 (“We look forward to the day when we can put an end to using animals in research...but for now we’re focusing on achievable goals.”) (quoting Andrew Rowan).

War II.<sup>10</sup> In response to the Government directing greater grants towards medical science,<sup>11</sup> the NSMR devoted its efforts to enacting state laws, which would create a plentiful supply of laboratory animals. Now commonly referred to as “pound seizure” laws, the laws required animal shelters and public pounds to surrender dogs and cats to scientific institutions for use in experiments.<sup>12</sup> One justification for such laws was that dog dealing and stealing would cease if animals were made available from shelters.<sup>13</sup> The NSMR was successful in its mission and pound seizure would soon create an ongoing battle between medical science and animal welfare.

The first pound seizure laws were of various types. The first forced surrender law, passed in Minnesota in 1948, required the release of animals impounded at pounds and shelters receiving funds from taxes.<sup>14</sup> Another pound seizure law, passed in Wisconsin in 1949 was more severe, requiring the release of any stray animal, whether from a private or public shelter.<sup>15</sup>

The animal welfare groups found themselves at an extreme disadvantage in fighting pound seizure laws. To begin, they were too understaffed and underfunded to wage successful legislative battles. In fact, the humane organizations were unaware that the first pound seizure law had been introduced until it had gone through both Houses and been signed by the Governor of Minnesota.<sup>16</sup> Additionally, the public sentiment seemed to support the medical community.<sup>17</sup> In the mid 1940s, city ordinances requiring pound seizure passed by public referendum in both Baltimore and Los Angeles.<sup>18</sup> Lastly, the NSMR sought to undermine any hopes the humane organizations had of negotiating with the medical community.<sup>19</sup> When Robert Sellar, the President of the American Humane Association (“AHA”), arranged to meet with the NSMR, the NSMR alerted anti-vivisection groups who brought the issue to national attention. The national attention backfired and encouraged state legislatures, such as South Dakota, Oklahoma, Connecticut, Ohio and Iowa to enact statutes mandating that pounds and shelters release at least some impounded animals for experimentation.<sup>20</sup>

<sup>10</sup> Christine Stevens, *Laboratory Animal Welfare*, in ANIMALS AND THEIR LEGAL RIGHTS 67 (The Animal Welfare Institute ed., 4th ed. 1990); Cecile C. Edwards, *The Pound Seizure Controversy: A Suggested Compromise in the Use of Impounded Animals for Research and Education*, 11 J. ENERGY, NAT. RESOURCES & ENVTL. L. 241, 242 (1991).

<sup>11</sup> Federal funding disbursed through the NIH was \$0.7 million in 1945; \$98 million in 1956, and \$2,000 million in 1988. Orlans, *supra* note 2, at 212.

<sup>12</sup> ANDREW N. ROWAN, OF MICE, MODELS AND MEN: A CRITICAL EVALUATION OF ANIMAL RESEARCH 150 (1984); Stevens, *supra* note 10, at 67.

<sup>13</sup> Stevens, *supra* note 10, at 70. This argument, however, proved false. The very case that led to the passage of the Animal Welfare Act involved a New York hospital that purchased dogs from a Pennsylvania dog dealer even though it was entitled to free dogs from the ASPCA. Some laboratories prefer to buy from dealers rather than take advantage of pound seizure laws. *Id.*

<sup>14</sup> *Id.* at 67.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Edwards, *supra* note 10, at 243; Rowan, *supra* note 12, at 150.

<sup>18</sup> Rowan, *supra* note 12, at 150.

<sup>19</sup> *Id.* at 151.

<sup>20</sup> Stevens, *supra* note 10, at 67-68.

It would not be until animal welfare groups were able to visit research labs in the 1960s, and document conditions of abuse and neglect, that public sentiment would begin to shift.<sup>21</sup> In 1960, for example, the Animal Welfare Institute documented gross filth, and a massive infestation of ticks, roaches and other insects at St. Vincent's Hospital in New York. In 1963, the Institute observed similar conditions at the New York University Dental school where feces were allowed to build up so long that there was nowhere to step foot in the dog runway and wild rodents ran about through the animals' cages.<sup>22</sup> Such knowledge soon led to many reform movements. In 1966, Congress passed the Laboratory Animal Welfare Act (now the "Animal Welfare Act").<sup>23</sup> By 1973, Hawaii, Maine and Pennsylvania had state laws prohibiting pound seizure.<sup>24</sup> Then in 1979, the New York legislature repealed the Hatch-Metcalf Act, which had required all pounds and humane societies receiving public funds to surrender animals to scientific institutions. Soon, Massachusetts, Connecticut and West Virginia followed suit, repealing similar acts.<sup>25</sup> Today, the nation remains split.

### III. STATE POUND SEIZURE STATUTES: HOW PREVALENT IS THE PROBLEM TODAY?

While pound seizure is becoming less common, many pounds and shelters in various states around the nation still engage in the activity. At the National Institutes of Health ("NIH") research facilities in 1964, one-hundred percent of all animals used were random source, but by 1973 this number fell to eighty-five percent.<sup>26</sup> By 1989, it was estimated that nationally about sixty percent of all animals used were pound animals (approximately 94,000 dogs); while the remaining forty percent were purpose-bred. In 1991, 108,000 dogs and 35,000 cats were used in research nationwide. More recently, in 2007, the USDA reports a total of 1,027,450 animals were the subjects of experimentation.<sup>27</sup> Of those animals, 72,037 were dogs and 22,687 were cats.<sup>28</sup> These may appear small numbers contrasted with the three to four million animals that the HSUS estimates are euthanized each year, yet these numbers are significant given the lifetime of unregulated experiments to which the animals are subject. Most alarming is that the numbers appear to be on the rise: the number of dogs used in research rose 8 percent from 2006 to 2007.<sup>29</sup>

Currently, only fifteen states expressly prohibit the practice of pound seizure

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<sup>21</sup> Edwards, *supra* note 10, at 243 (citing NIVEN, *THE HISTORY OF THE HUMANE MOVEMENT* 130 (1967)).

<sup>22</sup> Stevens, *supra* note 10, at 69.

<sup>23</sup> *Id.* at 70.

<sup>24</sup> Rowan, *supra* note 12, at 151.

<sup>25</sup> Stevens, *supra* note 10, at 70.

<sup>26</sup> Orlans, *supra* note 2, at 209.

<sup>27</sup> USDA, *supra* note 7, at 38.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 10-11.

including the District of Columbia.<sup>30</sup> They are as follows: Connecticut;<sup>31</sup> Delaware;<sup>32</sup> Hawaii;<sup>33</sup> Illinois;<sup>34</sup> Maine;<sup>35</sup> Maryland;<sup>36</sup> Massachusetts;<sup>37</sup> New Hampshire;<sup>38</sup> New Jersey;<sup>39</sup> New York;<sup>40</sup> Rhode Island;<sup>41</sup> South Carolina [citation is S.C. CODE ANN. § 47-3-60 (2002)]; Vermont;<sup>42</sup> West Virginia;<sup>43</sup> and Washington D.C. [citation is ACT 17-493 (2008)]. Of the above, Massachusetts is the only state to prohibit both the sale of an impounded animal within its borders and the sale of an impounded animal brought across state borders.<sup>44</sup>

Conversely, three states require pound seizure. The first state that requires pound seizure was also the first state to enact a pound seizure law – Minnesota.<sup>45</sup> The other two states that still require pound seizure are Oklahoma<sup>46</sup> and Utah.<sup>47</sup> All of the three states that have statutes requiring pound seizure have enacted either a “right-to-know” or an “affirmative consent” based provision, or both.<sup>48</sup>

Additionally, eleven states allow pound seizure. They are: Arizona;<sup>49</sup>

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<sup>30</sup> Even in states prohibiting pound seizure, there are some ways around the law. For example, animal wardens will individually sell animals to dealers, who in turn sell them to research labs. This practice has greatly declined since the enactment of the AWA. Stevens, *supra* note 10, at 115.

<sup>31</sup> CONN. GEN. STAT. § 22-332a (2007).

<sup>32</sup> 3 DEL. C. § 8001 (2003).

<sup>33</sup> HAW. REV. STAT. § 143-18 (2003).

<sup>34</sup> 510 ILL. COMP. STAT. 5/11 (2005).

<sup>35</sup> 17 ME. REV. STAT. § 1025 (2003).

<sup>36</sup> MD. ANN. CODE § 10-617 (2002).

<sup>37</sup> MASS. ANN. LAWS ch. 140, § 151 (2003).

<sup>38</sup> N.H. REV. STAT. ANN. § 437:22 (2007).

<sup>39</sup> N.J. REV. STAT. § 4:19-15.16 (2003).

<sup>40</sup> N.Y. AGRIC. & MKTS. LAW § 118 (2003).

<sup>41</sup> R.I. GEN. LAWS § 4-19-12 (2005).

<sup>42</sup> VT. STAT. ANN. tit. 13, § 352(7) (2003).

<sup>43</sup> W. VA. CODE § 19-20-23 (2008).

<sup>44</sup> MASS. ANN. LAWS ch. 140, § 174D (LexisNexis 2003) (“no person, institution, animal dealer or their authorized agents shall transport, or cause to be transported, any animal obtained from any municipal or public pound, public agency, or dog officer acting individually or in an official capacity into the commonwealth for purposes of research, experimentation, testing, instruction or demonstration.”).

<sup>45</sup> MINN. STAT. § 35.71 (2008).

<sup>46</sup> OKLA. STAT. tit. 4, § 394 (2008); OKLA. STAT. tit. 4, § 501 (2008).

<sup>47</sup> UTAH CODE ANN. § 26-26-3 (2008); UTAH CODE ANN. § 26-26-4 (2008).

<sup>48</sup> MINN. STAT. § 35.71 (2008); OKLA. STAT. tit. 4 § 394 (A)(2)&(4) (2008); UTAH CODE ANN. § 26-26-3 (2008).

<sup>49</sup> ARIZ. REV. STAT. Ann. § 11-1013 (2007).

California;<sup>50</sup> Colorado;<sup>51</sup> Iowa;<sup>52</sup> Michigan;<sup>53</sup> Ohio;<sup>54</sup> Pennsylvania [citation is 3 PA. CONS. STAT. § 459-302 (2003) (pound seizure is prohibited in Pennsylvania for dogs but allowed for other animals); South Dakota;<sup>55</sup> Tennessee;<sup>56</sup> Wisconsin;<sup>57</sup> and Washington D.C. Only three of these eleven states have either “right-to-know” or “affirmative consent” based provisions in effect. They are California, Colorado, and Ohio.<sup>58</sup> Iowa used to require affirmative consent but that provision was repealed in 2008. Wisconsin, which only subjects dogs to pound seizure, also has protections in place so that former pets are not sold to research labs. Wisconsin limits those dogs that can be sold to labs to “unclaimed dogs” and excludes dogs surrendered by their owners from the definition.<sup>59</sup>

Lastly, there are twenty-two states that delegate decisions regarding pound seizure to municipalities, cities, or other local authorities. They are: Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Texas, Washington, and Wyoming. Given that at least 2000 of the 2500 animal control facilities in existence in this country in the early 1990s were run by towns and municipalities, and that publicly financed pounds are the most likely to voluntarily provide animals for experimentation,<sup>60</sup> the amount of pound seizure practiced in these twenty-two states could be a significant portion of that practiced nationwide.

Virginia is the only state without any legislation addressing pound seizure.

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<sup>50</sup> CAL. CIV. CODE § 1834.5 (2008); CAL. CIV. CODE § 1834.6 (2008); CAL. CIV. CODE § 1834.7 (2008). Although California state law allows the release of animals from shelter facilities, all California counties are currently exercising bans on pound seizure. *Id.*

<sup>51</sup> COLO. REV. STAT. § 35-42.5-101 (2003).

<sup>52</sup> IOWA CODE § 162.20, 5(c) (2008) (A pound or animal shelter may transfer a dog or cat to a research facility without sterilizing it); IOWA CODE § 145B.2 (2002) (repealed 2008); IOWA CODE § 145B.3 (2002) (repealed 2008) (“A dog lawfully licensed at the time of its seizure shall not be tendered unless its owner consents in writing”); IOWA CODE § 145B.4 (2002) (repealed 2008); IOWA CODE § 145B.6 (2002) (repealed 2008).

<sup>53</sup> MICH. COMP. LAWS §§ 287.388, 287.389 (2003).

<sup>54</sup> OHIO. REV. CODE ANN. § 955.16(D) (2006) (“An owner of a dog that is wearing a valid registration tag who presents the dog to the dog warden or poundkeeper may specify in writing that the dog shall not be offered to a nonprofit teaching or research institution or organization, as provided in this section”).

<sup>55</sup> S.D. CODIFIED LAWS § 40-1-34 (2008); S.D. CODIFIED LAWS § 34-14-8 (2008).

<sup>56</sup> TENN. CODE ANN. § 44-17-112 (2008).

<sup>57</sup> WIS. STAT. § 174.13 (2) (2008); WIS. STAT. § 174.13 (4) (2008).

<sup>58</sup> CAL. CIV. CODE §§ 1834.5, 1834.7 (2008); COLO. REV. STAT. 35-42.5-101 (1)(A)(I)&(III) (2003); IOWA CODE § 145B.3 (2002)(repealed 2008); OHIO. REV. CODE ANN. § 955.16 (D) (2006).

<sup>59</sup> WIS. STAT. § 174.13 (2) (2008) (“A dog left by its owner for disposition is not considered an unclaimed dog under this section”).

<sup>60</sup> Orlans, *supra* note 2, at 210.

#### IV. EXISTING LAW: THE PROTECTION CURRENTLY AFFORDED BY THE ANIMAL WELFARE ACT

Beginning in 1880, animal welfare supporters in the United States sought to protect laboratory animals through federal legislation.<sup>61</sup> Because of American society's widespread belief that animal experimentation helps to improve the physical and psychological lives of humans, such experimentation often is exempted from state anti-cruelty statutes.<sup>62</sup> Not until 1966 did Congress enact the Laboratory Animal Welfare Act ("LAWA") to prevent companion animals from being stolen from their homes and sold to research facilities.<sup>63</sup> Perhaps because of the belief that pound seizure would cut down on pet theft, the Act, as originally enacted did not specifically address the issue. Congress would not begin to address pound seizure until 1990 despite several amendments in the interim.

The LAWA of 1966 had four main parts.<sup>64</sup> First, the Secretary was authorized to "promulgate standards and record-keeping requirements governing the purchase, handling, or sale of dogs and cats by dealers or research facilities."<sup>65</sup> The Secretary could also "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers at research facilities."<sup>66</sup> Second, the Act required dealers to be licensed,<sup>67</sup> and research facilities to be registered.<sup>68</sup> The LAWA also required dealers to keep a dog or cat for at least five business days after acquiring one before selling it,<sup>69</sup> and prohibited research facilities from buying dogs or cats from anyone but a licensed dealer.<sup>70</sup> Third, the LAWA required research facilities to keep records of dogs and cats,<sup>71</sup> and dealers to mark or identify dogs and cats transported, delivered, purchased or sold in commerce.<sup>72</sup> Fourth, the Secretary was permitted to impose various penalties for violations, including suspension or revocation of a dealer's license and imprisonment of dealers.<sup>73</sup>

The LAWA became the Animal Welfare Act when it was amended in

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<sup>61</sup> *Id.* at 42.

<sup>62</sup> DANIEL S. MORETTI, *ANIMAL RIGHTS AND THE LAW* 1 (Irving J. Sloan ed., Oceana Publications, Inc. 1984).

<sup>63</sup> Ito, *supra* note 6, at 380.

<sup>64</sup> GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* 192 (Temple University Press 1995).

<sup>65</sup> *Id.* at 192 (quoting Laboratory Animal Welfare Act, Pub. L. No. 89-544, § 12, 80 Stat. 350 (1966)).

<sup>66</sup> *Id.* (quoting Laboratory Animal Welfare Act § 13).

<sup>67</sup> *Id.* at 193 (citing Laboratory Animal Welfare Act §§ 3, 4).

<sup>68</sup> *Id.* at 193 (citing Laboratory Animal Welfare Act § 6).

<sup>69</sup> *Id.* (citing Laboratory Animal Welfare Act § 5). An animal may spend up to 30 days at a dealer's facility before being transferred to a research lab, Orleans, *supra* note 2, at 212.

<sup>70</sup> Francione, *supra* note 64, at 193 (citing Laboratory Animal Welfare Act § 7).

<sup>71</sup> *Id.* (citing Laboratory Animal Welfare Act § 10).

<sup>72</sup> *Id.* (citing Laboratory Animal Welfare Act § 11).

