

FUZZY TOYS AND FUZZY FEELINGS: HOW THE “DISNEY” CULTURE PROVIDES THE NECESSARY PSYCHOLOGICAL LINK TO IMPROVING ANIMAL WELFARE

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“Reason is, and ought only to be the slave of the passions.”

~David Hume, *A Treatise of Human Nature*

This statement may seem counterintuitive to some, especially lawyers. They are trained from the first day in law school to think, not feel, that arguments must be well-reasoned, dispassionate statements of why things should be a certain way. Emotion cannot cloud rationality. Logic, not feeling, ultimately convinces the decision maker. Perhaps this emphasis is why evidence in today’s courtrooms relies on expert testimony and scientific analysis. The side with the best experts, the most comprehensive tests, and the most thorough studies wins.

But consider for a moment if, instead, rationality could not cloud emotion; if feeling, not logic, convinced the decision maker; if evidence relied more on intuition and instinct rather than scientific analysis. While some fields of law would not benefit from such a reversal, one area surely would: animal law. Court systems that have adopted an intuition-oriented approach over a science-oriented approach have made more progress in improving animal welfare.¹ That is why reason—as far as it involves the “right” thing to do regarding animal welfare—is and ought only to be the slave of the passions.

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¹ *Compare* McDonald’s Corp. v. Steel, [1997] EWHC (QB) 366 (Eng.), as reprinted in Sonia S. Waisman, Bruce A. Wagman, & Pamela D. Frasch, ANIMAL LAW – CASES & MATERIALS 177 (Carolina Academic Press, 2d ed., 2002), with N.J. Soc’y for the Prevention of Cruelty Towards Animals v. N.J. Dep’t of Agric., No. A-6319-03T1, 2007 WL 486764 (N.J. Super. Ct. App. Div. Feb. 16, 2007) (per curiam). Cf. Mariann Sullivan & David J. Wolfson, *If It Looks Like a Duck ... New Jersey, The Regulation of Common Farming Practices, and the Meaning of “Humane”* in ANIMAL LAW & THE COURTS: A READER 94, 109-22 (Taimie L. Bryant, et al. eds., 2008).

I. INTRODUCTION

Although people presumably have used animals in experiments, fought animals against each other, and otherwise abused or tortured animals for hundreds of years, it was not until the mid- to late-1900s that statutes began to address these practices.² The connection between pop culture’s psychological influences on society and people’s ability to empathize and anthropomorphize helps explain this shift. The media helps cultivate increased sentiment for animal welfare, which is the first burden to overcome when advocating for a change in this area of the law. The second hurdle is convincing the courts to recognize that using purely scientific evidence in this field is like trying to force a square peg into a round hole. Pop culture—specifically Disney movies featuring animal characters (perhaps the term should be “pup” culture)—has already accomplished the first task by cultivating an increased interest in animal rights. The second obstacle still remains. Only when courts realize that past precedent is no longer in keeping with the increasing concern over animal welfare, and that scientific evidence of suffering is inadequate to measure or identify cruelty, will there be a sufficient change in the legal protections given to animals.

II. STUDIES ON FUZZY FEELINGS

Many standard human psychology textbooks “[are] based on the belief in a[n]...emotional continuity between animals and humans.”³ The ability to imagine oneself in another’s position—to empathize—begins to develop during childhood.⁴ Moreover, “[t]his human ability to empathize with another is not limited to other human targets. Anthropomorphism...is likely a byproduct of the ability to draw upon one’s own beliefs, feelings, intentions, and emotions, and apply the knowledge of these experiences to the understanding of the mental states of other species.”⁵ Researchers working in the field of

² Cf. Linda J. Keeling, *Getting the Basics Right!*, in PROCEEDINGS OF THE INT’L CONFERENCE ON ANIMAL WELFARE EDUC., 8 (European Commission 2010), available at http://ec.europa.eu/food/animal/welfare/seminars/docs/2010100102_proceedings.pdf; Alistair B. Lawrence, Janine Muldoon, Nelly Lakestani, Candace E. Currie, & Joanne Williams, *Animal Welfare Education: Evidence for Action*, in PROCEEDINGS OF THE INT’L CONFERENCE ON ANIMAL WELFARE EDUC., 10 (European Commission 2010).

³ Sullivan & Wolfson, *supra* note 1, at 124.

⁴ See Lawrence et al., *supra* note 2, at 12-13.

⁵ Marissa A. Harrison & A.E. Hall, *Anthropomorphism, Empathy, and Perceived Communicative Ability Vary With Phylogenetic Relatedness to Humans*, 4(1) J. SOC., EVOLUTIONARY, & CULTURAL PSYCHOLOGY 34, 35 (2010) (citing G. Gallup, *Do Minds Exist In Species Other Than Our Own?*, 2 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 237-238 (1985)).

animal welfare have recognized that children’s empathetic responses and attitudes are “potentially strong influences on stimulating positive behaviour [sic] towards animals in children.”⁶ Muldoon et al. believe that a better understanding of children’s empathy, combined with teaching children how to be humane, will promote caring behavior in children.⁷ Ultimately, “[a] lack of empathy ... restrains people from caring about [a]nimal [w]elfare.”⁸

Young people who develop caring behavior during their formative years will carry those skills and attitudes with them to adulthood,⁹ resulting in a society that is more conscious of animal welfare.¹⁰ Using anthropomorphism and “[c]alling on the feelings of children when considering the humane treatment of animals can be a powerful ... tool.”¹¹ Specifically, the way animals are represented in the environment in which young people grow up contributes to the attitudes and empathy children develop towards animals.¹² Thus cultural norms, especially the media and pop culture in today’s society, have a strong influence on how children—and hence future adults—view animals.¹³

Although “[e]xperience with animals is perhaps the strongest influence on [children’s] attitudes,” the amount of experience children have with animals may not be as important as the quality of experience they have.¹⁴ For example, a young victim of a dog bite may be less likely to form a positive attitude or caring behavior towards animals than a child who has had little experience, good or bad, with a dog. The inverse also holds true: a child who has only a few exceptionally good experiences with animals may be more likely to develop a positive view towards animals than a child who has many neutral experiences.

⁶ Janine Muldoon, Joanne Williams, Alistair Lawrence, Nelly Lakestani, & Candace Currie, PROMOTING A ‘DUTY OF CARE’ TOWARDS ANIMALS AMONG CHILDREN AND YOUNG PEOPLE, at 4-5 (Univ. of St. Andrews Sept. 2009), available at http://www.research.ed.ac.uk/portal/files/5277504/Defra_Yr1Report_Sep09.pdf.

⁷ *Id.* at 5.

⁸ Dirk Lips, *Animal Welfare Education Programs*, in PROCEEDINGS OF THE INT’L CONFERENCE ON ANIMAL WELFARE EDUC., 58 (European Commission 2010).

