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ANIMAL LAW

**Michigan State University
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MYTHIC NON-VIOLENCE

TAIMIE L. BRYANT†

All societies have myths by which they define and inspire themselves. Perhaps because myths represent aspirations as well as optimistic self-descriptions, there are inevitable gaps between a society's mythic representations and actual, complicated realities. Paradoxically, depending on the strength of the myth, a myth can actually slow developments in accord with the very values that underlie the myth. One example is the myth of America as a "melting pot," through which Americans have defined themselves as "color-blind" or "tolerant" of race. Of course, in actual fact there is a lot of evidence that we are color-sensitive and intolerant. Certainly American society has not been consistently experienced by people of color as a felicitous "melting pot," and the idea of "melting" (i.e., assimilating) into white society has not been uniformly perceived as the best response to racism, either. However, the strength of mythic representation of a melting pot meant that civil rights advocates had to first contest the factual basis of the mythic representation--whether in fact ours is a melting pot society--and only then build a basis for actual racial acceptance premised on something other than assimilation into white society--diversity.

Analogously, there are many myths about our regard for and protection of animals, and the strength of those myths makes acceptance of contrary evidence more difficult than it might be without such myths. One myth is that Americans reject cruel treatment of animals, as evidenced by the existence of anti-cruelty statutes in every state. While Americans' rejection of animal cruelty may accurately reflect some aspects of our values on an ideological level, reality is much more complicated. Indeed, Gary L. Francione's label of "moral schizophrenia" aptly describes our participation in and acceptance of tremendous amounts of human-caused animal suffering despite our professed rejection of such suffering.¹ Among other possible reasons for the disjuncture is the possibility that strength of the belief that we are "animal-friendly" makes contrary evidence more difficult to accept than if there were no such pre-existing belief.

Another complex myth that impacts animals and their advocates involves representations that we disdain violence and take immediate steps to redress violent harms, even as evidence grows that violence is a common, unaddressed feature of our society. In this essay I claim that mythic rejection of violence harms animals and their advocates in the following ways: (1) it lays

†Professor of Law, UCLA Law School. I would like to thank New York University's Student Animal Legal Defense Fund chapter for its April 14, 2006, symposium "Confronting Barriers to the Court Room for Animal Activists," which provided the opportunity to develop the ideas in this essay. I also thank Vicki Steiner for her thoughtful comments on drafts of this essay and Bob Barker for his generous support of UCLA Law School for purposes of research and teaching in the field of animal rights law.

¹ GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS 1 (2000).

the foundation for the claims of institutional (ab)users² of animals that they do not and would not treat animals cruelly or violently because they are participants in the mainstream values of the society; (2) it results in traumatic silencing of advocates because of public disbelief that so much violence against animals could be occurring in a society that abhors violence; (3) it creates broad-brush oppositional categories such that animals' advocates can be painted as violent actors in a society that rejects violence; and (4) it hinders full consideration among advocates as to what advocates themselves consider "violent" means of protecting animals for fear that such discussion might allow for *any* amount of violence and, thereby, discredit animals' advocates and their cause. However, if advocates do not participate in the definition of violence, as it concerns their own activism, violence will be defined by their opponents in ways that make advocates' tasks of exposing violence against animals much more difficult.

I. THE PROBLEM OF INAPPROPRIATE DEMANDS FOR TRUST

During a recent visit to UCLA Law School. Justice Ginsburg related her disappointment when, shortly after oral argument in which the Government denied the use of torture in interrogating U.S. military detainees, pictures of abuse at Abu Ghraib appeared on the front pages of major newspapers all over the world. Twice on April 28th, 2004, the Solicitor General of the United States had rejected the idea that the U.S. participates in torture. And twice the Solicitor General had argued that the government should be trusted. During oral argument in the case of *Hamdi v. Rumsfeld*, the Solicitor General was asked, "[D]o you think there is anything in the law that curtails the method of interrogation that may be employed?"³ The Solicitor General responded,

It's . . . the judgment of those involved in this process that the last thing you want to do is torture somebody. . . . [I]f you did that, you might get information more quickly, but you would really wonder about the reliability of the information you were getting. So the judgment of the people who do this as their responsibility is that the way you would get the best information from individuals is that you . . . try to develop a relationship of trust.⁴

The Solicitor General opined that the government is entitled to trust from the public as well as from military detainees. On the same day, during oral argument in *Rumsfeld v. Padilla*, the Solicitor General was asked, "Suppose the executive says mild torture we think will help get this information?"⁵ The Solicitor General responded that "the executive doesn't [make use of torture],"⁶ and "the fact that executive discretion in a war situation can be abused is not a good and sufficient reason for judicial micromanagement and overseeing of that authority . . . you have to trust the executive to make the kind of quintessential military judgments that are involved. . ." ⁷ At the time of oral argument, it was, perhaps, easy to accept such assertions.