<sup>73</sup> *Id.* (citing Laboratory Animal Welfare Act § 19(a), (c)).

1970.<sup>74</sup> The Act was subsequently amended in 1976, 1985, 1990, and 2002.<sup>75</sup> The 1970 amendment expanded the scope of the AWA's coverage to include *any* "warm-blooded animal" that the Secretary of Agriculture ("Secretary") determined was "being used, or [wa]s intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet."<sup>76</sup> The Act was amended in 1976 to prohibit animal fighting and regulate the commercial transportation of animals. The amendment also imposed the same fines on research facilities as on exhibitors and dealers and set the same standards for government research facilities as for private ones.<sup>77</sup> According to the Congressional Statement of Policy to the 1976 Amendments,<sup>78</sup> the AWA had three purposes: 1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets receive humane care and treatment; 2) to assure the humane treatment of animals during transportation in commerce;<sup>79</sup> and 3) to protect animal owners from theft of their animals by preventing the sale or use of stolen animals.<sup>80</sup> These goals are sometimes referred to as the "Three R's—"replacing or reducing animal experimentation wherever possible and refining the research to minimize suffering."<sup>81</sup>

Congress again amended the AWA in 1985 when it enacted the Improved Standards for Laboratory Animals Act ("ISLAA").<sup>82</sup> ISLAA requires each facility using test animals to create an Institutional Animal Care and Use Committee ("Committee") of at least three people. One member must be a veterinarian and one must be external to the organization. If the facility does not make the changes that the Committee advises, the Committee must report the facility to the Animal and Plant Health Inspection Service.<sup>83</sup> Aside from submitting Committee reports, animal-testing facilities must submit a report to the Secretary explaining any deviations from approved protocol.<sup>84</sup>

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<sup>74</sup> Ito, *supra* note 6, at 382; Moretti, *supra* note 62, at 42.

<sup>75</sup> Stephanie J. Engelsman, "World Leader"-- At What Price? A Look at Lagging American Animal Protection Laws, 22 PACE ENVTL. L. REV. 329, 332 (2005). It should be noted that the progress the AWA was slowly making amendment-by-amendment came to a halt in 2002. Despite the Act's original intent to protect all "warm-blooded laboratory animals," Congress passed an amendment excluding birds, mice, and rats – which comprise 95% of the animals used in research – from its protection, *id.* at 333. Thus, as of 2002, the Animal Welfare Act covered only 5% of animals used in federal research facilities, *id.*

<sup>76</sup> Ito, *supra* note 6, at 382-83. The effect of this amendment was short-lived. In 1972, the Secretary issued regulations specifically excluding birds, mice, rats, horses, and farm animals from coverage under the Act, SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, ANIMAL LAW: CASES AND MATERIALS, 375 (3d. ed. 2006).

<sup>77</sup> Waisman, *supra* note 76, at 375. Prior to the '76 Amendments, research facilities could only be fined if they violated a cease and desist order, *id.*

<sup>78</sup> 7 U.S.C. § 2131 (1976).

<sup>79</sup> See Moretti, *supra* note 62, at 95. "The AWA requires the Secretary Of Agriculture to promulgate regulations setting forth humane standards for animals transported in commerce."

<sup>80</sup> See *id.* at 43.

<sup>81</sup> Starr, *supra* note 1, at 20.

<sup>82</sup> Ito, *supra* note 6, at 384.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 384-85.

On November 28, 1990, Congress amended the AWA again to include provisions aimed to prevent the theft and sale of pets.<sup>85</sup> Due to these amendments, commonly referred to as the “Pet Theft Act,” the AWA now regulates pound seizure in two ways: 1) it establishes holding period requirements for entities; and 2) it establishes certification requirements for dealers. The holding period section of the 1990 amendments requires an entity to hold and care for a cat or dog for at least five days (including at least one weekend day) before selling it to a dealer so that the pet has time to be claimed by its original owner or adopted by a new owner.<sup>86</sup> An “entity” is a publicly owned pound or shelter, a private shelter or organization that has contracted with the state or local government to release animals, and a research facility licensed by the Department of Agriculture.<sup>87</sup> The holding requirements require no notice be given to a person surrendering an animal that after the five day holding period an animal may be sold for research.

The certification requirements, on the other hand, are particularly important for this discussion because they do require and acknowledge a limited need for disclosure. The certification section requires a dealer to provide any individual or entity acquiring a *random source* dog or cat from it with a valid certification.<sup>88</sup> “Random sources” include “dogs and cats obtained from *animal pounds or shelters*, auction sales, or from any person who did not breed and raise them on his or her premises.”<sup>89</sup> Because animal pounds and shelters are included in the definition of “random source,” they fall within the ambit of the amendment’s certification requirements.

To be valid, a certification must state the following: 1) the dealer’s name, address, and Department of Agriculture license and registration number (if such number exists); 2) the recipient’s signature, along with his or her name, address, and Department of Agriculture number if he or she has one; 3) a description of the dog or cat being provided, including the species and breed, sex, date of birth if known, colors and markings, and any other information the Secretary determines is appropriate; 4) the name and address of the person, pound or shelter from which the dealer acquired the dog, “*and an assurance that such person, pound, or shelter was notified that such dog or cat may be used for research or educational purposes;*” 5) the date the dog or cat was transferred from the dealer to the recipient; 6) a statement by the pound or shelter that it complied with the holding requirements if the dealer acquired the pet from a pound or shelter; and 7) any other information the

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<sup>85</sup> Wilks, *supra* note 8, at 103, 108.

<sup>86</sup> *Id.* at 103; 7 U.S.C. § 2158(a)(1) (1990). In 2004, Sacramento County Animal Shelter was sued under the AWA for not following the Act’s holding requirements. *See e.g.*, Julian Guthrie, *Shelter Sued by Animals’ Friends; County Accused of Untimely Killing of Dogs and Cats*, S. F. CHRON., Mar. 25, 2004, at B1.

<sup>87</sup> 7 U.S.C. § 2158(a)(2) (1990).

<sup>88</sup> 7 U.S.C. § 2158(b)(1) (1990).

<sup>89</sup> 9 C.F.R. § 1.1 (2003) (emphasis added).

Secretary of Agriculture shall determine is appropriate.<sup>90</sup> Research facilities must hold the original certificate and dealers must hold onto a copy of the certificate for at least one year following the transfer of an animal from the dealer to the research facility.<sup>91</sup> A copy of the certificate should also accompany any subsequent transfers of animals between research facilities.<sup>92</sup>

## V. GAPS IN THE ANIMAL WELFARE ACT: THE NEED FOR A TIGHTER DISCLOSURE REQUIREMENT

### *a. The Current Disclosure Requirement Does Not Apply to Public Pounds, Shelters, and Research Facilities Because They Are Not “Dealers” under the AWA*

The disclosure requirement included in the 1990 amendments is ineffective because the USDA promulgated regulations interpreting it so that it does not apply to public animal pounds and shelters. In order to understand why the disclosure requirement does not apply to public pounds and shelters, it is necessary to examine how the USDA reached its conclusion.

First, the USDA looked to the text of the amendments. The certification requirements of the 1990 amendments require that all *dealers* provide a valid certification to the recipient of a random source animal. That certification, among other things, must include: “an assurance” that the *person, pound, or shelter* from which a dog or cat was acquired was notified that such dog or cat may be used for research or educational purposes.<sup>93</sup> In other words, all dealers must certify that the entity or individual from which they acquired an animal was put on notice that the animal could be used for research. Thus, if pounds and shelters were “dealers” within the meaning of the AWA, the amendment would be sufficient to require animal pounds and shelters to notify owners surrendering their pets that the pets could be sold for research. Whether owners would be required to receive notice in this regard would depend on the meaning the USDA would ascribe to “dealers.” Looking at the text of the amendments, the term “dealer” is left undefined. The amendments only define “entity,” which is defined as including both pounds and shelters, and research facilities licensed by the USDA.<sup>94</sup> To define “dealer,” the USDA would have to search elsewhere.

In looking elsewhere, the USDA turned to the definition of “dealer” as it is defined elsewhere in the AWA. The Act states that:

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<sup>90</sup> 7 U.S.C. § 2158(b)(2) (1990) (emphasis added).

<sup>91</sup> 7 U.S.C. § 2158(3) (1990).

<sup>92</sup> 7 U.S.C. § 2158(4) (1990).

<sup>93</sup> 7 U.S.C. § 2158(b)(2)(D) (1990) (emphasis added).

<sup>94</sup> Looking at the text of the 1990 amendments, the USDA could have found strength in the argument that because pounds, shelters, and research facilities fit into the definition of “entity,” they do not fall within the definition of “dealer.”

[t]he term ‘dealer’ means *any person* who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include —

- (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
- (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year.<sup>95</sup>

Because the above definition limits the term “dealer” to a “person,” the definition of dealer depends on what constitutes a “person” under the AWA.

The USDA had two places it could have looked to define “person:” 1) the text of the Act itself; and 2) the Act’s legislative history. The Act defines “person” as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate or other legal entity.”<sup>96</sup> Under this expansive definition, public pounds, shelters, and research facilities would likely qualify as “persons” under the Act. Nevertheless, the USDA chose to rely instead on a House of Representatives Report in defining “person” within the context of the AWA. The report, relied on by the USDA, reads as follows:

The term “person” is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions, which handle dogs and cats. It is not intended to include public agencies or political subdivisions of State or municipal governments or their duly authorized agents. It is the intent of the conferees that local or municipal dog pounds or animal shelters shall not be required to obtain a license since these public agencies are not a “person” within the meaning of section 2(a).<sup>97</sup>

Utilizing this report, the USDA determined that public pounds, shelters, and research facilities were not “persons” within the AWA, and thus were not “dealers” within the meaning of the 1990 amendments. Therefore, such operations are exempt from the amendment’s certification requirements. As such, public pounds,

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<sup>95</sup> 7 U.S.C. § 2132(f) (1985) (emphasis added).

<sup>96</sup> 7 U.S.C. § 2132(a) (1985).

<sup>97</sup> Statement of Managers on the Part of The House accompanying H.R. Conf. Rep. No. 1848, 89th Cong., 2d Sess. 9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2649, 2652, *quoted in* Letter from Richard L. Crawford, USDA to Chris S. Smith, University of Texas (Mar. 19, 1993)(on file with author).

shelters, and research labs are under no obligation to notify people from whom they acquire dogs or cats that those animals may be used for research. This is particularly troublesome given that publically financed pounds are the most likely to provide animals for experimentation, and that a majority of the animal control facilities in this country are public.<sup>98</sup>

*b. Even if the Current Disclosure Requirement Applied to All Animal Pounds and Shelters it is Too Vague to be Enforceable*

Even if the certification requirements applied to public pounds, shelters, and research facilities, the amendment's "right-to-know" provision is too vague to be enforceable. The amendment requires that for a certification to be valid it include, among six other requirements:

- 4) the name and address of the person, pound or shelter from which the dealer acquired the dog, and *an assurance* that such person, pound, or shelter was notified that such dog or cat may be used for research or educational purposes;

The amendments require no specific guidelines for notifying the person, pound, or shelter from which the dealer acquired the dog. The amendments do not specify the manner in which the person, pound, or shelter must be informed. They neither specify whether the notification need be oral or written, nor mention the form the notice should take or the information it should contain in either instance. Perhaps most troubling is that the amendments require a mere "assurance." The dealer need not produce any proof that the person, pound, or shelter was notified. Assurance of notification is based on the dealer's word alone. In an industry notorious for its deceitful tactics,<sup>99</sup> such an assurance is likely to be anything but assuring.

*c. The Current Disclosure Requirement is Unenforced*

The 1990 amendment of the AWA provides that dealers who fail to provide certification or include false information in the certification shall be subject to fines and/or imprisonment.<sup>100</sup> Any dealer who violates the certification requirements more than once shall be fined \$5,000 for each dog or cat acquired or sold in violation of the requirements.<sup>101</sup> Moreover, any dealer who violates the section three or more times

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<sup>98</sup> Orlans, *supra* note 2, at 210.

<sup>99</sup> Dealers have gained bad publicity from their "Free to a Good Home" scandals, in which they promise an owner that they will give an animal a good home but sell it for research instead. *See* Stevens, *supra* note 10, at 70.

<sup>100</sup> 7 U.S.C. § 2149 (1985); 7 U.S.C. § 2158(c)(1) (1990).

<sup>101</sup> 7 U.S.C. § 2158(c)(2) (1990).

shall have its license permanently revoked.<sup>102</sup> Nevertheless, enforcement of the certification provision is “woefully inadequate.”<sup>103</sup> Laboratory animal veterinarian Brian Gordon, for example, says he has encountered Class B dealers who presented incomplete paperwork regarding where they obtained the animals they sold.<sup>104</sup> Additionally, the number of convictions for violations of humane standards show that bunchers (people who collect animals to sell to dealers), puppy mills, and dealers are more likely to treat animals inhumanely than commercial breeders.<sup>105</sup>

*d. The AWA’s Disclosure Requirement is Inadequate*

The proof that public pounds and shelters do not fall within the confines of the 1990 amendments is evident by examining state law. Of the eleven states that allow pound seizure, only three have either “right-to-know-” or “affirmative consent-” based provisions in effect.<sup>106</sup> This means that at least seven states may release former pets to laboratories without notifying the person that surrendered them. This is not including the twenty-two other states that leave pound seizure issues to local municipalities. With so many municipalities in a given state, pound seizure absent disclosure could occur in all twenty-two states.

The drafting of the disclosure provision in the 1990 amendment is also inadequate. The disclosure provision is crouched at the end of a different requirement, requiring the name and address of the person, pound, or shelter from which the dealer acquired the animal. The disclosure provision is easily lost and glossed over as a secondary matter rather than an element of primary importance.

*e. The State Statutes in Place are Insufficient*

Even if every state in the country practicing pound seizure had legislation requiring disclosure, it would still fall short of adequately protecting the animals and their owners. For one, a state could amend its pound seizure statute at anytime to do away with the disclosure requirement. Moreover, the disclosure provisions would be inconsistent across state lines. Pet owners in one state may benefit from more restrictive disclosure requirements while pet owners in another state may arbitrarily be less protected.

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<sup>102</sup> 7 U.S.C. § 2158(c)(3) (1990).

<sup>103</sup> Orlans, *supra* note 2, at 211.

<sup>104</sup> Janice Francis-Smith, *Pound seizure bill in Okla. Dies in Committee*, J. REC. LEGIS. REP., Feb. 28, 2008.

<sup>105</sup> Orlans, *supra* note 2, at 211-12.

<sup>106</sup> *I.e., California, Colorado, and Ohio*: CAL. CIV. CODE §§ 1834.5 & 1834.7 (West 2008); COLO. REV. STAT. § 35-42.5-101(1)(A)(I)&(III) (2003); OHIO REV. CODE ANN. § 955.16(D) (West 2006), respectively.

*f. The AWA's Current Disclosure Requirement is Out of Line with the Act's Purpose and Goals*

The 1990 amendment's disclosure requirement, as it stands today, is not in tune with the purpose and goals of the AWA. The purpose and goals of the AWA are to insure that animals intended for use in research facilities receive humane care and treatment, to assure the humane treatment of animals during transportation in commerce, and *to protect animal owners from the theft of their animals by preventing the sale or use of stolen animals.*<sup>107</sup> Thus, as originally enacted, the AWA's purpose was to protect a pet owner's property rights in his or her animal. This is still the purpose today. Commenting on the 1990 amendments, Congress reiterated its intent to, "prohibit the use of stolen pets in research."<sup>108</sup>

The question then becomes whether an owner's property rights in his or her animal (specifically, the owner's property interest in his or her emotional well-being) are violated if that owner voluntarily surrenders an animal to an animal care facility on the mistaken assumption that the animal will be either adopted or humanely euthanized, but that animal is instead sold for research. The answer to this question is undoubtedly "yes." Consider the following illustration, with which we are dealing:

The pet owner, P, gives her pet to an animal shelter, A, in the belief that A will either adopt the pet or humanely euthanize it. Then, D, a dealer, seizes the pet from A and sells it to a research facility.

In the above scenario, the animal's owner would likely have a cause of action for conversion; both civilly and criminally. Criminal conversion is a lesser included offense of *theft*.<sup>109</sup> It occurs when a person knowingly or intentionally exerts unauthorized control over the property of another:

The essential element of the crime of criminal conversion is that the property must be owned by another and the conversion thereof must be without the consent and against the will of the party to whom the property belongs, coupled with a fraudulent intent to deprive the owner of the property.<sup>110</sup>

Civil conversion, on the other hand, is "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to

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<sup>107</sup> See Moretti, *supra* note 62, at 43 (emphasis added).