⁹ See Muldoon et al., *supra* note 6, at 19 (citing E. S. Paul & J. Serpell, *Childhood Pet Keeping and Humane Attitudes in Young Adulthood*, 2 ANIMAL WELFARE 321-337 (1993)).

¹⁰ See Marie Helene Schieb, Lars Roeper, & M. Hametter, *Animal Welfare Education for Children*, in PROCEEDINGS OF THE INT’L CONFERENCE ON ANIMAL WELFARE EDUC., at 68-73 (European Commission 2010) (stating that “an improvement of people-animal relations is especially durable if knowledge is transferred to children”).

¹¹ D.C. Turner, *Importance of Animals to Children, Anthropomorphism, and the Development of Empathy*, in PROCEEDINGS OF THE INT’L CONFERENCE ON ANIMAL WELFARE EDUC., at 122-23 (European Commission 2010).

¹² Muldoon et al., *supra* note 6, at 6.

¹³ See *id.* at 10.

¹⁴ *Id.* at 20.

Furthermore, experience with animals encompasses two distinct forms of contact: direct and indirect, both of which are important. Direct experience involves contact with real animals, as in the example given above, whereas indirect experience is comprised of exposure to animal likenesses, such as toys, television, and movies. Since people's early basic attitudes towards animals are likely to be shaped by the ways their culture uses and represents animals, the media has the power to shape children's unconscious feelings towards animals.¹⁵ Especially in Western cultures, "animal representations are introduced into all aspects of a child's life," from fuzzy toys and clothing to literature, television shows, and movies.¹⁶ Some commentators contend that such fictionalizations and personifications of animals create an idealized view of the animal kingdom, populated by furry "friends." Although some believe these idealizations "may unconsciously influence adult behaviour [sic] and engender impossible expectations for actual animals,"¹⁷ a person's ability to care for animals is likely not as important as his or her empathy towards them in bringing about greater legal protection for animals.

Furthermore, media often use an anthropomorphic approach—which is "likely necessary for the social construction of animal welfare"¹⁸—when portraying animals by giving animals human traits, thus breaking down the classic human-animal distinction.¹⁹ Such representations imbue certain animals "with characteristics that make them more worthy of care and respect."²⁰ Specifically, mammals generally receive more positive characteristics than fish and invertebrates. However, even the mammal category can be broken down further; farm animals usually receive only minor roles, and mammal meat's origins are often overlooked or minimized. Moreover, television programs tend to criticize cruelty towards non-farm mammals but avoid the treatment of farm animals.²¹ The difference in legal protections between farm mammals and other mammals may have its causes in both this disparate media treatment—indirect contact—and the lack of direct

¹⁵ *Id.* at 24. Cf. Nick Jukes, *Catalysing Change in the Curriculum: The Vision and Practice of InterNICHE*, in PROCEEDINGS OF THE INT'L CONFERENCE ON ANIMAL WELFARE EDUC., at 60-61 (E.C. 2010) (listing media as an innovative and alternative means to promoting animal welfare education).

¹⁶ Muldoon et al., *supra* note 6, at 24.

¹⁷ *Id.* at 24-25.

¹⁸ Harrison & Hall, *supra* note 5, at 46 (citing S. Wantanabe, *How Animal Psychology Contributes to Animal Welfare*, 106 APPLIED ANIMAL BEHAVIOUR SCIENCE 193-202 (2007)).

¹⁹ Muldoon et al., *supra* note 6, at 25.

²⁰ *Id.* (citing J. E. Lerner & L. Kalof, *The Animal Text: Message and Meaning in Television Advertisements*, 40 SOCIOLOGICAL QUARTERLY 565-86 (1999)).

²¹ *Id.* (citing E. S. Paul, *The Representation of Animals on Children's Television*, 9 ANTHROZOÏS, 169-83 (1996)).

contact children have with pigs, cows, or chickens.²² Compared to farm animals, children have more direct contact with companion animals such as dogs, cats, and to a lesser extent horses.

III. DISNEY MOVIES AND FUZZY TOYS

Pop culture, specifically Disney movies, enhances the intuitive connection between humans and animals by fulfilling both the quantity and quality of experience necessary to engender empathy and caring attitudes towards animals in children. Aside from princesses (who notably always have lovable animal friends), animal stars are perhaps the most recognizable and beloved Disney characters. For example, from 1937—when Disney released its first feature film-length movie—through the end of 2012, the children’s entertainment giant produced 72 animated and non-animated movies that feature animal characters as the primary stars.²³ The most memorable of these include “Dumbo,” “Bambi,” “101 Dalmatians,” “Homeward Bound: The Incredible Journey,” and “The

²² See *id.* at 26.

²³ See *Disney Movies Guide*, DISNEYMOVIESLIST.COM, <http://www.disneymovieslist.com/disney-movies.asp> (last visited Apr. 11, 2013) (DUMBO (1941), BAMBI (1942), THE THREE CABALLEROS (1944), FUN AND FANCY FREE (1947), LADY AND THE TRAMP (1955), 101 DALMATIANS (animated version) (1961), THE LEGEND OF LOBO (1962), THE INCREDIBLE JOURNEY (1963), KING OF THE GRIZZLIES (1970), THE ARISTOCATS (1970), CHANDAR, THE BLACK LEOPARD OF CEYLON (1972), RUN, COUGAR, RUN (1972), ROBIN HOOD (1973), THE RESCUERS (1977), A TALE OF TWO CRITTERS (1977), THE MANY ADVENTURES OF WINNIE THE POOH (1977), THE FOX AND THE HOUND (1981), BASIL—THE GREAT MOUSE DETECTIVE (1986), BENJI THE HUNTED (1987), OLIVER AND COMPANY (1988), DUCK TALES: THE MOVIE—TREASURE OF THE LOST LAMP (1990), THE RESCUERS DOWN UNDER (1990), HOMEWARD BOUND: THE INCREDIBLE JOURNEY (1993), THE LION KING (1994), A GOOFY MOVIE (1995), HOMEWARD BOUND II: LOST IN SAN FRANCISCO (1996), 101 DALMATIANS (non-animated version) (1996), THE LION KING II: SIMBA’S PRIDE (1998), MICKEY’S ONCE UPON A CHRISTMAS (1999), AN EXTREMELY GOOFY MOVIE (2000), WHISPERS: AN ELEPHANT’S TALE (2000), 102 DALMATIANS (2000), MICKEY’S MAGICAL CHRISTMAS: SNOWED IN AT THE HOUSE OF MOUSE (2001), LADY AND THE TRAMP II: SCAMP’S ADVENTURE (2001), THE COUNTRY BEARS (2002), WINNIE THE POOH: A VERY MERRY CHRISTMAS (2002), BROTHER BEAR (2003), 101 DALMATIANS II: PATCH’S LONDON ADVENTURE (2003), PIGLET’S BIG MOVIE (2003), FINDING NEMO (2003), TEACHER’S PET (2004), HOME ON THE RANGE (2004), WINNIE THE POOH: SPRINGTIME WITH ROO (2004), MICKEY’S TWICE UPON A CHRISTMAS (2004), THE LION KING 1½ (2004), VALIANT (2005), POOH’S HEFFALUMP MOVIE (2005), CHICKEN LITTLE (2005), AIR BUDDIES (2006), BROTHER BEAR 2 (2006), THE FOX AND THE HOUND 2 (2006), BAMBI II (2006), THE WILD (2006), MY FRIENDS TIGGER AND POOH: SUPER SLEUTH CHRISTMAS (2007), RATATOUILLE (2007), UNDERDOG (2007), SNOW BUDDIES (2008), BOLT (2008), BEVERLY HILLS CHIHUAHUA (2008), SANTA BUDDIES (2009), PONYO (2009), TIGGER AND POOH AND A MUSICAL TOO (2009), G-FORCE (2009), SPACE BUDDIES (2009), THE SEARCH FOR SANTA PAWS (2010), SPOOKY BUDDIES (2011), WINNIE THE POOH (2011), BEVERLY HILLS CHIHUAHUA 2 (2011), SANTA PAWS 2: THE SANTA PUPS (2012), BEVERLY HILLS CHIHUAHUA 3: VIVA LA FIESTA! (2012), and TREASURE BUDDIES (2012)).