² I use the terms (ab)user and (ab)use for ease in referencing both types of animal advocacy claims: (1) that all use of animals constitutes abuse, and (2) that only inhumane use of animals constitutes abuse.

³ Oral Argument at 48, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf.

⁴ *Id.* at 50.

⁵ Oral Argument at 22, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1027.pdf.

⁶ *Id.* at 23.

⁷ *Id.*

Certainly it was easier than during the subsequent days, weeks, and months of public debate about photographs revealing abusive, violent conduct against detainees at Abu Ghraib. In her remarks to us, Justice Ginsburg expressed disappointment in the Solicitor General's assertions of a simple reality when, in fact, reality was far more complex.

For the feminists sitting with me, Justice Ginsburg's example (and disappointment) brought to mind instances in which claims of violence against women have been rejected as the hysterical overstatement of emotional women. After all, it could not be in the best interests of men to abuse their wives or female employees, could it? For me, Justice Ginsburg's example also brought to mind the claims of factory farmers that consumers need not worry about their treatment of factory farmed animals. Indeed, factory farmers have long contended that they are not cruel or violent. Practices like cutting the beaks of chickens and docking the tails of pigs have been defended as actually sparing animals from harms associated with living in close proximity to each other.⁸ The claim is that the practices are not violent; such practices are simply necessary to reduce the harms that animals would experience if not "prepared" for life in intensive confinement. Factory farmers would have us believe that, since it is in their best interest to produce meat from well-cared for animals, they do not subject animals to cruel practices.⁹ Finally, factory farmers could point to lack of prosecutions for cruelty as evidence that they are compliant with anti-cruelty laws and non-violent. Animals' advocates can answer each of these contentions, of course, but, without proof of their claims, it is difficult to convince consumers that factory farmers' claims are inaccurate.

As in the case of little documentation of U.S. military abuses of authority, there is little documentation of institutional exploitation of animals because the public is not given access to see for themselves what is going on. Animal-exploiting industries own both the animals and the buildings in which they are kept, with no obligation to provide access to the public. Such industries can reject calls for greater transparency and accountability, based on claims that their practices take into account the needs of the animals and are designed to protect rather than to harm animals. They would ask, "What need is there for inspection rights of animal facilities?" They would claim, "We are not the ones who should be monitored in this society; it is those who unlawfully disrupt our businesses who should be monitored." And, they would argue, "As participants in the mainstream values of American society, which include protection of animals from suffering and rejection of violent conduct, we should be trusted to apply those values to our own business practices."

In this essay I am not focused on whether violence against animals is "like" violence against women or against U.S. military detainees. Nor am I analyzing a claim that violence against animals should be recognized as equally bad as violence against women and U.S. military detainees or anyone else harmed by violent human action. Undoubtedly, our society imposes a hierarchy of victim-worthiness to be free of violence, but it is not the purpose of this particular essay to participate in or protest that hierarchy. My focus in these few pages is on consideration of some costs associated with a sociocultural myth of disdain for and rejection of

⁸ PETER SINGER, *ANIMAL LIBERATION* 100-01, 121 (1975, 1990).

⁹ For example, Peter Singer reports that "[F]armers are sometimes advised to avoid practices that would make their animals suffer because the animals will gain less weight under these conditions; and they are urged to handle their animals less roughly when they send them to slaughter because a bruised carcass fetches a lower price. . . ." *Id.* at 97. See also the Foster Farms website reassurance that Foster Farms treats its birds well: "[I]n the interest of optimal health and development, we keep the birds comfortable, clean, and well treated." [Http://www.fosterfarms.com/faq/raise.asp](http://www.fosterfarms.com/faq/raise.asp).

violence. Such mythic non-violence facilitates arguments that various actors with power over others would, as mainstream participants in society, not abuse their power by acting in violent ways and that we should trust them. These arguments, taking place against a backdrop of general belief that violence is only a last resort rather than an ever-present possibility in our society, makes it easy to dismiss “radical” claims of violence occurring on a regular and predictable basis.

If violence and the potential for abuse in privately controlled settings were part of our general belief system, we would, as a matter of course, seek greater transparency and accountability without specific proof of violence and wrong-doing in a particular context or setting. While trust may be a desirable basis on which to structure some relationships, the circumstances under which trust is requested or created should take into account the prevalent use of violent conduct to produce desired effects in others. In other words, there should be a basis for trust other than a myth of societal disdain for and rejection of violence. The basis for trust should be *demonstrated* rejection of violence, not unsupported claims of non-violent conduct. In order to create a default rule of required transparency and accountability whenever one has control over another, it is important to break down mythic notions that suggest that such transparency and accountability are not necessary.