<sup>108</sup> See, e.g., S. Rep. No. 101-357, at 276 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4930.

<sup>109</sup> 18 AM. JUR. 2D *Conversion* § 158 (2008).

<sup>110</sup> *Id.* at § 156.

control it that the actor may justly be required to pay the other the full value of the chattel.”<sup>111</sup> Under modern law, the plaintiff need not be in possession of the chattel at the time of the conversion.<sup>112</sup> Thus, the conversion can occur when an animal is sold for research even though the owner has relinquished possession to the shelter.

Consent, however, is a defense to conversion. If the person entitled to the future possession of the chattel consented to the conversionary act, that person cannot recover for any harm done to his interest in the chattel.<sup>113</sup> Therefore, the animal shelter is likely to assert that the animal’s owner consented to the animal’s seizure when she willingly gave up all rights to her pet upon surrender. Nonetheless, the defense of consent in a conversion action can be overcome by a showing of fraudulent non-disclosure. Such a showing requires that a duty to disclose exist in the first place:

[The] duty to disclose and [the] corresponding liability for [a] failure to disclose [may] arise[] when[ a] party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that [] failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.<sup>114</sup>

Although never litigated, a court could likely find that an animal shelter has a duty to disclose to a pet’s owner that a surrendered pet may be used for research. Often times, when an owner surrenders a pet to a shelter that engages in pound seizure, but does not notify owners of the practice, the owner relies on a misleading representation that the animal will be treated humanely. Sometimes, such a misrepresentation can stem from an entity’s name alone (e.g., “humane society”). Based on such representations, an owner justifiably surrenders her pet. The owner will argue that had she known of the pound seizure practice, she would not have surrendered her pet. Thus, the pound seizure practice becomes a material fact, of which the shelter ought to have known failure to disclose would render any representations of humane care untrue.

In summary, an owner surrendering a pet to a pound or shelter, who is not notified that her pet could be used for research, and whose pet is used for research, will likely have a claim for conversion, either criminal or civil. Because conversion is a lesser offense of theft, failure to disclose pound seizure policies leads to a form of theft, or at the very least, the impairment of one’s property rights. Considering that one of the main purposes of the AWA is to “protect animal owners from the theft of their animals,” the proposed amendment is a way to effectuate the purposes and goals of the Act.

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<sup>111</sup> RESTATEMENT (SECOND) OF TORTS § 222A (1965).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 352 (6th Cir. 2000) (applying Ohio law).

*g. The Current Disclosure Requirement Ignores the Inherent Rights of Household Pets*

When a pet is transferred for research, the uninformed owner is not the only one harmed; the inherent rights of her pet are harmed as well. By subjecting former household pets to research, the AWA lags behind the law's growing trend to recognize the inherent worth of household pets. As early as 1979, a New York court held that, "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."<sup>115</sup> Although a New York court later refused to follow this logic, the court still acknowledged that, "[t]here is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family. This is particularly true of owners of domesticated dogs who have been repeatedly referred to as 'Man's Best Friend' and a faithful companion."<sup>116</sup> At least two states, Tennessee<sup>117</sup> and Illinois,<sup>118</sup> have acknowledged that pets are more than mere property, and have enacted statutes allowing for recovery of non-economic damages, such as the loss of the reasonably expected companionship, love, and affection of a pet resulting from the intentional or negligent killing of a pet.<sup>119</sup> Ironically, Tennessee is a state that allows pound seizure. This means that in Tennessee, the AWA allows the state to transfer pets in direct contradiction of the inherent rights accorded them by state law. Therefore, the AWA should require disclosure to pet owners not only to protect an owner's property rights but the inherent rights of household pets who have been raised in such intimate settings as to form deep physical and psychological bonds with humans.

## VI. RECOMMENDED LANGUAGE

In proposing a statutory revision to the AWA that would require disclosure to persons, pounds and shelters surrendering animals for research, it may be helpful to refer to the language of two sources. The first is the Pet Safety and Protection Act, a piece of legislation last introduced in Congress in 2007. The second are state statutes that contain, or at one time contained, disclosure requirements. In drafting the statutory provision, it is necessary to keep in mind the purpose of the amendment: to prevent former pets from being used for research absent any knowledge or consent from their owners.

On February 28, 2007, Senator Daniel Akaka (D-HI) introduced the "Pet Safety and Protection Act of 2007" in the United States Senate. The next day,

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<sup>115</sup> *Corso v. Crawford Dog and Cat Hospital, Inc.*, 415 N.Y.S.2d 182,183 (1979); see also *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (1964).

<sup>116</sup> *Johnson v. Douglas*, 723 N.Y.S.2d 627,628 (2001).

<sup>117</sup> TENN. CODE ANN. § 44-17-403 (2008).

<sup>118</sup> 510 ILL. COMP. STAT. 70/16.3 (2005).

<sup>119</sup> Frasch, *supra* note 76, at 77.

Representatives Michael Doyle (D-PA) and Phil English (R-PA) introduced a companion bill, H.R. 1280, in the House of Representatives. The bill proposes the Animal Welfare Act be amended to ensure that all dogs and cats used by research facilities are obtained legally.<sup>120</sup> On its face, the Pet Safety Act favors purpose-bred animal research over random source. The Act allows commercial breeders to provide animals to laboratories and research facilities to breed animals themselves.<sup>121</sup> The Act also prohibits “Class B” dealers from selling dogs and cats to laboratories and seeks to prevent stray animals (who may be lost family pets) from being sold to laboratories.<sup>122</sup> On the other hand, the Act does not favor purpose-bred research alone. The Act allows individuals to donate their own animals to laboratories for research purposes and *permits registered public pounds and shelters to turn over animals surrendered by their owners*.<sup>123</sup> Unfortunately, the bill does not contain any language mandating that the public pounds and shelters notify owners surrendering their animals that the animals may be used for research. Therefore, even if a similar bill were to pass, an additional amendment to the AWA requiring notice would still be necessary. Such a bill, however, does not appear to be moving anywhere fast. Congress failed to consider similar legislation introduced by Senator Akaka in 1996, 1999, 2001, 2004, 2005, and 2006.<sup>124</sup> For that reason, rather than alter the Pet Safety and Protection Act to include a notice provision to be reintroduced during the next Congress, a stand-alone amendment requiring disclosure would be more appropriate. The Pet Safety Act has a long history of lying dormant in Congress and it contains many more controversial issues, such as the debate between random-source and purpose-bred animal research. A notice provision, on its own, would be less controversial, more logical and easier to gain support for given the existing text and purpose of the AWA.

Many states that require or allow pound seizure have developed ways to protect an owner surrendering his or her animal. Some states have “right-to-know” provisions, others have provisions requiring “affirmative consent,” and some states have both. A few states also have creative mechanisms in place to ensure that someone’s pet is not turned over for research without the owner’s knowledge. Depending on how a given state has utilized the above protections, some are much more effective than others.

The states that seek to protect an owner from unknowingly subjecting his or her pet to a life of experimentation are Minnesota, Utah, Oklahoma, Ohio, California, Colorado, and Wisconsin. Utah requires affirmative consent. Its statute provides that, “[o]wners of animals who voluntarily provide their animals to an establishment may, by signature, determine whether or not the animal may be

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<sup>120</sup> Pet Safety and Protection Act of 2007, H.R. 1280, 110th Cong. § 1 (2007).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Office of Legislative Policy and Analysis, 109th Congress, Legislative Updates, *available at* <http://olpa.od.nih.gov/legislation/109/pendinglegislation/petsafety.asp>.

provided to an institution or used for research or educational purposes.”<sup>125</sup> Iowa used to require affirmative consent but recently repealed this protection in its 2008 Acts. Prior to its repeal, Iowa’s statute provided that, “[a] dog lawfully licensed at the time of its seizure shall not be tendered unless its owner consents in writing.”<sup>126</sup> Both the Utah statute and the repealed Iowa statute have strengths and weaknesses. The Iowa statute is clear that an animal could not have been transferred unless the owner consented to the transfer but it did not specify that the consent be informed. In other words, pet owners in Iowa could have been jeopardized under the statute if the pound seizure consent provision was inconspicuously hidden in a five page long document. This would have been especially true where owners surrendering pets signed quickly in order to hasten the painful process of giving up a pet. This concern also applies to the Utah statute, which also leaves it unclear whether the owner need sign or not sign to prohibit the pet from being transferred. An additional concern with the Iowa statute is that it only protected “lawfully licensed” pets. An owner may not realize that his or her pet’s license has expired or even that a license was required in the first place. This requirement punishes the pet at the expense of its owner’s actions.

California and Colorado both take a “right-to-know” approach. California requires there, “be a notice posted in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at [an] animal care facilit[y],”<sup>127</sup> that the animals could be sold for research under state law. California specifies the form and content of said notice as follows:

Notice requirements that animals turned into a shelter facility may be used for research purposes —

In any pound or animal regulation department of a public or private agency where animals are turned over dead or alive to a biological supply facility or a research facility, a sign (measuring a minimum of 28 x 21 cm— 11 x 8 1/2 inches — with lettering of a minimum of 3.2 cm high and 1.2 cm wide — 1 1/4 x 1/2 inch — (91 point)) stating: “Animals Turned In To This Shelter May Be Used For Research Purposes or to Supply Blood, Tissue, or Other Biological Products” shall be posted in a place where it will be clearly visible to a majority of persons when turning animals over to the shelter.<sup>128</sup>

Colorado’s “right-to-know” provision is not as specific. It provides that, “[i]f a pound or shelter provides dogs or cats to facilities for experimentation, such pound or shelter shall inform an owner who is relinquishing his dog or cat to the

<sup>125</sup> UTAH CODE ANN. § 26-26-3 (2008).

<sup>126</sup> IOWA CODE § 145B.3 (2002) (repealed 2008).

<sup>127</sup> CAL. CIV. CODE §§ 1834.5, 1834.7 (2008).

<sup>128</sup> CAL. CIV. CODE § 1834.7 (2008) (this statement shall also be included on owner surrender forms).

pound or shelter of such practice.”<sup>129</sup> California’s notice requirement is far superior to Colorado’s. Colorado’s statute is vague and requires only that an owner be informed. It does not specify exactly what an owner must be told or in what matter; oral or written. California’s statute, on the other hand, is sufficiently definite and sets out the appropriate form and manner of notice line by line. California’s signage requirement actually goes above and beyond protecting an owner surrendering an animal, by providing notice not only to such owners, but to the members of the public at large visiting the shelter. Not surprisingly, California appears to have one of the highest levels of public awareness regarding the practice of pound seizure. It is undoubtedly for this reason that all counties in California ban pound seizure even though it is allowed under state law. Under the California notice statute, an owner surrendering an animal arguably gives implied consent after viewing the sign. Nevertheless, a provision also requiring affirmative consent would insure that any owners, outside of the majority of those who by statute must be able to view the sign, do not fall through the cracks. Lastly, the California provision could be improved by increasing the size of the sign, increasing the size of the lettering on the sign or requiring additional signs. Nevertheless, California likely has the best protections in place regarding notice overall.

Lastly, Minnesota, Oklahoma, Ohio, and Wisconsin employ methods other than signage or informed consent to prevent pets from being transferred to research labs. Minnesota, Oklahoma and Ohio specifically do so by prohibiting any dogs or cats from being transferred if they are “tagged.”<sup>130</sup> Minnesota’s statute provides that, “if a tag affixed to the animal or a statement by the animal’s owner after the animal’s seizure specifies that the animal may not be used for research, the animal must not be made available to any institution ...”<sup>131</sup> Similarly, Oklahoma’s statute provides that:

[a]ny owner of an animal who voluntarily delivers the possession of it to a public pound shall have a right to specify that it shall not be used for scientific research, and if an owner so specifies, it shall be the duty of the pound superintendent to tag such animal properly and to make certain that such animal is not delivered to an institution for scientific purposes.<sup>132</sup>

Ohio’s statute provides that, “[a]n owner of a dog that is wearing a valid registration tag who presents the dog to the dog warden or poundkeeper may specify in writing that the dog shall not be offered to a nonprofit teaching or research institution or organization...”<sup>133</sup>

The above statutes, including the tagging requirements, are laudable at first

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<sup>129</sup> COLO. REV. STAT. 35-42.5-101 (1) (a) (III) (2003).

<sup>130</sup> Oklahoma also requires that an owner be notified. OKLA. STAT. tit. 4, § 501 (2008).

<sup>131</sup> MINN. STAT. § 35.71 (2008).

<sup>132</sup> OKLA. STAT. tit. 4, § 394 (2008).

<sup>133</sup> OHIO REV. CODE ANN. § 955.16 (D) (2006).

glance but raise red flags for several reasons. First, although the statutes state that an owner may specify that his or her pet not be used for research, they do not specify if or how an owner be notified of the practice in the first place. Surely an owner would not know to exempt his or her pet from animal research if he or she did not know the practice was occurring. Second, the tagging requirements are subject to human error. The superintendent under Oklahoma's statute might mis-tag or fail to tag a dog.<sup>134</sup> Under Minnesota's statute, an owner may not know to tag his or her pet so as to exempt it from research if the owner does not know the practice exists. Likewise, under Ohio's law, an owner may turn over a dog with a registration tag that is invalid or expired. Here, as was previously the case in Iowa, this leads to unfortunate results for both owner and pet. Lastly, in regards to identification tags, not all pet owners require their pets to wear tags all of the time. A pet could escape in a moment in which it is not wearing its tags or a pet could lose its tags before it arrives at a shelter. Even worse, an owner could remove a pet's tags to save as a keepsake of the animal upon surrender. While in practice, the shelter would likely notify the owner that it needs the pet's tags; the shelter is under no obligation to notify the owners in accordance with the above statutes. Tagging may be one effective means to protect pets from pound seizure, but it should not be the only means.

Lastly, Wisconsin, which only allows the release of dogs, takes an alternate measure. It provides that only unclaimed dogs may be turned over to research labs and states simply that, "[a] dog left by its owner for disposition is not considered an unclaimed dog..."<sup>135</sup> Because all dogs surrendered by owners are unclaimed dogs, such dogs cannot be turned over to research labs. This provision is so effective that it eliminates the need for disclosure to pet owners. As such, it is desirable but beyond the scope of this note.

In light of the strengths and weaknesses of the Pet Safety and Protection Act and state pound seizure laws, the following legislation should be adopted to adequately protect pet owners surrendering animals to pounds and shelters in the United States:

#### A BILL

To amend the Animal Welfare Act to ensure owners surrendering dogs and cats to animal pounds and shelters practicing pound seizure are notified that their animals could be turned over to research facilities.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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<sup>134</sup> Some shelters do not have enough funding in place to adequately keep track of every animal. See e.g., Guthrie, *supra* note 86, at B1 ("Our computer system does not have safeguards in place to keep track of every animal").

<sup>135</sup> WIS. STAT. § 174.13 (2) (2008).

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Pound Seizure Disclosure Act of 2008'.

SEC. 2. PERSONS.

- (a) Section 2 of the Animal Welfare Act (7 U.S.C. 2132(a)) is amended by adding the phrase, "including any animal pound, shelter or research facility," after the phrase, "or other legal entity."

SEC. 24. EFFECTIVE DATE.

The amendments made by section 2 take effect on the date that is 60 days after the date of enactment of this Act.

SEC. 30. DISCLOSURE REQUIREMENTS FOR OWNERS SURRENDERING PETS TO POUNDS AND SHELTERS.

The Animal Welfare Act (7 U.S.C. 2131-59) is amended to read as follows:

- (a) Definition of Animal Care Facility- In this section, the term "animal care facility," means any animal pound or shelter, whether public or private.
- (b) Notice- All animal care facilities that sell, donate, or transfer dogs and cats to research facilities in any way, shall post a notice in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at such animal care facilities that said animal may be sold, donated or otherwise transferred to a research facility.
- (c) Conspicuous Notice- In any animal facility where animals are turned over to a research facility, two signs shall be posted in such a place that they will be clearly visible to a majority of persons when turning animals over to the shelter, and shall —
  - (1) measure a minimum of 42 x 28 cm (17 x 11 inches);
  - (2) contain letters of at least a 105 point font; a minimum of 4.5 cm high and 1.9 cm wide (1.75 x .75 inch);
  - (3) state in clear bold letters: "Animals Turned In To This Shelter May Be Used For Research Purposes;" and
  - (4) be of contrasting font and background colors – either light lettering on a dark background or dark lettering on a light background to be easily read.
- (d) Affirmative Consent- Dogs and cats surrendered to animal care facilities may only be provided to an institution or used for research or educational purposes if the dog or cat's owner

consents to the transfer. Consent will be effective when the owner places his or her signature on a writing that adequately declares on one 8.5 x 11 sheet of paper in 12 point font that the owner hereby consents, agrees, and understands that the animal she or he is surrendering may be turned over for research purposes.