Lion King,” to name a few. When one adds movies that feature animals as co-stars alongside human actors or in which the plot revolves around animals—“Old Yeller,” “Air Bud,” and “Secretariat,” for example—the total increases to 109.²⁴ This list does not even begin to account for movies in which animals play minor roles as friends or sidekicks of main characters, such as the White Rabbit in “Alice in Wonderland” or Iago the parrot and Raj the tiger in “Aladdin.” Nor does the list include non-Disney films or television shows that are either spinoffs of these movies or feature an independent cast of animals.

Another important fact to consider is that all of the Disney animated films inevitably result in corresponding child-friendly paraphernalia: stuffed animals, clothing, blankets, decor, school supplies, and so on. Clearly, the volume and beloved nature of these Disney movies and their product lines contribute to the quantity and quality of experience children have with animals during their formative years. The subconscious, positive view of Pongo the Dalmatian that children developed when they watched the movie and subsequently played with a stuffed toy Dalmatian carries over into adulthood.²⁵ On a societal scale, these empathetic and caring attitudes translate into greater protections for animals, especially those animals prevalent in media.

Disney films and related paraphernalia not only enhance the indirect contact children have with animals, they also contribute to the direct contact children experience, but on a more limited scale. For example, a dog breed’s popularity often correlates to the release of a Disney movie featuring that breed. To illustrate, Disney’s “Air Bud,” a film featuring a Golden Retriever, debuted in 1997, and since then the entertainment company has released eleven additional spinoffs of the film—roughly one every two years.²⁶ Compare those release dates to data compiled by the American Kennel Club: since at least 2002, the

²⁴ See *id.* (SONG OF THE SOUTH (1946), THE ADVENTURES OF ICHABOD AND MR. TOAD (1949), OLD YELLER (1957), THE SHAGGY DOG (1959), GREYFRIARS BOBBY (1961), BIG RED (1962), SAVAGE SAM (1963), MIRACLE OF THE WHITE STALLIONS (1963), A TIGER WALKS (1964), THE UGLY DACHSHUND (1966), CHARLIE, THE LONESOME COUGAR (1967), MONKEYS, GO HOME! (1967), THE JUNGLE BOOK (1967), THE BAREFOOT EXECUTIVE (1971), THE BISCUIT EATER (1972), MUSTANG (1973), THE SHAGGY D.A. (1976), THE CAT FROM OUTER SPACE (1978), CHEETAH (1989), WHITE FANG (1991), RUDYARD KIPLING’S THE JUNGLE BOOK (1994), WHITE FANG 2 (1994), AIR BUD (1997), AIR BUD: GOLDEN RECEIVER (1998), MIGHTY JOE YOUNG (1998), AIR BUD 3: WORLD PUP (2000), AIR BUD: SEVENTH INNING FETCH (2002), SNOW DOGS (2002), AIR BUD SPIKES BACK (2003), THE YOUNG BLACK STALLION (2003), LIFE IS RUFF (2005), THE SHAGGY DOG (remake) (2006), SECRETARIAT (2010), and FRANKENWEENIE (2012)).

²⁵ See Muldoon et al., *supra* note 6, at 19.

²⁶ See DISNEYMOVIESLIST.COM, *supra* at note 23 (AIR BUD (1997), AIR BUD: GOLDEN RECEIVER (1998), AIR BUD 3: WORLD PUP (2000), AIR BUD: SEVENTH INNING FETCH (2002), AIR BUD SPIKES BACK (2003), AIR BUDDIES (2006), SNOW BUDDIES (2008), SANTA BUDDIES (2009), SPACE BUDDIES (2009), SPOOKY BUDDIES (2011), and TREASURE BUDDIES (2012)).

Golden Retriever has been one of the top five most popular breeds in the United States.²⁷ While statistics were not available for each year since 2002 or for earlier years, it is likely that, given the Golden Retriever’s consistently high popularity rankings, the breed took a top spot on the list for several years before 2002 as well. Thus a clear correlation exists between popular Disney animal movies and actual pet ownership,²⁸ leading to increased direct contact between children and animals.

The disparity in legal protection afforded to non-farm mammals and farm animals also likely has its roots in Disney films. There are few, if any, laws that actually protect farm animals from the abysmal conditions present on factory farms, whereas companion animals enjoy slightly more protection under anti-cruelty statutes.²⁹ A similar disparity exists in Disney movies. Of the 109 movies that feature animals as the main characters or as co-stars, or whose plot focuses on animals, only five involve farm animals—“The Three Caballeros” and “Duck Tales,” both of which feature ducks; “Piglet’s Big Movie,” “Home on the Range,” and “Chicken Little,” which star a pig, cows, and chickens, respectively.³⁰ Compare this representation rate of less than five percent to the percentage of Disney movies that feature the classic companion animals: nearly half focus on dogs or cats.³¹ Such a gross underrepresentation leads to a lack of experience children have with farm animals and may translate to a lack of legal protection.

²⁷ Am. Kennel Club, *AKC Dog Registration Statistics*, http://www.akc.org/reg/dogreg_stats.cfm (last visited Apr. 11, 2013).

²⁸ However, the relationship may be reversed, meaning increased animal-specific ownership could actually have spurred the making and subsequent popularity of movies featuring that animal.

²⁹ For example, the Animal Welfare Act, 7 U.S.C. §§ 2131 et seq., specifically exempts farm animals from its coverage. *See* 7 U.S.C. § 2132(g). Similarly, the Animal Welfare Regulations, 9 C.F.R. §§ 1.1 et seq., specifically excludes farm animals from its provisions.

³⁰ *See* DISNEYMOVIESLIST.COM, *supra* note 23.

³¹ *See id.* (LADY AND THE TRAMP (1955), 101 DALMATIANS (animated version) (1961), THE INCREDIBLE JOURNEY (1963), THE ARISTOCATS (1970), THE FOX AND THE HOUND (1981), BENJI THE HUNTED (1987), OLIVER AND COMPANY (1988), HOMEWARD BOUND: THE INCREDIBLE JOURNEY (1993), A GOOFY MOVIE (1995), HOMEWARD BOUND II: LOST IN SAN FRANCISCO (1996), 101 DALMATIANS (non-animated version) (1996), AN EXTREMELY GOOFY MOVIE (2000), 102 DALMATIANS (2000), LADY AND THE TRAMP II: SCAMP’S ADVENTURE (2001), 101 DALMATIANS II: PATCH’S LONDON ADVENTURE (2003), TEACHER’S PET (2004), AIR BUDDIES (2006), UNDERDOG (2007), SNOW BUDDIES (2008), BOLT (2008), BEVERLY HILLS CHIHUAHUA (2008), SANTA BUDDIES (2009), SPACE BUDDIES (2009), THE SEARCH FOR SANTA PAWS (2010), SPOOKY BUDDIES (2011), OLD YELLER (1957), THE SHAGGY DOG (1959), GREYFRIARS BOBBY (1961), BIG RED (1962), SAVAGE SAM (1963), THE UGLY DACHSHUND (1966), THE BISCUIT EATER (1972), THE SHAGGY D.A. (1976), THE CAT FROM OUTER SPACE (1978), WHITE FANG (1991), WHITE FANG 2 (1994), AIR BUD (1997), AIR BUD: GOLDEN RECEIVER (1998), AIR BUD 3: WORLD PUP (2000), AIR BUD: SEVENTH INNING FETCH (2002), SNOW DOGS (2002), AIR BUD SPIKES BACK (2003), LIFE IS RUFF (2005), THE SHAGGY DOG (remake) (2006), and FRANKENWEENIE (2012)).

IV. OVERCOMING THE AWARENESS HURDLE

Legislative branches and voter ballots in the United States have been somewhat more amenable than the judicial branch to recognizing animal interests. Legislators' and voters' ability to rely on their emotions likely has caused the slightly better response and resulted in a heightened ability to overcome inertia in the realm of animal welfare, whereas the judiciary is bound by its reliance on science. The empathy towards animals that lawmakers and voters developed when they watched Disney movies as children carried over into adulthood and manifested itself in the animal rights movement. Voters in a few states have banned certain factory farming practices,³² and there is evidence even in factory farming that Disney media may have subconsciously affected the industry's mindset. For instance, major pork producers recently pledged to slowly phase out gestation crates,³³ and the American Veal Association Board of Directors unanimously approved a new policy that the veal industry transition from veal crates to group housing by the end of 2017.³⁴ The co-president of a leading veal producer even called veal crates "inhumane and archaic."³⁵ Courts, on the other hand, cannot keep pace. Common law prevents most judges from being able to fully consider their intuition or adhere to the caring attitudes they developed as children.

To illustrate, thousands of plaintiffs have brought cases to recover emotional damages for injuries to pets, but the vast majority of state courts do not allow such recovery for a variety of reasons.³⁶ In cases alleging negligent infliction of emotional distress, the injured person

³² Sullivan & Wolfson, *supra* note 1, at 124-25.

³³ Steve Karnokowski, *Gestation Crates For Pigs Phased Out By Pork Industry To Improve Treatment Of Animals*, HUFFINGTON POST (Mar. 22, 2012), http://www.huffingtonpost.com/2012/03/22/gestation-crates-for-pigs_n_1372073.html.

³⁴ Rod Smith, *Veal Group Housing Approved*, FEEDSTUFFS, Aug. 6, 2007, at 3.

³⁵ Humane Soc'y of the U.S., *Strauss Veal and Marcho Farms Eliminating Confinement by Crate* (Feb. 22, 2007), available at http://www.humanesociety.org/assets/pdfs/farm/strauss_veal_marcho_farms.pdf.

³⁶ See, e.g., *McDougall v. Lamm*, 48 A.3d 312 (N.J. 2012); *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352 (N.C. Ct. App. 2012); *Scheele v. Dustin*, 998 A.2d 697 (Vt. 2010); *Kaufman v. Langhofer*, 222 P.3d 272 (Ariz. Ct. App. 2009); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209 (Mich. Ct. App. 2009); *Feger v. Warwick Animal Shelter*, 814 N.Y.S.2d 700 (N.Y. App. Div. 2006); *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248 (Kan. Ct. App. 2006); *Carbasha v. Musulin*, 618 S.E.2d 368 (W. Va. S. Ct. App. 2005); *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. Ct. App. 2005); *Kennedy v. Byas*, 867 So. 2d 1195 (Fl. Dist. Ct. App. 2004); *Oberschlake v. Veterinary Ass'n Animal Hosp.*, 785 N.E.2d 811 (Ohio Ct. App. 2003); *Mitchell v. Heinrichs*, 27 P.3d 309 (Alaska 2001); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996).

usually must be related to the party bringing the claim. For example, in *Rabideau v. City of Racine*,³⁷ police officers shot the plaintiff’s dog in plain view, so she sued for emotional distress damages. Despite the Supreme Court of Wisconsin’s recognition that humans and dogs share a special bond and have done so for thousands of years,³⁸ the Court nevertheless resorted to the long-established precedent that the plaintiff could not recover under her negligent infliction of emotional distress theory because she and her dog were not related.³⁹

Courts also deny recovery for intentional infliction of emotional distress in pet injury cases, as did the *Rabideau* court, because courts usually find that intentional infliction does not occur in companion animal cases, which is what happened in *Gluckman v. American Airlines, Inc.*⁴⁰ In that case, the plaintiff’s dog was in an airplane cargo crate for hours on a hot summer day in Arizona and suffered from extreme heat exhaustion and brain damage.⁴¹ American Airlines broke policy mandates to keep air cargo compartments at a certain temperature.⁴² The court found that, although the airline did not follow policy, it had not directed that conduct towards the plaintiff.⁴³

Both *Rabideau* and *Gluckman* show how deeply the courts are entrenched in their prior decisions. Even if a judge sympathizes with a plaintiff and might be personally inclined to rule in his or her favor,

³⁷ 627 N.W. 2d 795 (Wis. 2001).