*(f) Penalties*

- (1) IN GENERAL- A person that violates this section shall be fined \$1,000 per day for each violation of subsection (b) and \$1,000 for each violation of subsection (d).
- (2) ADDITIONAL PENALTY- A penalty under this subsection shall be in addition to any other applicable penalty.

The above language borrows the structure of the 2007 Pet Safety and Protection Act as well as the substantive aspects of both California's signage statute and Iowa's repealed disclosure statute. First, the proposed amendment declares itself the "Pound Seizure Disclosure Act of 2008." Next, the proposed amendment alters the definition of the word "person" to include "any animal pound, shelter or research facility," not just public ones. This change could also be achieved by convincing the USDA to revise their regulations. Nevertheless, changing the definition of "person" alone would not be enough protection due to the 1990 amendment's other deficiencies such as its vagueness, inadequacy and unlikelihood of being enforced.

The fourth section of the proposed amendment incorporates but improves upon California's conspicuous notice provision requiring signage. The proposed amendment requires the shelter to put up two signs rather than just one, increases the size of the sign and its lettering, and states that the lettering and the background of the sign must be of contrasting colors to be easily read. Lastly, the proposed amendment incorporates and improves upon Iowa's repealed affirmative consent provision. Like Iowa's repealed statute, it allows an owner to exempt his or her pet from research by refusing to consent. Unlike Iowa's statute, it requires that the consent be given on one piece of eight-and-a-half by eleven inch sheet of paper with twelve point font, so as to provide clear notice and avoid unconscionability.

In light of the fallacies of the AWA's current disclosure requirement, the proposed amendment should be adopted for many reasons. First, the suggested language falls in line with goals and purpose of the AWA. It puts a pet owner on notice and avoids any misrepresentations that may result in a "theft" of his or her pet. Second, the proposed amendment is easily enforceable. Such right-to-know and affirmative consent provisions are low cost and easily implemented. Third, the proposed amendment would create a national baseline that would lend consistency to the current diversity of state approaches, and ensure that protection remained in

place nationwide. Lastly, the proposed legislation addresses a concern Congress expressed in its original legislation. When Congress drafted the 1990 amendment, one of its states purposes was to, “require[] notification of persons that dogs and cats obtained by dealers may be used for research.”<sup>136</sup> Congress could not foresee that the USDA would interpret the Act in such a way that it would not apply to all pounds and shelters. This is Congress’ opportunity to fix it.

## VII. IMPLICATIONS OF THE PROPOSED AMENDMENT

### *a. Negative Implications*

The biggest issue that the proposed legislation raises is what owners, who refuse to surrender a pet to a shelter because of its pound seizure policy, will do with their animals. The biggest fear is that the pet owners will simply let their animals loose, which would pose a danger to the animals, exacerbate the pet overpopulation problem, and increase public expenditures for animal control.<sup>137</sup> It would also convert many pets into strays exposing them to eligibility for pound seizure in states where they would otherwise be exempted.<sup>138</sup> These concerns, however, are unlikely to be large problems as a result of the proposed legislation. The legislation allows owners to surrender their animals to facilities practicing pound seizure even though the owner has refused to consent to her animal being used for research. Many owners will feel satisfied with these protections. Those that do not may find a place for the animal at a private shelter not practicing pound seizure, a no-kill shelter, or with a friend or family member.<sup>139</sup>

A secondary consideration is that if fewer pets become eligible for pound seizure, dealers and research facilities may have to turn to different sources to acquire animals. This could mean either an increase in animals procured legally from commercial breeders, or worse yet, an increase in animals procured illegally via theft

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<sup>136</sup> H.R. Rep. No. 101-916, at 761 (1990) (Conf. Rep.), as reprinted in 1990 U.S.C.C.A.N. 5286-5763.

<sup>137</sup> Julian Guthrie, *Bill seeks to bar selling cats, dogs for research; Proposed state Assembly measure would apply to animal shelters across California*, S. F. CHRON., Feb. 25, 2003, at A13 (“When the public learns that a family dog or cat may end up as research fodder, the animals will be abandoned in public instead, creating more work and increasing the cost of taxpayer-funded animal control.”) (quoting Paul Koretz, a West Hollywood city councilman who introduced a 2003 bill to prohibit pound seizure in California); Sacramento County enacted an animal overpopulation ordinance that required a higher fee for registering an unfixed animal to encourage pet owners to have their pets spayed or neutered to deal with this problem. Ed Fletcher, *County to Stop Selling Shelter Animals to Labs*, SACRAMENTO BEE, Aug. 9, 2006 at B2..

<sup>138</sup> For example, in Wisconsin, a dog let loose would become an unclaimed dog subject to use for research. WIS. STAT. § 174.13 (2) (2008).

<sup>139</sup> Judy Dynnik, *Voice of the People; Don’t Blame Volunteers for Animal Problems*, JACKSON CITIZEN PATRIOT, Aug. 14, 2007, at A7 (stating that a high unemployment rate and the time of year led to an increase in the number of pets in shelters, not the ban on pound seizure in Jackson County, Michigan).

or bunchers. Nevertheless, the AWA's licensing and certification requirements for dealers have since their enactment provided a means to regulate such activities.

*b. No Implications*

The statute could have no implications depending on the mindset of animal owners. An animal owner that is willing to surrender an animal to an animal care facility in the first place may be unconcerned about the animal's future fate. This owner might consent to animal research and believe that medical research is more valuable than the pet's quality of life. This owner might be in a hurry to surrender the pet and leave the shelter as quickly as possible. The owner could also believe that it is standard practice for owners surrendering animals to consent to such a provision. On the other hand, an owner may be concerned but hope for the best; such is currently the case with euthanasia. Just as pet owners who surrender pets to kill shelters generally convince themselves that their pet will get adopted and not euthanized, owners will convince themselves that the pet will be adopted or at worst euthanized, not sold for research. Luckily, with the proposed consent provision, the owner can insure that that is the case.

*c. Positive Implications*

The proposed amendment could likely have many positive implications. The most important of these is that it would raise public awareness of pound seizure. Owners surrendering animals who disagree with the practice are likely to voice their opinions among friends and colleagues. Additionally, the notice signage would be visible not only to the pet owners surrendering animals but to members of the public at large, visiting the shelter. Many such people who are looking to adopt a pet from a shelter are aware of and concerned with the pet overpopulation issue in this country and are likely to be the same people who would have a problem with pound seizure. The hope is that eventually public awareness surrounding pound seizure will raise to a level that will encourage legislatures to pass additional laws banning the practice. California provides a good model for what may happen if notice requirements are tightened via the proposed amendment. As discussed earlier, California is the only state with a statute like the proposed amendment requiring a shelter to post a sign warning pet owners that animals surrendered may be used for research. It is not surprising that California also appears to have among the highest levels of public discussion on the subject. So much so that even though state law allows pound seizure, every county in California has banned the practice.<sup>140</sup> The citizens have in effect taken the matter in their own hands and overruled state law. It would not be a surprise to see the state legislature soon follow suit. It is hard to say exactly whether California's pound seizure statute is the cause of the state's awareness of the issue but there is no denying that the two are heavily correlated.

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<sup>140</sup> Sacramento County was the last county to ban pound seizure in California in August of 2006. Sacramento County's pound seizure laws were said to hurt its shelter's image and its ability to recruit volunteers. Fletcher, *supra* note 137.

Peering even further into the future, the same notice requirement that led to public awareness and the demise of pound seizure may one day mark the demise of animal experimentation altogether. As states repeal pound seizure laws, more and more labs are forced to buy expensive animals from commercial breeders. Facilities can pay as much as \$800 for each of these animals, compared to as little as \$15 for a pound animal.<sup>141</sup> The higher costs associated with purpose-bred animal research make it less appealing to the medical community and have already led to the decline in the number of animals used in research today.<sup>142</sup> In this way, the proposed amendment works to *reduce* animal experimentation, one of the “Three R’s,” and main goals outlined in the AWA.<sup>143</sup>

Given the potential of what the proposed requirement might achieve, including greater public awareness, increased legislation prohibiting pound seizure, and changing attitudes toward animal experimentation on the whole, the benefits of the amendment far outweigh its costs. Not only is the amendment easy to implement and cost effective, but it provides protections against any risk of an increased number of stolen or abandoned pets. The benefits of the amendments are likely to be great while the costs are likely to be low. Therefore, the proposed amendment should be adopted.

## VIII. CONCLUSION

The Animal Welfare Act does not require every animal pound and shelter practicing pound seizure to disclose to pet owners that a surrendered pet may be used for research. The 1990 amendments to the Act, which require a dealer to assure any individual or entity to which it sells an animal that the person or entity from which it acquired the animal was notified the animal could be used for research, do not apply to public animal pounds and shelters because they are not “dealers” according to regulations promulgated by the USDA. Accordingly, pet owners may surrender pets to a shelter in the mistaken belief that the pet will be dealt with humanely, only to have the pet sold for research.

Therefore, without a disclosure requirement, the AWA fails to adequately protect both the property interests of the animals and the owners of animals subject to pound seizure.

This paper has shown that the AWA should be amended to, at the very least, require all pounds and shelters engaging in the practice of pound seizure to disclose

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<sup>141</sup> Francis-Smith, *supra* note 104; Rowan, *supra* note 12, at 155.

<sup>142</sup> Douglas Starr, *supra* note 1, at 20.

<sup>143</sup> *Id.*

their activities to pet owners prior to surrender. Until we can eliminate the practice of pound seizure, or animal experimentation on the whole, such limited protection is more than appropriate.

## THAT'S OK, IT'S ONLY A RENTAL: THE BUSINESS OF RENTING DOGS

RACHIT ANAND

### I. INTRODUCTION

Often referred to as “man’s best friend,” dogs hold a special place in our society and our hearts. Dog companionship, and its incidental benefits to human physical and mental health, have been long recognized and continue to be further substantiated by the scientific community and the sheer number of households that have a dog as a pet. According to a 2007-2008 National Pet Owner survey by the American Pet Products Manufacturers Association, there are 74.8 million “owned dogs” in the United States and “[t]hirty-nine percent of U.S. households own at least one dog.”<sup>1</sup> In Great Britain, where forty-nine percent of the population owns a pet, dog owners spend the greatest amount of time with their pets and are more likely to take time off work for their dog(s) in comparison to other pet owners.<sup>2</sup> Besides providing companionship, health benefits from interacting with dogs are becoming increasingly recognized. The positive impact of dogs in various human treatment and rehabilitative settings can be evidenced by the growing fields of animal assisted therapy and counseling.<sup>3</sup> Since the beginning of their association with humans, dogs have served a number of different roles such as hunting companions, weapons in battles,<sup>4</sup> guards, rescuers in perilous terrains, instruments for detecting drugs,<sup>5</sup> aiding law enforcement agents and guides to

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<sup>1</sup> The Humane Soc’y of the United States, [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/pet\\_overpopulation\\_and\\_ownership\\_statistics/us\\_pet\\_ownership\\_statistics.html](http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/us_pet_ownership_statistics.html) (last visited Jan. 6, 2009) (The survey also indicates that dog owners spend \$219.00 a year on veterinary visits.).

<sup>2</sup> Steve O’Malley, *The Blue Cross UK Pet Census 2007*, Dec. 11, 2007, <http://www.ukpets.co.uk/> (search “UK Pet Census 2007”; then follow “The Blue Cross UK Pet Census 2007” hyperlink) (last visited Jan.6, 2009).

<sup>3</sup> See AUBREY FINE, *HANDBOOK ON ANIMAL-ASSISTED THERAPY XXXV* (2000) (The Delta Society, an international, non-profit organization that unites people with mental and physical disabilities and patients in healthcare facilities with professionally trained animals to help improve their health, estimates there are about 2000 Animal Assisted Treatment programs in the United States, with psychotherapy and physical rehabilitation using dogs being the most common.); see also CHRISTINE STEVENS, *Chapter VI: Dogs*, in *ANIMALS AND THEIR LEGAL RIGHTS*, 118 (4th ed. 1990) (A survey of 50 state health departments in 1986 showed that all states allow pets in nursing homes.).

<sup>4</sup> See J.J. BARLOY, *MAN AND ANIMALS 100 CENTURIES OF FRIENDSHIP* 14 (1978) (Egyptians sent dogs with spiked collars to attack their enemies. After death, dogs would sometimes be mummified, adorned with death masks and collars made of flowers, and placed in sarcophagi.).

<sup>5</sup> *Id.* at 19-21.

the handicapped, and specimen for laboratory testing<sup>6</sup> to name just a few. Yet, the relationship between dogs and human beings transcends that of mere utility for the benefit of humans. Our interactions with dogs are better described as that of mutual kinship and co-dependence which have nurtured a veritable bond between the two species. With our evolving societies, dogs have evolved as well.<sup>7</sup> Dogs have become a colorful and prominent thread in our history; they are a part of our culture, our literature and our families.<sup>8</sup>

While the benefits of dog ownership or even being in the presence of dogs have been widely accepted,<sup>9</sup> such opportunities are not always available to those who desire them. Whether it is the time or travel associated with work, family responsibilities, financial limitations, inability to make a commitment, or simply a lack of desire to take care of a dog, some people have generally been unable to own dogs despite wanting their company. It is with the expectation of servicing this demographic that Flexpetz,<sup>10</sup> a San Diego based corporation, has created a niche for itself by providing a dog rental service in the United States. Started in February of 2007, Flexpetz contracts out dogs by the day to urbanites without the time or space to care for a full time pet.<sup>11</sup> Whereas the idea of renting dogs is not new,<sup>12</sup> Flexpetz is the first company in the United States to use such a concept to provide companionship<sup>13</sup> along with the main objective of making a profit.

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<sup>6</sup> See PETER SINGER, *ANIMAL LIBERATION* 217-23 (1984) (discussing how the French Philosopher and the father of vivisection, Rene Descartes and his followers, the Cartesians were able to carry out cruel acts such as nailing animals up on boards by their four paws to vivisect them and see the circulation of the blood by believing the mechanistic doctrine that animals were soulless machines, incapable of thought or sensation).

<sup>7</sup> Editorial, *Pet-For-A-Day Taking Advantage of Man's Best Friend*, *PITT. POST-GAZETTE*, Aug. 8, 2007, at B4 available at <http://www.post-gazette.com/pg/07215/806529-192.stm> ("Many scientists are beginning to suggest that dogs, as well as other animals, may be smarter than previously believed. In fact, some researchers say canine IQ has increased over the millennia precisely because of their close association with humans.").

<sup>8</sup> *Id.*; See Susan J. Hankin, *Not A Living Room Sofa: Changing The Legal Status of Companion Animals*, 4 *RUTGERS J.L. & PUB. POL'Y* 314, 377 (2007) (arguing for a new legal category for companion animals that better reflects their status as somewhere between property and persons); see also The Blue Cross, *Pet Owners Prefer Their Furry Friends to Their Human Pals*, Oct. 12, 2007, [http://www.bluecross.org.uk/web/site/Media\\_centre/Press\\_releases\\_2007/December/Pet\\_Census\\_2007.asp](http://www.bluecross.org.uk/web/site/Media_centre/Press_releases_2007/December/Pet_Census_2007.asp) (according to a 2007 national survey conducted in the UK, 1 out of 10 people would choose to spend time with their pets rather than close family).

<sup>9</sup> See FINE, *supra* note 3, at 49.

<sup>10</sup> FlexPetz, <http://flexpetz.com/contact.html> (last visited Jan. 6, 2008) (FlexPetz is incorporated in the state of Delaware.).

<sup>11</sup> See *MSNBC: No Time for a Pet? How About Sharing One?* July 30, 2007, <http://today.msnbc.msn.com/id/20024378>.

<sup>12</sup> *Id.*; See Terry Selucky, *Leaders And Bow-Wowers: A New Pet Rental Company Draws A Waiting List-And Some Controversy*, <http://www.timeout.com/newyork/article/22785> (last visited Jan. 6, 2009) ("Dog rental services have been around since the '80s, and are especially popular in cramped cities like Hong Kong and Tokyo.").

<sup>13</sup> *Id.* Renting dogs and other animals as "character animals" for movies, television shows and other theatrical events as well as for agricultural production differs in that the animal is not being

While the company has grown from San Diego to other cities in the United States,<sup>14</sup> as well as into the United Kingdom and Europe,<sup>15</sup> the idea of renting dogs has been met with mixed reviews and concerns for the welfare of the dogs. Further, such a scheme of temporary pet ownership could raise some novel legal issues that the courts have not dealt with in the nascent area of animal law.