³⁸ *Id.* at 798, stating:

At the outset, we note that we are uncomfortable with the law’s cold characterization of a dog . . . as mere ‘property. Labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog This term inadequately and inaccurately describes the relationship between a human and a dog.

The association of dog and human is longstanding. Dogs have been a part of human domestic life since 6,300 B.C. Archaeologists have uncovered a 12,000-year-old burial site in which a human being and a dog lay buried together. ‘The arm of the person was arranged on the dog’s shoulder, as if to emphasize the bonds that existed between these two individuals during life.’ [citation omitted]. Dogs are as much a part of the human experience that we need not cite to authority when we note that . . . dogs continue to provide humans with devoted friendship.

³⁹ *Id.*

⁴⁰ 844 F.Supp 151, 157-58 (S.D.N.Y. 1994).

⁴¹ *Id.*

⁴² *See generally, id.*

⁴³ *Id.*, at 158.

precedent constrains the decision and mandates otherwise.⁴⁴ There is hope, however. Case law can be changed when a judge feels that the old way of doing things is no longer adequate or relevant. Take *Campbell v. Animal Quarantine Station*,⁴⁵ for example. In that case, the Supreme Court of Hawaii affirmed an emotional damages award to a family whose dog had negligently been left in a hot car while awaiting transport from a quarantine station.⁴⁶ The family was notified of the dog's death via telephone.⁴⁷ Normally, a plaintiff would have to show that the emotional distress manifested itself in physical symptoms, but Hawaii had done away with the requirement years ago.⁴⁸ Another requirement is that the plaintiff must either be an eyewitness to the accident or located a reasonable distance away from the accident, but the court departed from that general rule as well.⁴⁹ While the court ultimately affirmed the damages award to the dog's family in that case, the amount was relatively low—\$1,000 for the entire family.⁵⁰ Had they received more at the trial court level, the result may have been different.

Compare generally stagnant case law in the United States to slightly more dynamic statutes. Importantly, the difference lies in the fact that Disney movies span multiple generations and reach as far back as the Silent Generation, or those born prior to World War II. The first predominantly animal cast debuted in “Dumbo” in 1941, meaning that children who enjoyed the movie were born in the 1930s. Disney released at least one animal movie almost every year thereafter.⁵¹ Thus that first group of children who grew up watching Disney classics reached an age at which they could effect legal change around the mid-twentieth century. Predictably, laws that attempted to protect animal welfare and promote their interests first began to appear in the middle of the twentieth century. Congress enacted the Humane Slaughter Act in 1958,⁵² the first version of the Animal Welfare Act passed in 1966,⁵³ the first state anti-animal cruelty statute passed in 1975, and before the turn of the century, every state code contained some kind of prohibition

⁴⁴ *Id.* (stating that courts that “view[] a pet as more than property ... are aberrations flying in the face of overwhelming authority to the contrary” and noting that “sentiment will not be considered in assessing market value for purposes of determining measure of damages for destruction of a dog”).

⁴⁵ *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981).

⁴⁶ *Id.* at 1067.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1068 (citing *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970)).

⁴⁹ *Id.* at 1069.

⁵⁰ *Id.* at 1067.

⁵¹ See DISNEYMOVIESLIST.COM, *supra* note 23.

⁵² Humane Slaughter Act 7 U.S.C. § 1901 et. seq. (1958). [Rule 12]

⁵³ Laboratory Animal Act of 1966, 7 U.S.C. § 2131 et. seq. (1966). [Rule 12]

against such practices.⁵⁴ While these statutes do not provide much bite in the struggle for improved animal welfare, they are generally better than the current state of much of the case law.

V. SCIENCE VS. INTUITION

a. *The American Approach*

Two facts explain why the common law in the United States is so resistant to change in the area of animal law. The first is the fact that most evidence, especially in recent years, consists of scientific testimony. The second is the fact that trials rely heavily on this scientific evidence. The resulting combination is a body of case law that fails to account for a common sense, intuitive approach, thereby stripping any effect empathy could have on the outcome.

To illustrate, the gross inadequacy of scientific evidence in animal welfare cases can be seen in *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture (NJSPCA)*.⁵⁵ That case centered around a number of industry-wide practices concerning livestock: forced molting of egg-laying hens,⁵⁶ use of veal crates,⁵⁷ sow gestation crates,⁵⁸ tail docking, castrating without anesthesia, de-beaking, toe-trimming,⁵⁹ transporting emaciated and

⁵⁴ See Pamela D. Frasch, Stephan K. Otto, Kristen M. Olsen & Paul A. Ernst, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 71 & n. 13 (1999).

⁵⁵ *NJSPCA*, No. A-6319-03T1, 2007 WL 486764 (N.J. Super. Ct. App. Div. Feb. 16, 2007) (per curiam). [Rule 10.8]

⁵⁶ Forced molting involves withholding all food from hens for as long as fourteen days to induce additional egg-laying. See *A Compassion Over Killing Report: Animal Suffering in the Egg Industry*, EGGINDUSTRY.COM, <http://www.eggindustry.com/cfi/report/?v=forced> (last visited Jan. 31, 2014).

⁵⁷ Calves raised in veal crates are confined in small spaces, which are big enough for the calf only to stand or lie down but not to turn around or stretch its limbs. They contain no hay for bedding in order to prevent the calf from eating it. Instead the calves are fed an iron and fiber-deficient liquid milk-substitute to give their meat a pale color. See Mass. Soc’y for the Prevention of Cruelty to Animals, *Factory Farming: Veal Calves on a Factory Farm*, MSPCA.org, <http://www.mspsca.org/programs/animal-protection-legislation/animal-welfare/farm-animal-welfare/factory-farming/cows/veal-calves-on-a-factory-farm.html> (last visited Mar. 21, 2013).

⁵⁸ Sow gestation crates are similar; these cages are not big enough for the pregnant sow to turn around or take a full step forward or backward. Humane Soc’y of the U.S., *Crammed Into Gestation Crates* (Dec. 14, 2012), available at http://www.humanesociety.org/issues/confinement_farm/facts/gestation_crates.html.