This paper will discuss the concept of renting dogs, explore in specifics the services provided by Flexpetz and highlight the general public reaction to the idea of temporary dog ownership. It will then explore whether such a practice could be deemed cruel or inhumane in the United States under the Animal Welfare Act or the anti-cruelty statutes of California and New York (states in which the company currently operates) as well as animal welfare laws of the United Kingdom.<sup>16</sup> After establishing that although dogs exposed to such a scheme may suffer from psychological and behavioral problems, this paper will nonetheless assert that the practice and consequences of renting dogs are beyond the ambit of anti-cruelty statutes and animal welfare legislation as currently enacted.<sup>17</sup> In its conclusion, this paper will briefly discuss the alternatives available to those that are unable to commit to full-time pet ownership and whether Flexpetz and its dog rental scheme is truly a service benefiting both humans and dogs or a blatant exploitation of “man’s best friend.”

## II. FLEXPETZ: THE BUSINESS<sup>18</sup>

Ironically, Flexpetz was founded by a former behavioral therapist, Marlena Cervantes, “who got the idea [for the company] while working with pets and autistic

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rented for companionship but rather a commercial enterprise.

<sup>14</sup> *Id.*

<sup>15</sup> Flexpetz, <http://www.flexpetz.com/location.html> (last visited Jan. 6, 2009).

<sup>16</sup> *Id.*

<sup>17</sup> On August 8, 2008, the Massachusetts Legislature passed a law prohibiting renting of dogs, as contemplated by the Flexpetz business model. Codified as §80I, under Massachusetts General Laws Annotated, Chapter 272 and effective November 3, 2008, the law bans the business of leasing or renting dogs and further imposes fines on “both the business that is leasing a dog and the person that has entered into a rental agreement” (M.G.L.A. 272 §80I). The statute was enacted a few months after this paper was completed and before Flexpetz commenced operations in Boston. Since it expressly prevents Flexpetz from operating in Massachusetts alone, the passage of §80I is merely noted here to qualify the discussions in this paper and to present a current legislative act in response to Flexpetz.

<sup>18</sup> While researching this topic, the author made numerous attempts to contact a representative of Flexpetz in order obtain information beyond that which was provided on the company’s website but was unsuccessful. On one occasion, after a number of messages were left with the general 1-800 number of the company, the author did receive a reply phone call from Marlena Cervantes, the founder of Flexpetz, and was advised to submit his inquiry via email to her personally which was sent on November 8, 2007; however, a response has yet to be received. Therefore, the information pertaining to the company’s general procedures and chargeable fees provided in this section and elsewhere in this paper was obtained through its website at <http://www.flexpetz.com>.

children.”<sup>19</sup> Perhaps of little or no significance or perhaps a foretelling fact it is nonetheless interesting to note that Ms. Cervantes has no background in animal husbandry or behavior.<sup>20</sup> Nevertheless, Flexpetz is a growing enterprise. Having started in San Diego in early 2007,<sup>21</sup> the company currently has operations in Los Angeles, New York, San Francisco, Washington, D.C., Boston and London, UK.<sup>22</sup> Members are selected by their willingness to pay exorbitant fees as well as through a rather vague screening process<sup>23</sup>. To become a Flexpetz dog, youth, pedigree and social skills are among the most important factors, though having been rescued or in need of a home seem to be considered as well.<sup>24</sup>

## A. MEMBERSHIP

In order to become a FlexPetz member, an individual is required to pay a registration fee for an introductory session of \$150.00, an annual account maintenance charge of \$99.00, a monthly membership fee of \$99.95 and a minimum of \$180.00 per month in dog rental (“Doggy Time”) fees “regardless of actual usage” with a Flexpetz dog.<sup>25</sup> Therefore, an annual membership will cost a minimum of approximately \$3,608.40 irrespective of whether the member rents a dog.

The registration fee of \$150.00 covers a mandatory one hour introduction session with a FlexPetz trainer which introduces the member to the “dogs, dog handling & training” and Flexpetz “encourage[s] the whole family to attend.”<sup>26</sup> Membership fees entitle a person to a “free Convenience Package that includes a dog bed, food/water bowls and a custom leash.”<sup>27</sup> Membership fees also cover all veterinary expenses as well as a checkup by a veterinarian every 3 months.<sup>28</sup> The fees also allow the Flexpetz dogs to be fitted with GPS-tracking collars so that they can be located if they go for “walkies” on their own.<sup>29</sup> Presumably, proceeds from the fees also cover the costs of when the dogs are not rented out and “live in a home environment with a primary carer . . . [where they] love to frequent the beach, local dog parks and long walks several times daily through the beautiful cities where they live.”<sup>30</sup>

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<sup>19</sup> See *MSNBC*, *supra* note 11.

<sup>20</sup> See Denise Flaim, *No Time for Pets by the Hour*, Sept. 24, 2007, <http://www.newsday.com/news/columnists/ny-sp49agbar3245387902>.

<sup>21</sup> See Selucky, *supra* note 12.

<sup>22</sup> See Flexpetz, *supra* note 15.

<sup>23</sup> Flexpetz, <http://www.flexpetz.com/membership.html> (last visited Feb. 14, 2009).

<sup>24</sup> Flexpetz, <http://www.flexpetz.com/ourdogs.html> (last visited Feb. 14, 2009).

<sup>25</sup> Flexpetz, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (Monthly membership fees “contribute[ ] towards providing full care for all the dogs . . .”) Such care includes that “dogs are veterinary checked every 3 months . . .” Flexpetz, <http://www.flexpetz.com/faq.html> (last visited Feb. 14, 2009).

<sup>29</sup> Flexpetz, *supra* note 23.

<sup>30</sup> Flexpetz, <http://www.flexpetz.com/faq.html>.

Further, a member may choose shuttle services “that can deliver and collect a Flexpetz dog to your home or office”<sup>31</sup> and costs generally about \$25.00 each way for a pickup and collection.<sup>32</sup> An inconvenience charge of \$75.00 per day applies if a FlexPetz dog is not returned on the last day of the reservation period; however, if the dog is returned “between opening time (7 AM) and the start of the next reservation period (8 AM), then the Member will not be charged the Inconvenience Fee.”<sup>33</sup>

Besides paying the required annual and monthly fees, in order to become a FlexPetz member, an individual is screened to ensure he/she is a proper candidate for renting dogs. Flexpetz “gather[s] a great deal of personal information from [ . . . ] potential members and meet[s] all in person in the presence of a certified dog trainer.”<sup>34</sup> “Each member participates in a training session and must be able to demonstrate sensitivity, compassion, patience and the desire to be a responsible dog owner.”<sup>35</sup> Flexpetz also has “each member sign[s] documents stating he/she has not had any history of animal violence or abuse and a promissory note to treat all Flexpetz dogs with absolute respect.”<sup>36</sup>

## B. FLEXPETZ DOGS

From where the Flexpetz dogs are obtained is not known with any certainty.<sup>37</sup> According to the Flexpetz website, the company claims that “[w]here possible, Flexpetz dogs are rescues or in urgent need of rehoming.”<sup>38</sup> Where and why it would not be “possible”<sup>39</sup> is not mentioned on the company’s website; however, the criteria for being selected as a Flexpetz dog may shed some light on how such a possibility is determined.

All Flexpetz dogs are between the ages of 2 and 5 because dogs of this age have developed their personalities and have been properly socialized.<sup>40</sup> Much like the screening process for its members, Flexpetz “screen[s] each dog for social skills, temperament, interest in befriending people, and ability to easily adapt to different people.”<sup>41</sup> Of course, certain breeds instinctively possess the social skills sought

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<sup>31</sup> Flexpetz, *supra* note 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Flexpetz, *supra* note 30.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Flexpetz’s website does not state whether their dogs have been adopted from pounds, shelters or any other animal rescue organization. As previously mentioned, the company has not responded to such inquiries submitted via email and telephone messages.

<sup>38</sup> Flexpetz, *supra* note 24.

<sup>39</sup> See Rebecca J. Huss, *Rescue Me: Legislating Cooperation Between Animal Control Authorities And Rescue Organizations*, 39 CONN. L. REV. 2059, 2061 (2007) (stating that the leading cause of death for dogs in the United States is euthanasia because of lack of homes, between 3-4 million dogs are euthanized each year based on conservative estimates).

<sup>40</sup> See Flexpetz, *supra* note 30.

<sup>41</sup> *Id.*

out by Flexpetz and would be ideal candidates simply based on their pedigree.<sup>42</sup> However, the company does not explicitly state its preference for purebreds though the dogs featured on the company's website do include a Labrador Retriever, a Boston Terrier, two Afghan Hounds, and a Miniature Pinscher.<sup>43</sup> While the company's website also proclaims on a number of pages that Flexpetz provides an opportunity to help rescued or re-homed dogs,<sup>44</sup> it is hard to imagine that a homely looking mixed-breed dog would be chosen by Flexpetz. Since Flexpetz is a profit seeking enterprise, the selection of dogs available is understandable in light of Ms. Cervantes statement: "Look, at the end of the day, we're a business . . . [p]eople aren't looking for a brown mutt. They want a breed they can feel good about taking to Central Park."<sup>45</sup>

Other than "full of fun time"<sup>46</sup> visits with Flexpetz members as well as stays with one primary "carer" where they are never kenneled, Flexpetz dogs are checked by a veterinarian every 3 months, provided prepackaged and premeasured food and have the possibility of being adopted on a full-time basis by a member.<sup>47</sup> The company's website states that if a member's situation changes and they become able to "have a dog full-time" adoption is an option. "We anticipate a constant rotation of dogs being adopted out and new dogs entering the Flexpetz program."<sup>48</sup> When, how or for how much a pet may be adopted is not disclosed on the company's website and such information was not provided upon inquiry. Nevertheless, the company does ensure that if a dog "becomes unable to continue within the Flexpetz program due to illness or ailment the dog would be provided for by Flexpetz for life and placed into a permanent home."<sup>49</sup> Whether permanent homes have already been secured for any such dog or dogs that get older<sup>50</sup> and are no longer "a joy to spend time with"<sup>51</sup> is not mentioned on the company's website.

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<sup>42</sup> See DR. BRUCE FOGLE, *DOG OWNER'S MANUAL* 92-97 (2003) (Breeds such as Golden Retrievers, Pembroke Welsh Corgis, Labrador Retrievers, Pointers, just to name a few, are known to be good tempered, family companions that are easily trained.).

<sup>43</sup> See Flexpetz, *supra* note 24.

<sup>44</sup> See Flexpetz, <http://www.flexpetz.com/about.html> (last visited Jan. 7, 2009) ("Flexpetz is also a unique opportunity to provide rescue dogs or dogs that need a new home with a carefree, loving environment."); see also Flexpetz, *supra* note 24 ("Flexpetz dogs are rescues or in urgent need of rehoming."); see also Flexpetz, <http://www.flexpetz.com/isitforyou.html> (last visited Jan. 7, 2009) ("Would you feel even better if such a program helped dogs in need of rescuing or re-homing? . . . Flexpetz aims to help by taking in dogs that need rescuing or re-homing."); see also Flexpetz, <http://www.flexpetz.com/how.html> (last visited Jan. 7, 2009) ("Flexpetz provides our members with local access to a variety of dogs, all of whom are rescued or rehomed . . ."). "Where possible" qualifier apparently not deemed important enough for repetition in any of the above representations.

<sup>45</sup> See Selucky, *supra* note 12.

<sup>46</sup> See Flexpetz, *supra* note 30.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See FOGLE, *supra* note 42 at 276 (Noting that diminished sight and hearing, tendency to sleep more, dogs own dislike to changing routines, constipation and gas, painful joints, lack of strength, incontinence are among the many medical conditions that aging dogs can develop).

<sup>51</sup> See Flexpetz, *supra* note 24.

### III. PUBLIC REACTION TO TEMPORARY DOG OWNERSHIP

Of the number of people to whom the idea of renting dogs was mentioned, not a single person responded in favorable terms. Whereas such a reaction may be to some extent biased as most people questioned have companion pets and are either friends or family of the author, the few randomly selected people who were questioned responded unfavorably and perplexed. Not surprisingly however, public reaction in the media to the idea of renting dogs has also been overwhelmingly negative.

The practices of Flexpetz have been criticized as being cruel and ignorant to the needs and psychology of dogs. “The whole point of having a dog is having a relationship . . . [i]t’s not like wearing a piece of jewelry. Dogs get attached quickly and then it’s lifted away from them, which is cruel.”<sup>52</sup> Dismissing her business as a “rent-a-pet operation” and likening it instead to a vacation time-share or a gym membership, Ms. Cervantes seems to be intimating that such a characterization makes the practice less objectionable.<sup>53</sup> Yet, it is obvious that though such a trend in “consumers who are more interested in the experience rather than owning” is growing, even business strategists commenting on shared ownership of inanimate objects such as cars, art, and luxury bags warn that “[p]eople will not feel connected to the brand. It’s another disposable.”<sup>54</sup> While thinking of bags or cars as disposables when rented may hurt the bottom line of a company seeking brand loyalty, thinking of dogs as disposable items hurts dogs and how we view them in our society. Perhaps recognizing this dichotomy in our treatment of dogs as compared to inanimate objects, along with the possible harm caused to the particular dogs being rented out, is why some people have had such a vehement reaction to Flexpetz.

If you can’t tell already, I think all of this is a supremely bad idea-for the dog, at least. Renting may be fine for cars or tuxedos, but dogs are sentient beings that, like children, crave stability and routine. They want to belong to a stable pack, and they want a leader – not an ever-changing cast of Hummer driving, Slate-reading urbanites.<sup>55</sup>

Veterinarians, animal rights activists and a number of humane societies in the United States and United Kingdom have also reacted similarly. Veterinarians, dog trainers, and many pet owners consider the practice as “shocking.”<sup>56</sup> “Veterinarians say renting out dogs could inflict permanent damage to their psyches, as multiple

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<sup>52</sup> Annie Karni, *The New York Sun: Pet-Renting Concept Termed ‘Shocking,’* Aug. 17, 2007, available at <http://www.nysun.com/article/60715> (quoting Deborah Sarfaty, a veterinarian and health director of the doggie day care center Biscuit and Bath).

<sup>53</sup> See *Pet-For-A Day*, *supra* note 7.

<sup>54</sup> Kimberly D. William, *Give this Pooch a Home (Whenever you have the time)*, ADVERTISING AGE, Aug. 13, 2007, at 4 (quoting Richard Laermer, the author of “Trendspotting” and other works on the topic of transumers).

<sup>55</sup> Flaim, *supra* note 20.

<sup>56</sup> See Karni, *supra* note 52.

owners could muddle their understanding of loyalty.”<sup>57</sup> While no one denies the positive impact of dogs in one’s life and programs that take animals to nursing homes have a positive effect, those dogs, nevertheless, have a stable home life.<sup>58</sup> Moreover, given the detrimental effects of such a practice on dogs, others question: “What sort of scrutiny is the company doing to gauge the impact on its animals as they are passed from client to client for a fee?”<sup>59</sup>

The Humane Society of the United States commenting on Flexpetz transmitted the following press release:

Dogs form attachments to their families and instinctively learn to protect their packs. Frequent and abrupt changes in location, routine, discipline and attention are confusing and are likely to lead to stress-induced behavior problems. Dogs are not like cars or furniture. Moving them from person to person, home to home, can induce problems such as anxiety and depression.<sup>60</sup>

The release went on to state that the Humane Society was critical of the concept of renting pets and that despite its good intentions, “Flexpetz is not likely to benefit the overall welfare of the dogs they rent.”<sup>61</sup> Similarly, the American Society for the Prevention of Cruelty to Animals (ASPCA) issued a statement on Flexpetz “Flexible Dog Ownership Program” stating:

The ASPCA believes this goes against the very concept of developing the human-animal bond, which we in the animal welfare world work so hard to promote. Dogs and other pets deserve a family and home that they can depend on. They are not commodities to be availed of when the whim strikes, and to be put away when not.<sup>62</sup>

The ASPCA’s press release also pointed out that Flexpetz’s rental program is fundamentally different from other practices of homing and fostering pets, since it does not seek to find permanent homes for the animals.<sup>63</sup>

To the extent that Flexpetz may in fact provide dogs with a better environment than a shelter and perhaps even a permanent home, given the lack of information

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<sup>57</sup> *Id.*

<sup>58</sup> *Pet-For-A Day*, *supra* note 7.

<sup>59</sup> *Id.*

<sup>60</sup> The Humane Soc’y of the United States, *Dogs Deserve Life-Long Homes*, Press Release Aug. 6, 2007, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/dogs\\_deserve\\_lifelong\\_homes.html](http://www.hsus.org/press_and_publications/press_releases/dogs_deserve_lifelong_homes.html).