⁵⁹ Tail docking, castrating, de-beaking, and toe-trimming are all forms of amputation that are done without anesthesia, which purportedly serves hygienic and safety purposes. However, studies on cow tail-docking did not show a decrease between disease rates in cows with their tails and cows whose tails had been docked. See C. B. Tucker & D. M. Weary, *Tail Docking in Dairy Cattle*, 11 ANIMAL WELFARE

downed animals,⁶⁰ and forced feeding.⁶¹ Several groups view all of these practices as inhumane due to the suffering they inflict on animals.⁶² In an effort to address these practices, in 1996, the New Jersey legislature directed the state department of agriculture to promulgate “humane” standards for the treatment of farmed animals.⁶³ The agency did so, but animal welfare groups challenged the regulations concerning the practices listed above as outside the legislative mandate because the standards were not actually “humane.”⁶⁴ The court in that case had to decide whether the department’s regulations concerning the treatment of farmed animals accorded with the definition of “humane,”⁶⁵ which the regulations defined as “marked by compassion, sympathy and consideration for the welfare of animals.”⁶⁶ The regulations further defined “animal welfare” as the “physical and *psychological* harmony between the animal and its surroundings,”⁶⁷ which requires a “holistic evaluation.”⁶⁸

Despite the regulations’ reliance on psychological terms and concepts—compassion, sympathy, psychological harmony, and holistic evaluation—the department nevertheless based the practical regulations concerning animal husbandry on “objective criteria.”⁶⁹ The agency

INFO. CENTER BULL. No. 3-4 (Winter 2001 & Spring 2002), available at <http://www.nal.usda.gov/awic/newsletters/v11n3/11n3tuck.htm>. Other studies on de-beaking poultry suggested that this practice has led to “long-term chronic pain and depression” and has served only to prevent poultry from pecking at and eating each other. This unnatural behavior is in turn caused by the extremely cramped and artificial conditions in battery cages. See United Poultry Concerns, *Debeaking*, UPC FACT SHEET, available at http://www.upc-online.org/merchandise/debeak_factsheet.html (last visited Mar. 27, 2013).

⁶⁰ A downed animal is an animal that “is too sick, diseased, or injured to stand and walk on his or her own.” They occur in almost every type of factory farm. NoDowners.org, <http://www.nodowners.farmsanctuary.org/faqs/htm> (last visited Mar. 27, 2013).

⁶¹ *NJSPCA*, 2007 WL 486764, at *1-2. Forced feeding, which is used in foie gras production, consists of forcing a pipe down a duck or goose’s neck each day for several weeks to cause the bird’s liver to develop hepatic lipidosis and grow up to ten times its normal size. Humane Soc’y of the U.S., *California’s 2012 Ban on Force-Feeding for Foie Gras* (Apr. 30, 2012), available at http://www.humanesociety.org/issues/force_fed_animals/#.UuhcZ3n0DoA.

⁶² See, e.g., EGGINDUSTRY.COM, *supra* note 53; Massachusetts Society for the Prevention of Cruelty to Animals, *supra* note 54; Humane Society of the United States, *supra* note 55; Tucker & Weary, *supra* note 56; United Poultry Concerns, *supra* note 56; NoDowners.org, *supra* note 57; Humane Society of the United States, *supra* note 58.

⁶³ N.J.S.A. 4:22-16.1(a) (1996).

⁶⁴ *NJSPCA*, 2007 WL 486764, at *1-2

⁶⁵ *Id.*

⁶⁶ N.J.A.C. 2:8-1.2(a).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* at 2:8-1.1(a).

⁶⁹ *NJSPCA*, 2007 WL 486764, at *2.

considered factors such as “maint[enance] of adequate body condition, assessment of the animal’s ability to sustain its reproductive capacity, data measuring adrenal gland activity . . . , manifestation of signs of injury or disease and the rate of animal morbidity and mortality.”⁷⁰ None of these factors afforded an opportunity to consider on a subjective, intuitive level whether a particular factory farming practice constituted “humane” treatment.

At the outset, precedent prevented the *NJSPCA* court from taking anything but a scientific approach.⁷¹ The court had to give “substantial deference” to the state department of agriculture because ““agencies have the *specialized expertise* necessary to enact regulations dealing with *technical* matters.””⁷² Additionally, the court presumed that it lacked expertise in the field of animal suffering and that the agency could supply such expertise⁷³—a presumption that implicitly suggests the court could not rely on its own intuition. This scientific approach, devoid of any reliance on instincts, resulted in a victory for the state department of agriculture.⁷⁴ The regulations governing veal crates were based on more than one hundred studies and were supported by science, but the court ignored the fact that calves could not turn around in the crates.⁷⁵ Likewise, the scientific community supported the use of sow gestation crates but the court discarded “several state and foreign governments[’]” denunciations of this type of pigpen.⁷⁶ Despite controversy over the various forms of amputation, which the court itself even labeled “[m]utilation [p]ractices.”⁷⁷ the court nevertheless deferred to the agency because the department “made a scientific judgment” for a practice such as tail docking.⁷⁸ Similarly, the court rejected the remainder of the practices under review.⁷⁹ If the court had considered, or had been allowed to consider psychological components as the regulations called for, perhaps the outcome would have been different.

Although the Supreme Court of New Jersey eventually reversed in part the appellate court’s decision,⁸⁰ the supreme court’s opening remarks

⁷⁰ *Id.*

⁷¹ *Id.* at *4.

⁷² *Id.* (quoting *N.J. State League of Muns. v. Dep’t of Cmty. Affairs*, 729 A.2d 21, 27 (N.J. 1999) (emphasis added)).

⁷³ *Id.* at *5 (quoting *In Re Regulation of Operator Serv. Providers*, 778 A.2d 546, 576 (N.J. Super. Ct. App. Div. 2001)).

⁷⁴ *Id.* at *3.

⁷⁵ *Id.* at *5-6.

⁷⁶ *Id.* at *6-7.

⁷⁷ *Id.* at *7.

⁷⁸ *Id.* at *8.

⁷⁹ *Id.* at *9-12, *16-17.

⁸⁰ *N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 955 A. 2d 886 (N.J. 2008).

illustrate the judiciary's recognition that evaluating animal welfare requires using intuition, yet the justices expressly declined to do so:

[T]he issues before us raise questions and debates arising from deeply held notions concerning the welfare of animals generally. Nonetheless, *the dispute before this Court has nothing to do with anyone's love for animals, or with the way in which any of us treats our pets...*

In the end, our focus is not upon, nor would it be appropriate for us to address, whether we deem any of the specifically challenged practices to be, *objectively*, humane. To engage in that debate would suggest that we have some better understanding of the complex *scientific and technical issues* than we possibly could have, or that we are in some sense better able to evaluate the extensive record compiled by the Department than is that body itself. To engage in that discussion would also suggest that in a realm in which the Legislature has expressed its intention that an administrative agency bring its expertise to bear upon the issues, this Court is better equipped to do so. More to the point, it would suggest that we, rather than the Legislature or the Department, know which farming and livestock practices are *objectively humane* and which are not.⁸¹

Indeed, the phrase “objectively humane” is an oxymoron and serves to further illustrate how using quantitative, scientific evidence and objective criteria are ill-suited for making qualitative, intuitive decisions.

b. The Alternative Approach

Compare *NJSPCA* to the overseas efforts to protect animals. In *McDonald's Corp. v. Steel*,⁸² a British animal rights group published a pamphlet that accused McDonald's and its meat suppliers of torture and cruelty towards animals. Since the allegations in the civil case included defamation, one of the issues facing the English court was whether the defendants were justified in printing the information—i.e., whether the pamphlet was true.⁸³ More specifically, the pamphlet stated that McDonald's

⁸¹ *Id.* at 889 (emphasis added).

⁸² *McDonald's Corp.*, ANIMAL L.—CASES & MATERIALS 177.

⁸³ See Daniel J. Wolfson, *McLibel*, 5 ANIMAL L. 21, 30-31 (1999).

was “responsible for torture and murder” by using animals that “spend their whole lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement.”⁸⁴

As a result of these statements, the judge in *McDonald’s Corp. v Steel*, Justice Bell, had to examine the practices used on factory farms and determine whether such procedures were “cruel.”⁸⁵ Thus the issue was analogous to the question facing the court in *NJSPCA* concerning whether factory farming practices were humane. Before Justice Bell could address the question in the English case, he first had to decide which of three approaches he would use. The first approach is that anything that causes an animal stress or discomfort is cruel. Justice Bell rejected this approach as too stringent, noting that “[m]erely containing, handling and transporting an animal may cause it stress.”⁸⁶ The second approach is that any practice that conforms to industry customs is acceptable and not cruel (notably, this approach is used in the United States and was part of the reason why the court in *NJSPCA* deferred to the state department of agriculture).⁸⁷ Justice Bell also rejected this approach, because it “hand[s] the decision as to what is cruel to the food industry completely. . . .”⁸⁸ Finally, the third approach is that any practice that does not follow government guidelines, recommendations, or codes is cruel.⁸⁹ Justice Bell partially settled on this approach by looking to a number of guidelines that various animal welfare organizations espouse. These guidelines are known as the “Five Freedoms” and encompass (1) malnutrition; (2) pain, injury, and fear; (3) disease treatment and prevention; (4) physical and thermal comfort; and (5) ability to perform normal behavioral functions.⁹⁰ However, Justice Bell stated these guidelines, even though they were useful, “do not necessarily judge what is cruel or not.”⁹¹ Rather, he “[had to] judge that for [himself] on the evidence” he heard.⁹²

Importantly, the evidence at trial did not include scientific evidence in the form presented in *NJSPCA*. Instead, Justice Bell relied on “[his] own judgment” and witnesses’ views, when they “seem[ed] sensible.”⁹³ Although various doctors testified, the evidence was more

⁸⁴ London Greenpeace, *What’s Wrong With McDonald’s?* (1986), available at <http://www.mcspotlight.org/case/pretrial/factsheet.html>.

⁸⁵ *McDonald’s Corp.*, ANIMAL L.—CASES & MATERIALS 177.

⁸⁶ *McDonald’s Corp. v Steel*, [1997] EWHC (QB) 366 (Eng.), reprinted in WAISMAN, WAGMAN, & FRASCH, ANIMAL LAW CASES & MATERIALS, at 182 (Carolina Academic Press, 2d ed., 2002) [hereinafter *McDonald’s Corp.*].

⁸⁷ *NJSPCA v N.J. Dep’t of Agric.*, 955 A.2d 886, at 900 (N.J. 2008).

⁸⁸ *McDonald’s Corp.* at 182.

⁸⁹ *McDonald’s Corp.* at 182.

⁹⁰ *McDonald’s Corp.* at 183.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

qualitative and consisted mostly of descriptions of the practices used in agribusiness rather than quantitative measurements or scientific studies.⁹⁴ For example, testimony about chickens focused on the fact that the birds are hatched in large numbers, housed in cramped conditions, exposed to low levels of artificial light, deliberately underfed, and genetically manipulated.⁹⁵ Despite the fact that Justice Bell purposefully avoided an extreme anthropomorphic approach, he nevertheless found a number of practices to be cruel: the gassing of unwanted chicks,⁹⁶ restricting the chickens' feed,⁹⁷ keeping the birds in high density cages,⁹⁸ and genetically manipulating the chickens, which causes "discomforting leg problems."⁹⁹ Justice Bell also reviewed the practices for slaughtering chickens. First, he determined that the method of rendering chickens unconscious by hanging them upside down and dipping them into an electric bath was cruel because some of the birds received an "unacceptable" pre-stun shock before their necks were cut.¹⁰⁰ Additionally, he found that the electrocution line was "so inefficient that [chickens] are frequently still conscious when they have their throats cut," which was "cruel by modern standards."¹⁰¹

Justice Bell also reviewed the conditions for egg-laying hens, which are kept in tightly-packed battery cages for the entirety of their lives. He found that

⁹⁴ See *McDonald's Corp.*, *supra* note 82.

⁹⁵ *Id.* at 185.

⁹⁶ *Id.* at 186.

⁹⁷ See *id.* (noting that "[this practice] is a well-planned device for profit at the expense of suffering of the birds."). Although Justice Bell tried to avoid placing human feelings onto the birds' plight, he nevertheless compared the hungry chickens to a man or a woman on an extreme diet. *Id.*

⁹⁸ *Id.* at 187:

I do not consider that I am indulging in too much anthropomorphism in judging [the chickens] to be uncomfortable for the last few days of high stocking density... The high density is intentional and unnecessary and it probably causes the birds some level of real discomfort. In my judgment it is cruel.

Justice Bell also noted that "[c]oncern for the bird did not seem to enter the equation." *Id.*

⁹⁹ *Id.* at 188.

¹⁰⁰ *Id.* at 189-90.

¹⁰¹ *Id.* at 190.

even the humble battery hen probably has some sentience, some power of perception by its senses, of virtually total deprivation of all natural activities save eating, drinking, some minimal movement, defecating and laying eggs, and that the one in three or four of them which suffer broken bones on ‘harvesting’ for slaughter must feel some significant pain.

I conclude that the battery system as described to me is cruel in respect of the almost total restraint of the birds and the incidence of broken bones when they are taken for slaughter.¹⁰²

Although the defendant animal rights group members in this case were held liable,¹⁰³ the case ultimately resulted in a public relations nightmare for McDonald’s due to the revelations made during the trial concerning factory farming practices.¹⁰⁴ Presumably, the public’s ability to empathize with animals and take an anthropomorphic approach to determining whether the animals suffered caused the backlash against the fast food giant. Comparing *McDonald’s* to *NJSPCA* highlights the different outcome when using an intuition-based rather than a science-based inquiry.¹⁰⁵

VI. OVERCOMING THE SCIENCE HURDLE

As previously stated, the first half of the effort in bringing about greater legal protection for animals is cultivating awareness and widespread sentiment for their plight. The Disney culture has already laid this foundation. The second half consists of actual legal change. Commentators and scholars have proposed various changes to the law to expand legal protections to animals. These include according something more than “property” status to animals, especially pets,¹⁰⁶ using an “aesthetic injury” concept to allow standing when humans

¹⁰² *Id.* at 191.