<sup>61</sup> *Id.*

<sup>62</sup> The American Soc’y for the Prevention of Cruelty to Animals, *ASPCA Issues Statement on Flexpetz “Flexible Dog Ownership Program,”* Press Release Aug. 3, 2007, <http://www.aspc.org/pressroom/press-releases/080307-1.html>.

<sup>63</sup> *Id.*

provided by the company, reservations about the benefits to the dogs can be anticipated.<sup>64</sup> In fact, after finding out about Flexpetz's plans to open in the United Kingdom, the Kennel Club of United Kingdom issued the following statement:

It is with deep concern that the Kennel Club has heard about a new scheme under way in America called FlexPetz, which is set to come to the UK in October [ . . . ] The concept of renting out dogs as a 'timeshare' equivalent is detrimental to the dog, leading to all kinds of confusion for the animal. It also raises many questions about the kind of person who is making money at the dog's expense, what happens when the dog gets older and no one wants it, and what happens in the situation where people who are renting the dog don't want to give it back? 'It is also of concern that different people will have different ideas about house rules, leading to even further confusion for the dog when it is not given any consistency with which rules to follow.'<sup>65</sup>

Despite the unanswered questions about Flexpetz, the practice of renting dogs is abhorrent to many. In criticizing Flexpetz, Ryan Neile, an animal behaviorist at The Blue Cross, a registered United Kingdom animal welfare charity, stated:

Dogs are dependent on meaningful lifelong relationships with their human owners. Both parties of the human dog partnership develop a strong bond which is underpinned by both trust and understanding. The more deep-rooted a relationship becomes, the more stable and secure the dog will be. The opposite occurs when a dog is passed around one person or home to another. They may become confused, distressed and unpredictable-something we sadly see all too often in dogs that come to The Blue Cross. It is only through consistency and predictability of routine and the awareness of social boundaries that a dog can truly thrive.<sup>66</sup>

Considering the overwhelmingly negative response to Flexpetz and the detrimental effects of its practices on dogs, one would think that a business like Flexpetz would have no clients and quickly go out of business. On the contrary,

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<sup>64</sup> See Selucky, *supra* at 12 ("Stephanie Scroggs, the director of communications for the SPCA International, has mixed feelings about the program. 'We're glad that people are able to experience the therapeutic qualities of companion animals through services like Flexpetz, but we hope customers will research how these programs treat pets after-hours.'"). *Id.*

<sup>65</sup> Steve O'Malley, *Kennel Club Statement on Flexpetz*, Aug. 2, 2007, <http://www.ukpets.co.uk/ukp/index.php?section=Home&sub=News&method=fetch&item=1266>.

<sup>66</sup> The Blue Cross, <http://www.bluecross.org.uk/web/site/news/2007/Flexpetz.asp> (last visited Jan. 7, 2009).

Flexpetz has already tripled in locations since its flagship branch opened in San Diego in February of 2007 and has opened a number of new national and international locations.<sup>67</sup> Unless the company is operating at a loss, it can be assumed practically that it has a growing number of members who are willing to pay the estimated \$1450 a year for pet companionship and are undeterred in their lifestyles from what these dogs may undergo.

For now, at least, it does not seem that the business of renting dogs for profit will cease to exist from a lack of demand or public condemnation based on the treatment of dogs. In fact, pet rental businesses already operating in Japan and Hong Kong have been thriving in the past few years. “[T]he number of companies dedicated to renting out pets in Tokyo alone has risen from 17 in 2000 to 134 today,”<sup>68</sup> despite being condemned by animal welfarists as stressful and unhealthy for the animals.<sup>69</sup> Similarly, while “Hong Kong’s Society for the Prevention of Cruelty to Animals stopped short of describing the practice as revolting, arguing that an animal should not be leased out like a disposable asset[,]”<sup>70</sup> the venture has been such a commercial success for a pet shop owner in Hong Kong that “sales have increased five-fold since he launched his pet rental program.”<sup>71</sup> Although an examination of animal welfare laws in Asia is beyond the scope of this paper, it should nevertheless be pointed out that there are vast differences in how cultures across the world view animals and their roles in society.<sup>72</sup> Further, and without engaging in the offensive practice of cultural imperialism, it should be noted that dogs and cats are commonly consumed by humans as food and slaughtered for their fur in China and many parts of Asia.<sup>73</sup>

Insofar as the practices of Flexpetz are concerned, the United States and each respective state in which Flexpetz currently operates as well as the United Kingdom, where a Flexpetz location is anticipated in 2008, have an animal anti-cruelty statute and the next section of this paper will discuss how those statutes affect the business of renting dogs.

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<sup>67</sup> See Flexpetz, *supra* note 15.

<sup>68</sup> Danielle Demetriou, *A Dog is Just for the Afternoon*, Nov. 26, 2007, <http://www.telegraph.co.uk/news/worldnews/1570492/A-dog-is-just-for-the-afternoon.html>.

<sup>69</sup> *Id.*

<sup>70</sup> Andrew Brown, *Hong Kong’s Rent-A-Pet Unleashes Row*, Sep. 5, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/east/09/05/hk.pet.rent/index.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Animal Asia Foundation, *Friends...or Food?*, <http://www.animalsasia.org/index.php?UID=OGJFM65K03Y3> (last visited Feb. 14, 2009) (stating “[c]ertain cultures view dogs as vermin,” and discussing the efforts of Animal Asia Foundation’s, a Hong Kong-based government-registered animal welfare charity, efforts in raising awareness of the poor treatment and slaughtering of millions of dogs and cats each year and pushing for legislation to ameliorate the situation.).

<sup>73</sup> *Id.*; See also Stanley J. Olsen, *Dogs*, in *THE CAMBRIDGE WORLD HISTORY OF FOOD*, at 508 (2000) (stating “Today dogs are employed as food for human consumption in many parts of Asia, and China in particular, but the origins and reasons for this practice are not well documented, or if they are, they are probably recorded in one or more of the many Asia sources not yet translated.”).

#### IV. ANIMAL WELFARE LEGISLATION IN THE UNITED STATES

##### *a. Animal Welfare Act*

The Animal Welfare Act<sup>74</sup> (AWA) could apply to FlexPetz through its procurement and/or interstate transportation of dogs. AWA is the only Federal law in the United States that regulates the treatment of animals in research exhibition, transport, commerce and by dealers, even though it does not “ban remedial state legislation in the field of interstate commerce in pets.”<sup>75</sup> The Act is enforced by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) and Animal Care (AC). AC develops regulations that interpret the Act with each amendment. The regulations are published in the Code of Federal Regulations, Title 9, Chapter 1, Subchapter A - Animal Welfare, which is popularly known as 9CFR.<sup>76</sup>

The AWA is a “regulatory scheme, in that its primary activity is to register certain animal users and then inspect the facilities of those users to determine whether the care guidelines or regulations for animals in their possession are being followed. Though it is not a national anti-cruelty law, which exist at the state level,”<sup>77</sup> it may nonetheless have limited implications for Flexpetz.

Section 2134 of the AWA requires dealers and exhibitors to obtain a license from the Secretary of Agriculture of the United States or his representative in order to operate.<sup>78</sup> The AWA defines the term dealer in pertinent part as:

...any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes.<sup>79</sup>

Person is defined as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.”<sup>80</sup> Since Flexpetz is a

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<sup>74</sup> 7 U.S.C §§ 2131-2159 (West 2007).

<sup>75</sup> See *Winkler v. Colorado Dep't of Health*, 564 P.2d 107 (1977) (court held that Colorado's regulations to prohibit importation of pets for resale from states whose licensing laws and regulations for commercial pet dealers were not as stringent as those of Colorado were not preempted by the AWA.) 111); but see *Taub v. State*, 463 A.2d 819 (1983) ( Maryland Court of Appeals held that since the Animal Welfare Act provided a comprehensive plan for the protection of animals used in research and as a subject to detailed regulations of the Secretary of Agriculture with respect to humane handling, care, treatment, transportation of nonhuman primates, Maryland animal cruelty statute did not apply to a laboratory funded by the National Institute of Health.).

<sup>76</sup> See U.S. Dep't of Agric., <http://www.nal.usda.gov/awic/legislat/regsqa.htm> (last visited Jan. 7, 2009).

<sup>77</sup> See <http://animallaw.info/articles/qvusawa.htm> (last visited Jan. 7, 2009).

<sup>78</sup> 7 U.S.C. § 2134 (2000).

<sup>79</sup> 7 U.S.C. § 2132(f) (2000).

<sup>80</sup> 7 U.S.C. § 2132(a) (2000).

corporation and may transport dogs to be rented for use as pets from one state to another in order to meet the demands of its members,<sup>81</sup> it may fall within the definition of a dealer in commerce and thus the purview of the Animal Welfare Act.

Under the Animal Welfare Act, Flexpetz would be subject to inspections of its dogs and records at reasonable hours upon request by law enforcement agencies in search of lost animals.<sup>82</sup> Furthermore, Flexpetz would be required to keep records with respect to the purchase, sale, transportation, identification, and previous ownership of the dogs;<sup>83</sup> develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise; provide proper housing and care;<sup>84</sup> and mark and identify each dog.<sup>85</sup>

Even though the AWA provides for criminal penalties, civil penalties and revocation of permits for violations, since the Act is primarily regulatory and of limited purpose and scope, it does not govern the practice of renting dogs. Therefore, absent violations of the aforementioned applicable provisions or standards as set forth in 9 C.F.R, Part 3, it is unlikely that an injunction would be sought or successfully obtained against Flexpetz for the renting of dogs under the Animal Welfare Act.<sup>86</sup>

### *b. State Laws*

While historically state animal cruelty laws, much like the Animal Welfare Act, were limited in scope and provided insufficient penalties for violations, in the past decade state animal laws have been considerably strengthened.<sup>87</sup> “In 1993, only seven states had felony animal abuse laws,”<sup>88</sup> whereas, by “June 2008, 45 states ha[d] enacted felony-level penalties for certain acts of animal cruelty, 31 of them in the last ten years.”<sup>89</sup> Since each state has its own unique statute, their

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<sup>81</sup> It can be foreseeable that due to fluctuations in rental demands, Flexpetz might transport a dog or some of its dogs to another state so that a dog may be rented by a member there.

<sup>82</sup> See 7 U.S.C. § 2147 (2000).

<sup>83</sup> See 7 U.S.C. § 2140 (2000).

<sup>84</sup> See 7 U.S.C. § 2143(a)(2)(B) (2000) (sets out the requirement that exercise be provided); 9 C.F.R. §3.8 (1967) (sets forth the standards for exercise to be provided).

<sup>85</sup> 7 U.S.C. § 2141 (2000).

<sup>86</sup> 7 U.S.C. § 2159 (2000) (allows an injunction to be sought if “Secretary has reason to believe that any dealer, carrier, exhibitor, or intermediate handler is dealing in stolen animals, or is placing the health of any animal in serious danger in violation of this Act or the regulations or standards promulgated.”); 7 U.S.C. §§ 2143, 2147, 2141 (2000).

<sup>87</sup> See Hankin, *supra* note 8.

<sup>88</sup> See Stephan K. Otto, *State Animal Protection Law – The Next Generation*, 11 ANIMAL L. 131, 132 (2005) (explaining the effectiveness of animal protection law across the country and how these laws can be amended to provide for better protection and through improved statutory standards and more comprehensive provisions).

<sup>89</sup> See The Humane Soc’y of the United States, *Animal Cruelty Laws: Where Does Your State Stand?*, [http://www.hsus.org/legislation\\_laws/state\\_legislation/animal\\_cruelty\\_laws\\_where\\_does\\_your\\_state\\_stand.html](http://www.hsus.org/legislation_laws/state_legislation/animal_cruelty_laws_where_does_your_state_stand.html) (last visited Nov. 12, 2007).

coverage can vary. Thus, this section will explore how Flexpetz' business of renting dogs can be affected by anti-cruelty statutes in California and New York.

Furthermore, since specific documented instances of animal abuse, whether through beatings, mutilation or neglect cannot be generally presumed to be part of a dog rental program,<sup>90</sup> the examination of such a program through various state laws is limited to the inherently detrimental effects of such practices on dogs. As mentioned previously, being constantly moved from one home to another can cause stress induced behavioral problems in dogs such as anxiety and depression. "One of the most important things for canines is their pack—their family[.] The two most important things pack animals do are eat and sleep together."<sup>91</sup>

Unfortunately, documented scientific studies to fully demonstrate the direct connection of an unstable environment and inconsistent routines on the health and psyches of dogs are presently lacking.<sup>92</sup> Adding to the frustration is the fact that "[p]hobias, anxieties, depression, and grieving have not been considered an integral part of veterinary medicine until recently"<sup>93</sup> and that is sure to impede such disorders from being readily accepted as an injury recognized by the law.

## I. CALIFORNIA

California, Illinois, Maine, Michigan and Oregon have the best anti-cruelty laws in the United States.<sup>94</sup> In analyzing whether the practice of dog renting can be brought within the ambit of California's animal anti-cruelty law, the most pertinent section of the law to be considered is California Penal Code Section 597 (b), which states:

[E]very person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance,

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<sup>90</sup> That is not to say that renting dogs to people who do not want the responsibility of ownership would not foster an environment conducive to neglect, cruel treatment or abuse.

<sup>91</sup> DR. LARRY LACHMAN & FRANK MICKADEIT, *DOGS ON THE COUCH: BEHAVIOR THERAPY FOR TRAINING AND CARING FOR YOUR DOG* 264 (1999).

<sup>92</sup> While researching this topic, the author corresponded with Marc Bekoff, Dr. Lynette Hart, Ph.D., M.S., and Dr. Raymond Coppinger, Ph.D. in order to find studies relating to the affects of an ever-changing environment and different human companions on dogs but was advised that to their knowledge there were no authoritative studies to date on such a topic. Nevertheless, their consensus was that while some breeds may be better suited for such a lifestyle, dogs in general would suffer from confusion and the inability to form a long-term bond with a human companion. (on file with author).

<sup>93</sup> See FOGLE, *supra* note 42 at 275.

<sup>94</sup> See *Best States to Abuse an Animal?* THE ANIMALS' ADVOCATE, THE Q. NEWSL. OF THE ANIMAL LEGAL DEF. FUND (ALDF, Cotati, Cal.), Vol. 25, No.2 (Summer 2006), at 1, available at [http://www.aldf.org/downloads/130\\_animalsadvocatessummer06.pdf](http://www.aldf.org/downloads/130_animalsadvocatessummer06.pdf) (The determination that California, Illinois, Maine, Michigan and Oregon had the best anti-cruelty laws was based on an analysis of the animal protection laws of each state in the U.S.; the 50 States and the District of Columbia were scored for the general comprehensiveness and relative strength of their respective legal protections for animals.).

drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or or [sic] a felony and by a fine of not more than twenty thousand dollars(\$20,000).<sup>95</sup>

It can be argued that Flexpetz dogs are being subjected to needless suffering since they are deprived of a stable home and a predictable environment. These dogs do not have a stable pack and being constantly moved around could lead to stress induced anxiety or depression. Also, an argument can be made that the dogs are being overdriven when they are sent from one member to the next as it can be anticipated that a dog could be rented the very same day that it is returned to a Flexpetz facility by a member.<sup>96</sup> This could also be considered unnecessarily cruel since dogs generally sleep at least twelve hours a day.<sup>97</sup> It is unlikely that a member will allow for a restful environment when the very purpose for which he/she has rented the dog is to spend time with it through various activities.

While one specific rental period may not amount to needless suffering, if it can be shown that these dogs are constantly rented out and are subject to back to back rentals a California court may find a valid anti-cruelty claim. An offense is of a continuing nature when it may be committed by “a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.”<sup>98</sup> Further, violations of California Penal Code § 597 are general intent crimes and thus a showing that Flexpetz intended to overdrive or inflict needless suffering on the dogs would not be required.<sup>99</sup>

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<sup>95</sup> CAL. PENAL CODE § 597(b) (West 1999).

<sup>96</sup> See Flexpetz, *supra* note 23 (If the dog is returned “between opening time (7 AM) and the start of the next reservation period (8 AM), then the Member will not be charged the Inconvenience Fee.”); *Id.*

<sup>97</sup> ARDEN MOORE, THE DOG BEHAVIOR ANSWER BOOK 50 (2006).