¹⁰³ See Editor’s Note, WAISMAN, WAGMAN, & FRASCH, *ANIMAL LAW CASES & MATERIALS*, at 201 (Carolina Academic Press, 2d ed., 2002).

¹⁰⁴ See generally, McDonald’s Corp.

¹⁰⁵ See Sullivan & Wolfson, *supra* note 1, at 122-23. (“Intuition can be very valuable in . . . area[s] where science has not been successful in devising ways to provide more objective measures of welfare.”). *Id.* at 123.

¹⁰⁶ See Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets As Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1357-64 (2010).

sue for injury to animals;¹⁰⁷ and adopting modestly creative ways to achieve incremental gains.¹⁰⁸ The first two suggestions are too narrow—something more than property status may only work for companion animals, thus leaving out farm animals, and a novel standing concept ensures only greater access to the courts rather than a better possibility of a positive outcome. However, moving evidence away from a scientific standard accords with the third suggestion of adopting a creative approach to improving animal welfare.

Sullivan and Wolfson propose alternatives to a strictly scientific standard in their article *If It Looks Like a Duck ... New Jersey, The Regulation of Common Farming Practices, and the Meaning of "Humane"*.¹⁰⁹ They believe that humaneness “can be answered only by the combination of an ethical inquiry (to set the standard) and a scientific inquiry (to see if the standard has been met).”¹¹⁰ Fundamentally, animal welfare issues are ethical¹¹¹ and thus require intuition. While “[i]ntuitive judgments about animals’ experiences are often criticized as mere anthropomorphism or as non-scientific nonsense[,]” intuition can nevertheless be “very valuable.”¹¹² Moreover, intuition is unquestionably used in other areas of the law, such as child abuse,¹¹³ first amendment law,¹¹⁴ and environmental law.¹¹⁵ Thus courts are not only capable of using subjective judgment, they are expected to do so.

¹⁰⁷ See *Developments in the Law—Access to Courts: VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1212-16 (2009).

¹⁰⁸ See Matthew Liebman, *Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIMAL L. 133, 136-38 (2011).

¹⁰⁹ See *supra* note 1.

¹¹⁰ Sullivan & Wolfson, *supra* note 1, at 111. See also Task Force Report, *A Comprehensive Review of Housing for Pregnant Sows*, 227 J. AM. VET. MED. ASS’N 1580 (2005) (stating that “science can identify problems and find solutions but cannot calculate and compare overall welfare”).

¹¹¹ Ian J.H. Duncan, *Science-Based Assessment of Animal Welfare: Farm Animals*, 24 REV. SCI. TECH. OFF. INT. EPIZOOTICS. 483, 483 (2005).

¹¹² Sullivan & Wolfson, *supra* note 1, at 123.

¹¹³ See, e.g., *U.S. v. Bailey*, 169 F. App’x 815, 822 (5th Cir. 2006) (“Common sense and the x-rays presented to the jury alone make the argument that the [two-month-old] child was not in pain almost ridiculous.”).

¹¹⁴ See, e.g., *Doe v. Gonzales*, 449 F.3d 415, 422 (2d Cir. 2006) (Cardamone, J., concurring) (“The government’s urging that an endless investigation leads logically to an endless ban on speech flies in the face of human knowledge and common sense: witnesses disappear, plans change or are completed, cases are closed, investigations terminate.”).

¹¹⁵ See, e.g., *Ethyl Corp. v. Env’tl. Prot. Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976) (en banc) (“Sometimes, of course, relatively certain proof of danger or harm ... can be found. But, more commonly, ‘reasonable medical concerns’ and theory long precede certainty. Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”).

Adopting a set of rules that requires courts to rely on intuition and make subjective instead of objective judgments will likely bring about greater legal protection for animals. Since the 1940s, judges presumably have been exposed to the same pop culture as voters and lawmakers, therefore giving them similar empathetic and intuitive connections to animals as legislators and the rest of the populace. Moreover, a rule that recognizes how ill-fitting scientific evidence and expert testimony are is not as radical as it may seem. The Supreme Court already adheres to

the general rule ... that expert testimony ... is unnecessary ... ‘if all the general facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation.’¹¹⁶

Because courts are likely to adhere to their prior animal law precedents, legislatures must be the ones to implement this kind of shift.

Furthermore, a rule limiting the use of scientific evidence also takes into account the fact that “science,” at least in the animal welfare realm, does not conclusively establish whether an animal suffers. “[O]bjective scientific measurement of an animal’s feelings has not been uniformly developed to the extent that it could be applied uniformly and consistently.”¹¹⁷ Additionally, “conscious feelings cannot be tested empirically, and so the study of conscious emotions is outside the realm of science.”¹¹⁸ Thus the usefulness of scientific evidence to a fact finder is limited, which should convince lawmakers to curtail the use of scientific testimony in hearings and trials.

¹¹⁶ *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (quoting *U.S. Smelting Co. v. Perry*, 166 F. 407, 411, 415 (8th Cir. 1909)).

¹¹⁷ Brief for Respondent at 8-9, *N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, No. A6319-03, 2007 WL 486764 (N.J. Super. Ct. App. Div. Feb. 16, 2007).

¹¹⁸ Sullivan & Wolfson, *supra* note 1, at 120 (quoting Marian Stamp Dawkins, *Feelings Do Not a Science Make: Review of Pleasurable Kingdom: Animals and the Nature of Feeling Good*, by Jonathan Balcombe, 57 *BIOSCIENCE* 83 (Jan. 2007)).

VII. CONCLUSION

The emergence of anthropomorphic media in the mid-twentieth century, especially Disney movies and their related paraphernalia, helped spark and continue to further the animal welfare movement. Films like “101 Dalmatians,” “The Lion King,” and “Air Bud” give children a wealth of positive, high-quality experiences with animals through indirect contact. On a more limited scale, such movies also contribute to the direct contact children have with animals by increasing pet ownership. Disney entertainment thus helps develop empathy towards animals and form caring attitudes in children. These subconscious feelings continue into adulthood, at which point Disney media consumers are able to bring about greater protection for animals by acting on their feelings. Thus a rule that allows judges and jurors to follow suit by requiring courts to rely on intuitive judgments rather than scientific evidence will overcome the final barrier to better animal welfare.