<sup>98</sup> See *People v. Sanchez*, 114 Cal.Rptr.2d 437, 444 (Ct. App. 2001) (*quoting* *People v. Epps*, 176 Cal.Rptr. 332 (Ct. App. 1981)) (defendant’s convictions under title 14, section 597(b) of the California Penal Code were affirmed in part and reversed in part based on the trial judge’s failure to give unanimity instructions).

<sup>99</sup> See *People v. Alvarado*, 23 Cal.Rptr.3d 391 (Ct. App. 2005) (court affirmed conviction of man who was inebriated and stabbed to death his two dogs).

If animal cruelty charges against the practice of renting dogs and Flexpetz are brought with the required evidence of how such a transient existence has harmed the dogs, it will likely be a case of first impression in California. Even if there is proof that Flexpetz practices have been the cause in fact to a dog's psychological or behavioral problem, at this point, given the lack of explicit statutory language and case law on the practice of renting pets, it is unlikely that such a claim would succeed in California.

## II. NEW YORK

Similar to California's anti-cruelty statute, New York also provides for a prohibition against overdriving, torturing and injuring animals in its Agriculture and Markets Law § 353. New York's statute states:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall be treated as a misdemeanor defined in the penal law.<sup>100</sup>

New York case law on the interpretation and application of § 353 is not extensive and a cruelty charge brought against Flexpetz and its dog rental practices would also be of first impression in the state. However, a Criminal Court decision from the City of New York could provide guidance on how such a case may be decided. In *People v. Arroyo*,<sup>101</sup> defendant was charged with overdriving, torturing and injuring animals and failure to provide proper sustenance<sup>102</sup> in violation of Agriculture and Markets Law § 353. The violation arose from defendant's failure to provide medical care to his dog which was found by an A.S.P.C.A. special investigator with a large bleeding tumor hanging from its stomach.<sup>103</sup>

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<sup>100</sup> N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2004) (Unlike California Penal Code § 597, which prescribes violations as a felony, New York's § 353 treats such acts as a misdemeanor.).

<sup>101</sup> *People v. Arroyo*, 777 N.Y.S.2d 836 (2004).

<sup>102</sup> *Id.* at 838.

<sup>103</sup> *Id.*

The defendant acknowledged that he was aware of the dog's medical condition but that he could not provide treatment because of his limited finances.<sup>104</sup> Nevertheless, the defendant argued that the statute was vague because its proscription against "unjustifiable pain" and requirement of "necessary sustenance" were not "specific enough to provide notice that an owner must provide medical care to a terminally ill animal."<sup>105</sup>

In finding that Section 353 was vague as applied to the facts of the case, the court reasoned that the language of the statute was not clear, the legislative history did not shed any light on the intent of the legislature when it included the term "sustenance" in the statute<sup>106</sup> and that it did "not afford notice to a person of ordinary intelligence."<sup>107</sup> The court also reasoned that as determined by common understanding and practice, as well as society's sense of morality, the phrase "unjustifiable physical pain" did not provide sufficient notice to a person that his or her decision not to provide a pet with medical care is a crime.<sup>108</sup>

In light of this decision, Flexpetz would seem to have a very good defense to any charges of cruelty stemming from its practices. In essence, based on the *Arroyo* court's reasoning, the terms "overdrive," "overload," and "any act of cruelty" would not seem to give a person of ordinary intelligence<sup>109</sup> notice that renting dogs for mere companionship is a violation of the statute. Further, as already discussed, behavioral problems stemming from unstable environments and a lack of a permanent bond to a "pack" are only recently being scientifically explored and accepted by the veterinary community. Absent recognition of such needs by the legislature and explicit legislation to address those needs, it is unlikely a New York court would venture to find dog renting in violation of the New York Agriculture and Markets Law § 350 et seq. This is especially so considering that visibly bleeding tumors did not suffice to give notice to a person of ordinary intelligence that a dog is suffering from "unjustifiable physical pain."<sup>110</sup>

Notwithstanding the relative ease with which Flexpetz may avoid cruelty or overdriving charges, another New York statute may still hinder its eleemosynary claim of helping dogs in need of rescue or re-homing. Agriculture and Markets Law § 374(2)(e) states:

No person shall release any dog or cat from the custody or control of any pound, shelter, society for the prevention of cruelty to animals, humane society, dog protective association, dog control officer,

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<sup>104</sup> *Id.* (Further, it was undisputed that despite defendant's financial situation, he was on vacation when the dog was initially found and confiscated by the A.S.P.C.A agent.).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 840.

<sup>107</sup> *Id.* at 842.

<sup>108</sup> *Id.* at 844.

<sup>109</sup> As mentioned previously, Marlena Cervantes has no experience in animal husbandry or behavior. The credentials of Flexpetz trainers are also unknown.

<sup>110</sup> *See Arroyo*, 777 N.Y.S.2d at 842-46.

peace officer or any agent thereof, for any purpose except adoption or redemption by its owner.<sup>111</sup>

As defined in § 350 “[a]doption’ means the delivery to any natural person eighteen years of age or older, for the limited purpose of harboring a pet, of any dog or cat, seized or surrendered.”<sup>112</sup> It would be safe to say that Flexpetz does not adopt pets for the “purpose of harboring a pet” but more accurately for the purpose of renting to others for a limited duration in exchange for monetary compensation. Perhaps this is also one of many circumstances where it would not be “possible”<sup>113</sup> for a dog that is in need of a home to be considered for the Flexpetz program.

In any case, it is unknown whether Flexpetz brings its dogs from other states or is privy to a network of people who are either willing to give up or sell their dogs to Flexpetz. Yet, as a matter of public policy and truthful advertising, Flexpetz should be required to disclose on its website information relating to exactly where its dogs are obtained from so that at least those who rent dogs with the intent or belief that they are helping abandoned animals in their city or state are not misled.

## V. ANIMAL WELFARE LEGISLATION IN THE UNITED KINGDOM

Having the distinct mark as the first country where a national animal society in the world was founded,<sup>114</sup> the United Kingdom is also considered to be the first country where animal protection was seriously debated by a full legislative body.<sup>115</sup> It naturally follows then that recognition of animal welfare and efforts to enact legislation to that end predate similar efforts in the United States. Whether it is the earlier establishment of the animal welfare movement in the United Kingdom or the desire of its citizens in pressing for more extensive legislation, it is clear from an examination of the below statutes and case law that the United Kingdom has stricter and broader laws to protect the welfare of animals in comparison to the United States.<sup>116</sup> Of the numerous existing laws that are applicable to animals and

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<sup>111</sup> N.Y. AGRIC. & MKTS. LAW § 374(2)(e) (McKinney 2004).

<sup>112</sup> *Id.* § 350.

<sup>113</sup> *See supra* text accompanying note 44 (There it was pointed out that Flexpetz’s website proclaims its program as helping dogs in need of rescuing or re-homing while omitting the “where possible” qualifier and the founder’s understanding that people do not want to be seen around with a mutt.).

<sup>114</sup> *See* Royal Soc’y for the Prot. of Animals, *History of the RSPCA*, [www.rspca.org.uk/](http://www.rspca.org.uk/) (follow “About the RSPCA” hyperlink; then follow “History” hyperlink) (last visited Feb. 2, 2008).

<sup>115</sup> David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800’s*, DET. C.L. REV. 1, 4 (1993).

<sup>116</sup> Just one example is The Hunting Act 2004, chapter 37, section 1, which makes unlawful the hunting of wild mammals with dogs. Hunting Act, 2004, c.37, § 1 (U.K.). Whereas, the Act does provide for exemptions, its prohibition is unparalleled in any U.S. Federal law and where limitations are imposed by the respective laws of California and New York, such limitations only proscribe to regulate the time, manner and location of hunting with dogs as opposed to announcing

activities for which they may be employed in the United Kingdom, none either explicitly prohibit or permit the renting of dogs. Therefore, this note will discuss the recently enacted Animal Welfare Act of 2006<sup>117</sup> which could either preclude Flexpetz from operating in London or have a substantial impact on its operations.

*a. The Animal Welfare Act 2006*

The Animal Welfare Act 2006 came into force on April 6, 2007 in England.<sup>118</sup> It has been described as “[t]he biggest crackdown on animal cruelty for nearly a century”<sup>119</sup> and besides raising penalties for offenses, the Act also “giv[es] law enforcement agencies the power to take action to prevent animal suffering before it has a chance to occur.”<sup>120</sup> The most pertinent part of the Act as bearing upon Flexpetz is Section 9, which states in pertinent part:

Duty of person responsible for animal to ensure welfare

- (1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.
- (2) For the purposes of this Act, an animal’s needs shall be taken to include—
  - (a) its need for a suitable environment,
  - (b) its need for a suitable diet,
  - (c) its need to be able to exhibit normal behaviour patterns,
  - (d) any need it has to be housed with, or apart from, other animals, and
  - (e) its need to be protected from pain, suffering, injury and disease.<sup>121</sup>

The Act defines “suffering” as “physical or mental suffering and related expressions.”<sup>122</sup> Further, since there is an affirmative duty upon a person responsible for an animal, in order for someone to have violated the law, the Act does not require that an animal has suffered but merely that reasonable steps have not been taken to ensure its needs. “Hence where the person knew (or ought reasonably to have known), that their actions or failed actions would be likely to result in the animal

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a general ban. *Id.*; see N.Y. ENVTL. CONSERV. LAW § 11-0923 (McKinney 2005); CAL. FISH & GAME CODE § 3008 (West 1998).

<sup>117</sup> Animal Welfare Act, 2006, S.I. 2007/499, art. 2 (U.K.).

<sup>118</sup> *Id.*

<sup>119</sup> *Overhaul for Animal Welfare Laws*, BBC NEWS, July 14, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/3891119.stm](http://news.bbc.co.uk/2/hi/uk_news/3891119.stm).

<sup>120</sup> Dog Trust, *New Laws and Bills in Progress*, <http://www.dogstrust.org.uk/information/factsheets/doglaw/newlawandbills/> (last visited Jan. 28, 2008).

<sup>121</sup> Animal Welfare Act, 2006, c. 45, § 9(2) (U.K.).

<sup>122</sup> *Id.* § 62(1).

suffering, they can be prosecuted.”<sup>123</sup> Additionally, in determining the reasonableness of a person’s action or lack thereof, an objective test is to be utilized.<sup>124</sup> This would dramatically lessen, if not vitiate the need to weigh the defendant’s assertion of having taken the proper subjective measures under the circumstances when prosecuted for not acting in accordance with the duty of care he/she owes to an animal.

Ostensibly, the practices of Flexpetz and its affects on dogs could fall within the language of the Act in respect to a “need for a suitable environment,” “need to be able to exhibit normal behavior patterns” and “need to be protected from suffering” which includes “mental suffering.” While, and as noted above, scientific studies and veterinary medicine dealing with behavioral and psychological problems in animals are only recently gaining acceptance, the explicit reference of an animal’s needs to include suitable environment, ability to exhibit normal behavior pattern and protection from mental suffering in the Act would seem to indicate a recognition and protection of those needs notwithstanding scientific proof. “Expert evidence may well be of assistance in many cases to establish not only the needs of an animal, but also whether or not they have been met in accordance with good practice. However, courts should not be afraid of concluding that these matters may well often be within their own experience and knowledge.”<sup>125</sup> It is not unfathomable that renting dogs and its detrimental effects or potential of such could be found as not meeting their needs to the extent required by good practice based on dogs’ general needs for stable environment, a hierarchical ‘pack,’ and long term bonds with human companions to name just a few.

However, much like the U.S., there is no U.K. case that addresses the specific issues raised by Flexpetz and the way in which a court may resolve a claim against the company for failing to ensure the welfare of an animal is at best speculative. Adding to the uncertainty is the fact that there are no officially reported cases of prosecutions for the newly enacted Animal Welfare Act 2006, which may have given some insight into how a court will interpret and apply the aforementioned duty of care provisions. While a number of offenses and violations of other provisions in the Act have been publicized in the media,<sup>126</sup> a case decided by the High Court of Justice

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<sup>123</sup> Dogs Trust, *Changes to Animal Welfare Legislation*, <http://www.dogstrust.org.uk/information/atozofdogs/animalwelfareacts/text.htm> (last visited Jan. 28, 2007).

<sup>124</sup> Sally Case, *The Animal Welfare Act 2006*, 169 CRIM. LAW. 3 (2007) (U.K.).

<sup>125</sup> *Id.* at 3.

<sup>126</sup> See Laura Churchill, *Geese Starved to Death on Plot with no Grazing*, N. DEVON J., Jan. 17, 2008, available at 2008 WLNR 1009394 (farm worker ordered to pay £736.06 for causing the animals’ unnecessary suffering under the Animal Welfare Act 2006 by not providing a nutritionally balanced diet and admonished by the Chairman of the Bench: “You should be ashamed of this and know better, working in the farming industry.”); see also Darren Evans, *Couple Fined for Neglect of Pedigree Dog*, THISISGWENT.CO.UK, Dec. 12, 2007, available at 2007 WLNR 24522606 (due to financial constraints a couple did not take their dog to a veterinarian when it developed a chronic skin condition resulting in substantial weight and fur loss and they were fined £520 each under the Animal Welfare Act 2006); see also Dean Kirby, *AMAN has Escaped Jail After He was Filmed Pinning a Dog to a Wall by its Throat and Repeatedly Beating it*, MANCHESTER EVENING NEWS, Jan. 17, 2008, available at 2008 WLNR 938212 (a man pleading guilty to three counts of causing

Queen's Bench Division interpreting the anti-cruelty provision of the Protection of Animals Act 1911, which was repealed and replaced by the Animal Welfare Act of 2006, may elucidate the breadth and application of the Act.

In *Hussey v. Royal Society for the Prevention of Cruelty to Animals*,<sup>127</sup> the plaintiff appealed her conviction for "causing unnecessary suffering to an animal, contrary to Section 1(1)(a) of the Protection of Animals Act 1911, on the basis that she unreasonably omitted, for want of professional advice which a responsible dog owner would have sought, to provide the dog with an adequate diet suitable for its breed, age and condition."<sup>128</sup> The plaintiff was the owner of a two year old German shepherd which was significantly underweight for a dog of its age and breed. Justices in the court below had found that the care given by the appellant to other animals in her care was satisfactory. And though the appellant was aware the dog had suffered a substantial loss of weight, her "response [was that] of a caring person"<sup>129</sup> when she fed the dog a range of food to change its diet.<sup>130</sup> Nonetheless, since the appellant had not taken the dog to a veterinarian for advice, as a reasonable person would have done, she was fined £200.00 and disqualified from having custody of a dog for two years.<sup>131</sup> On appeal, the court analyzed the language of the Section 1(1)(a) of the Protection of Animals Act 1911, which stated:

If any person-

- (a) shall...by wantonly or unreasonably doing or omitting to do any act...cause any unnecessary suffering...to any animal such person shall be guilty of an offence of cruelty within the meaning of this Act...<sup>132</sup>

In expounding on the meaning of "unreasonably," the court said: "the word 'unreasonably' connotes an objective test," the standard for which is "that of the ordinary reasonably competent, reasonably humane, modern' owner."<sup>133</sup> Furthermore, the court went on to state that "suffering becomes unnecessary when it is not inevitable in that it could be alleviated by some reasonably practical measure."<sup>134</sup>

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unnecessary suffering to his dog and disqualified from owning or keeping an animal for 10 years under the Animal Welfare Act 2006 among other penalties when his neighbor filmed him abusing the dog and though the dog seemed fine when the police were called, an RSPCA inspector was quoted as saying: "If it wasn't for the neighbour's webcam footage this dog could have ended up living in fear for years."

<sup>127</sup> *Hussey v. Royal Soc'y for the Prevention of Cruelty to Animals* [2007] EWHC (Admin) 1083 (Eng.).

<sup>128</sup> *Id.* at [1], [8].

<sup>129</sup> *Id.* at [5]

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at [7].

<sup>132</sup> *Id.* at [1] (*citing* Protection of Animals Act, 1911, c. 27, § 1(1)(a), *repealed* by Animal Welfare Act, 2006, c.45).

<sup>133</sup> *Id.* at [9] (*citing* Hall v. Royal Soc'y for the Prevention to Animals (Unreported, Nov. 11, 1993)).

<sup>134</sup> *Id.* at [1] (*citing* Royal Soc'y for the Prevention of Cruelty to Animals v. Isaacs, [1994] Crim. L.R. 517).

The appellant argued that “it . . . had to be proved by the prosecution not only that the [a]ppellant knew of the condition of the dog but also knew that that condition would, or might, lead to suffering.”<sup>135</sup> The court rejected this argument and confirmed the prosecution’s position that the only mens rea that needed to be proved was that the appellant had knowledge of the condition of the dog and that had been established by her awareness of the substantial weight loss.<sup>136</sup> The court went on to dismiss the appeal and affirm the conviction of the appellant based upon her failure to consult a veterinarian, as a reasonable person would have for the dog’s substantial weight loss which caused it unnecessary suffering.

The Animal Welfare Act of 2006 maintains the main anti-cruelty provisions of the Protection of Animals Act 1911 and also explicitly adopts the objective standard of a reasonably competent, humane owner and provides considerations for determining unnecessary suffering to include “whether the suffering could reasonably have been avoided or reduced.”<sup>137</sup> While it is clear that *Hussey* would be decided as it was even, or especially so, under the unnecessary provision of the new Act, it is also clear that the explicit reference to a suitable diet under the duty of care provision of the new Act would make a controversy such as in *Hussey* a straightforward case of statutory application rather than interpretation.<sup>138</sup>

Insofar as the operations and practices of Flexpetz can be implicated by the Animal Welfare Act of 2006, questions still remain. Foremost being: whether applying the standards (as predicated under *Hussey* and incorporated within the new Act) of unnecessary suffering (including mental suffering),<sup>139</sup> and steps as are reasonable (adjudged by an objective, humane owner) “to the extent required by good practice,”<sup>140</sup> make renting dogs unnecessarily cruel and/or failing to meet the needs of an animal and thus violative of the Animal Welfare Act 2006? In part, the answer depends on the extent to which the emotional, psychological and physical needs of a dog can be validated by veterinary medicine as well as generally recognized by society. Whereas, scientific studies are presently lacking to demonstrate and address the mental and behavioral needs of dogs, given the fervor with which Flexpetz has been admonished in the UK<sup>141</sup> as well as the Act’s imposition of a positive duty upon a person to ensure the needs of an animal, the prospect of a successful claim against the company do not seem that suppositious. “In introducing the first draft of the Animal Welfare Bill to the House of Commons in October 2005, Animal Welfare Minister Ben Bradshaw said: ‘Once this legislation is enacted, our law

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<sup>135</sup> *Id.* at [14].

<sup>136</sup> *Id.* at [13].

<sup>137</sup> Animal Welfare Act, 2006, c. 45, § 4(3) (U.K.).

<sup>138</sup> *Id.* § 9(2)(b).

<sup>139</sup> *Id.* § 62(1) (“In this Act- ‘suffering’ means physical or mental suffering and related expressions shall be construed accordingly.”).

<sup>140</sup> *Id.* § 9(1).

<sup>141</sup> See text accompanying note 64, 65; see also, Dogs Trust, *Flexpetz Comment*, [http://www.dogstrust.org.uk/press\\_office/pressreleases/2007/flexpetzcomment.htm](http://www.dogstrust.org.uk/press_office/pressreleases/2007/flexpetzcomment.htm) (last visited Feb. 2, 2008) (Dogs Trust’s press release commenting on Flexpetz stated: “Dogs Trust . . . is concerned about the emotional impact this will have upon these dogs; who does this service really benefit? Certainly not the dogs who need a stable routine and a constant owner to bond with.”); *Id.*

will be worthy of our reputation as a nation of animals lovers.”<sup>142</sup> Whether the UK wishes to endorse its reputation or advance it with the imprimatur of its laws by finding the practice of renting dogs illegal still remains to be seen. A Flexpetz location recently opened in the UK in 2008.<sup>143</sup>

## VI. CONCLUSION

United Kingdom’s Animal Welfare Act 2006 affords animals greater protection than federal and state laws in the United States. However, while the laws in the United States are unlikely to substantially impede the operations of Flexpetz and its harmful affects on dogs, it cannot be said with exactitude that UK laws will definitely fare better. Perhaps the reason why it is hard to authoritatively conclude on the legality of Flexpetz’s rental scheme is that existing laws do not fully address the needs of animals. This deficiency may very well be a product of our failure to recognize, explore and safeguard the needs of dogs and other species with whom we share the planet. Nevertheless, the Animal Welfare Act, California Penal Code § 597 et seq., New York Agricultural and Market Laws § 350 et seq., and the Animal Welfare Act of 2006 along with anti-cruelty statutes of other countries, reflect our evolving understanding of animals and our recognition of their worth to us as a society. While these laws are not all encompassing and grant exemptions for major institutional forms of exploitation,<sup>144</sup> they are still a progression in our efforts and desires to protect those that are incapable of speaking on their own behalf.<sup>145</sup>

The debate about the status of animals as property, non-property or somewhere in between as companion animal property, continues to fill the pages of scholarly articles and commentaries on the growth of Animal Law as a legal practice.<sup>146</sup> The significance of this debate lies not just in the fecundity of its legal

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<sup>142</sup> See Case, *supra* note 124 at 4, 5.

<sup>143</sup> See Flexpetz, *supra* note 15.

<sup>144</sup> See Wayne Pacelle, *Law and Public Policy: Future Directions for the Animal Protection Movement*, 11 ANIMAL L. 1, 3 (2005) (“Yet the body of law that now exists is porous and weak in confronting major institutional forms of animal exploitation. There are no categories of animal research that are forbidden, and there are but a handful of laws that exist to protect animals reared for food production.”).

<sup>145</sup> Cf. Lesley J. Rogers, Gisela Kaplan, *Think or be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 ANIMAL L. 151 (2006) (Authors Dr. Lesley and Dr. Kaplan are both full professors in the Centre of Neuroscience and Animal Behaviour at the University of New England, N.S.W., Australia. Their article discusses the expansion of research on the higher cognitive abilities of animals and reaction of lawmakers to such scientific studies. However, it argues that scientific processes used to research cognitive abilities in animals that have served as the impetus for legislators and the general public to accord certain animals greater rights and protections is counterproductive inasmuch as they exclude other animals since not all scientific processes adequately gauge or reflect the sensory perception and higher cognitive abilities of animals.).

<sup>146</sup> See David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87 (2004) (author argues that maintaining the legal status of animals as property and increasing the legal

analysis but also in how it is to such a great extent an acknowledgement of our sensitivities to the needs of animals. As offensive and demoralizing one might find the idea of renting dogs and the fact that it is lawfully permitted at the moment, one should also be comforted by the fervor with which the majority of the public has condemned such a practice.

Most important to note is that while pointing out the ignorance and short sightedness of Flexpetz, critics continue to affirm the benefits of dog companionship and encourage people to spend time with dogs but in a way that also benefits those animals who need it the most. “The ASPCA recommends that if you are unable to have a pet of your own due to time or other constraints...you can volunteer at your local animal shelter where you can walk dogs, socialize cats and help pets find new homes, without committing an extensive amount of time to a companion animal.”<sup>147</sup> Similarly, the Humane Society of the United States “urges dog lovers unable to make a life-long commitment to a pet to seek better and equally fulfilling options. Animal shelters and dog rescue organizations across the country seek caring volunteers to spend quality time with animals available for adoption, for play-time, walking and other forms of socialization. People can also provide foster care, in their home, for a dog or cat who needs extra attention while he or she awaits a permanent adoptive family.”<sup>148</sup> Programs that allow people to interact with dogs are available throughout the country and in contrast to Flexpetz, they cost absolutely nothing.<sup>149</sup> Analogous programs also exist in the UK, where a person desperate to spend time with a dog can volunteer at a Rehoming Centre and for no cost “spend time with many different dogs of all shapes and sizes, pedigrees and crossbreeds, as well as hav[e] the knowledge [they] are really making a difference to their lives.”<sup>150</sup>

Perhaps no other animal has served humans as well as the dog. Notorious for unconditional love and unyielding loyalty, dogs instinctively seek our approval

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obligations that humans have to animals in their care is in the best interest of the animals); *see also* Gary Francione, *Reflection on Animals, Property, and the Law and Rain Without Thunder*, 70-WTR LAW AND CONTEMP. PROBS. 9 (2007) (author argues that the property status of animals should be done away with altogether as it is a “substantial impediment to the meaningful protection of nonhuman interests”); *see also* Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL’Y 314, 379 (2007) (author proposes a new category of Companion Animal Property. “The ‘companion animal property’ category would thus take into account companion animals’ dependence on their human owners, their capacity to suffer if mistreated or neglected, and the bonds that we form with our animals and that they form with us.”); *see also* Terry Carter, *Beast Practices*, ABA JOURNAL, Nov. 2007, at 39.

<sup>147</sup> The American Socy’ for the Prevention of..., *supra* note 62.

<sup>148</sup> The Humane Soc’y of the United States, *supra* note 60.

<sup>149</sup> *See* Flaim, *supra* note 20 (while discussing different ways for people to spend time with dogs and doing so in a way that benefits the countless number of dogs that are in pounds or shelters, the author discusses Rent-A-Pet, started by Randy Grim, founder of Stray Rescue of St. Louis, which is the mirror image of Flexpetz but it does not cost anything. “Volunteers are assigned ‘home-work:’ Get your dog used to the sound of a vacuum. Take him for his first car ride. Teach her how to climb stairs. A behaviorist and an obedience trainer are on stand-by in case of roadblocks.”).

<sup>150</sup> Dogs Trust, *Flexpetz Comment*, [http://www.dogstrust.org.uk/press\\_office/pressreleases/2007/flexpetzcomment.htm](http://www.dogstrust.org.uk/press_office/pressreleases/2007/flexpetzcomment.htm) (last visited Feb. 2, 2008).

and derive pleasure from our company. Despite being ill-treated or met with indifference, dogs have an affinity with humans that is unparalleled between any two species on this planet.<sup>151</sup> To the extent that Flexpetz's practices injure dogs and further perpetuate the obtuse misconception that dogs are commodities or fashion accessories, they should be outlawed. Dogs are sentient beings with complex emotional and physical needs. These needs may not be readily recognized by the law or addressed in our animal welfare statutes but that does not make the practices of Flexpetz any less cruel or inhumane.

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<sup>151</sup> See Charles Darwin, *The Descent of Man* 71 (2nd ed., Prometheus Books 1998) (1874), also available at [http://www.darwin-literature.com/The\\_Descent\\_of\\_Man/5.html](http://www.darwin-literature.com/The_Descent_of_Man/5.html) ("In the agony of death a dog has been known to caress his master, and every one has heard of the dog suffering under vivisection, who licked the hand of the operator.").

## CASE LAW SUMMARIES

ANNA BAUMGRAS

| <b>Case</b>                              | <b>Citation</b>            | <b>Summary of the Facts</b>  | <b>Summary of the Holding</b>   |
|--|----------------------------|--|---|
| Californians for Humane Farms v. Schafer | 2008 WL 4449583 (N.D.Cal.) | <p>A non-profit ballot committee established to sponsor California's Proposal 2 sued the US Secretary of Agriculture for violating the Administrative Procedures Act by approving the American Egg Board's budget. The Egg Board, established under the Egg Research and Consumer Information Act to coordinate research, consumer and producer education, and promotion for the egg industry, set aside \$ 3 million for an advertisement campaign to educate consumers about current production practices. Plaintiff claimed approving the budget was an impermissible use of federal "check off" funds because the Egg Board's purpose in advertising was to influence voters to vote "no" on proposal 2.</p> | <p>The District Court granted Plaintiff's motion for a preliminary injunction. The court found that Plaintiff demonstrated a likelihood of success on the merits because Defendant was unlikely to prove the purpose of the advertisement was unrelated to influencing the election. Additionally, Plaintiff demonstrated the possibility of irreparable harm caused by the influx of \$3 million in funds to support anti-proposal 2 advertisements. Finally, the court determined the decision would serve the public interest by protecting the democratic process, federalism, and the rule of law.</p> |

| <b>Case</b>                     | <b>Citation</b>                        | <b>Summary of the Facts</b>   | <b>Summary of the Holding</b>   |
|---------------------------------|--|---|---|
| <p>United States v. Stevens</p> | <p>533 F.3d 218 (C.A.3 (Pa.) 2008)</p> | <p>The District Court convicted the Defendant of violating 18 U.S.C. § 48, which prohibits knowingly creating, selling or possessing depictions of animal cruelty with the intent to place such depictions into interstate or foreign commerce. The Defendant had advertised pit-bull videos and merchandise in an underground journal on illegal dog-fighting. Some videos showed clips of organized dog fights.</p> | <p>The Court of Appeals held that § 48 regulates speech that is protected under the First Amendment and therefore § 48 is subject to strict scrutiny. The court declined to extend Ferber to include depictions of animal cruelty as unprotected speech because children and animals are inherently different. First: The government's interest in enacting § 48 was not sufficiently compelling under Church of the Lukumi Babalu Aye. Additionally, because § 48 did not prevent animal cruelty, it served no compelling interest. Second: capturing animal cruelty on film does not prolong the harm suffered. Third: prohibiting animal cruelty videos would not affect the dog-fighting market because dog-fights are generally live. The court held § 48 was unconstitutional because</p> |

| Case                           | Citation                         | Summary of the Facts   | Summary of the Holding  |
|--------------------------------|----------------------------------|--|---|
| Fund for Animals v. Kempthorne | 538 F.3d 124 (C.A.2 (N.Y.) 2008) | <p>Plaintiffs challenged the Fish and Wildlife Service's (FWS) Depredation Order allowing the taking of federally protected double-crested cormorants, claiming it violated US treaties and statutes by allowing agencies and Indian Tribes to kill an unlimited number of these birds without restricting seasons or locations, without notice, and without showing specific, localized harm caused by the birds. The District Court granted the Defendant's motion for summary judgment.</p> | <p>it was not narrowly tailored using the least restrictive means and vacated the Defendant's conviction.</p> <p>The Court of Appeals affirmed, concluding that the Order complied with the Migratory Bird Treaty Act by restricting the species, locations, and means by which taking could occur, which restricted 3rd parties' discretion when taking under the Order. Additionally, the Order complied with the Mexico Convention, which requires closed seasons for game birds, because the parties agreed cormorants are not game birds. Finally, the FWS did not act arbitrary and capriciously when adopting the Order and the FWS actions complied with the National Environmental Policy Act.</p> |

| <b>Case</b> | <b>Citation</b> | <b>Summary of the Facts</b>  | <b>Summary of the Holding</b>   |
|-------------|-----------------|--|---|
|             |                 | <p>Defendant fired a pellet gun at/toward a cat that subsequently died. The court found substantial evidence that Defendant's actions caused the death. The District Court found the Defendant guilty of violating a Hawaii animal cruelty statute. HRS § 711-1109. Defendant claimed</p> <ol style="list-style-type: none"> <li>1) that he lacked the requisite state of mind;</li> <li>2) that the cat constituted a "pest" and therefore his behavior fell under an exception to the statute that permits killing insects, pests, or vermin; and 3) that his behavior fell under the exception that permits killing animals if there is "need" because he was concerned about his family's health.</li> </ol> | <p>The court affirmed the conviction. First, the court concluded the Defendant possessed the requisite state of mind that his actions were a gross deviation from the standard of conduct that a law-abiding person would observe. Next, the court concluded that the legislature did not intend for a cat to be a pest or vermin under the statute because the statute defines cat as a "pet animal." Additionally, the court concluded Defendant could have taken other measures to protect his family and therefore the shooting was without need.</p> |

| <b>Case</b>   | <b>Citation</b> | <b>Summary of the Facts</b>  | <b>Summary of the Holding</b>  |
|---------------|-----------------|--|--|
| Viilo v. Eyre | 547 F.3d 707    | <p>Plaintiff sued the City of Milwaukee and two police officers under 42 U.S.C. § 1983 because an officer shot and killed her dog “Bubba.” Police came to Plaintiff’s home after receiving a tip that a wanted felon was at her home with a pit bull. After hearing the police arrive, Bubba ran toward the police, who fired two shots at Bubba. The police later fired a third and fourth shot at Bubba, who died.</p> | <p>The District Court denied the Defendants’ motion for summary judgment based on qualified immunity. The Defendant’s took an interlocutory appeal challenging the denial. The court dismissed the appeal. The court applied a two-step analysis to determine whether qualified immunity applied: 1) whether a constitutional right would have been violated on Plaintiff’s version of the facts; if so, then 2) whether the right was clearly established. Under the first prong, the court held that there was clearly a violation of Plaintiff’s Constitutional rights. Courts have continually held that killing a companion dog constitutes a seizure under the Fourth Amendment. Under the second prong, the court held that the Defendants actions were not conclusively reasonable because</p> |

| <b>Case</b> | <b>Citation</b> | <b>Summary of the Facts</b> | <b>Summary of the Holding</b>  |
|-------------|-----------------|-----------------------------|--|
|             |                 |                             | <p>there was conflicting evidence on whether Bubba posed an immediate danger. Additionally, the police had reasonable notice that killing Bubba would violate the Fourth Amendment and therefore the Constitutional right was “clearly established.”</p> |