II. THE PROBLEM OF TRAUMATIC SILENCING

That violence is actually a common feature of our experience is illustrated by the American Psychiatric Association’s (APA) changed definition of “trauma.” In 1980, the APA defined a traumatic event as one “outside the range of usual human experience.”¹⁰ In 1994, the APA apparently recognized that traumatic events are not outside the range of usual human experience. It dropped that part of its definition and instead defined a traumatic event as one involving “actual or threatened death or serious injury, or a threat to the physical integrity of self or others.”¹¹ If approximately 60% of men and 50% of women state that they have been *directly* exposed to at least one traumatic event in their lives,¹² the extent of *indirect* experiencing of violence is quite great. The experience of violence is not evenly distributed, of course. Relatively powerless individuals are at greater risk of experiencing more violence than relatively powerful individuals.

Some in our society, social justice activists, actually deliberately expose themselves to violent mistreatment of others in order to bring such mistreatment to light and to stop it from continuing. Their experience of violence is necessarily and intentionally great because it is central to their goals to reveal the different manifestations and consequences of violence. As that exposure increases so do the repercussions of experiencing violence: posttraumatic stress.¹³

¹⁰ AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247 (3d ed. 1987).

¹¹ ALLEN FRANCES ET AL., THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV GUIDEBOOK 424 (1995).

¹² Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1052 (1995).

¹³ JUDITH L. HERMAN, TRAUMA AND RECOVERY 57 (1992). The most powerful determinant of psychological harm is the character of the traumatic event itself. Individual personality characteristics count for little in the face of overwhelming events. There is a simple, direct relationship between the severity of the trauma and its psychological impact, whether that impact is measured in terms of the number of people affected or the intensity and duration of harm. Studies of war and natural disasters have documented a ‘dose-response curve,’ whereby the greater the

Posttraumatic stress, in turn, adversely affects advocacy by, among other things, burdening the emotional and physical tolerance one has for being disregarded or discredited. Advocates' once calm presentations of reality may turn increasingly strident and take exaggerated form, which then becomes another basis for discrediting activists' statements about the reality of violence.

It is not the fault of advocates' presentation style that they are disbelieved. At the root of disbelief is people's reluctance to believe that there is so much violence in their society and that there is so much violence directly involved in producing their consumer products. Society's clinging to mythic non-violence and rejection of claims of violence ("it couldn't be happening here") compounds both the experience of violence and the potential for posttraumatic stress among social justice activists. Research psychiatrist Judith Herman has written about the trauma associated with, for example, rejecting war veterans' claims of the extent of violence they encountered as indicative of the very real nature of "war as hell" and rejecting rape victims' claims about their experiences as indicative of the very real risks of being a woman in this society.¹⁴ To tell the veteran that "war" is unique and not "violence" because its objectives are justified or to tell the rape victim that rape resulted only because of one aggressor's idiosyncratic evil is to deny the contributions of society to the probabilities that men and women will have experiences characterized by extreme violence. To be told that one's experience is atypical, that one is hypersensitive to situations that others easily tolerate, that one brought violence on oneself, or, in the case of animal activism, that animal suffering is of a different kind or importance, is to be told that one's experience doesn't comport sufficiently with normative values in one's society that society should bear obligations to address those claims of systemic violence.

Making claims of violence seem idiosyncratic--either on the part of the perpetrator or on the part of the victim--is a process by which mythic notions of non-violence are sustained and a means by which we reject the underlying claim of unacceptable probabilities of (and actual occurrences of) violence in our society. Rejection of the underlying claim of violence results in tenacious restating of the claim and relentless seeking of acknowledgement of those claims. Both victims and their advocates are caught at the first important step--having society acknowledge that there is a problem--without being able to move on and actually address the harms one knows are ongoing. Exposing a truth that others refuse to acknowledge is a tedious process that provokes self-doubt, frustration, and guilt as the body count of direct victims of violence increases. The stress of contending with seemingly willful disbelief in the prevalence of violence warps the advocacy process and contributes to advocate burnout.¹⁵

This problem of being caught between reality and a disbelieving public is not traumatic in the sense of a severe physical injury, although there are known physiological effects of the stress attendant to speaking truths others refuse to hear. It is traumatic because it is disorienting to be told that the reality one presents isn't "real" or isn't important. As sociologist Jeffrey Alexander has noted, trauma is as much a social construct as it is a phenomenon of individual experience; the community's validation of the truthfulness of the individual's reports either traumatizes or heals.¹⁶ Rejection of the reality of violence is not costly only to the individual; it is also costly to

exposure to traumatic events, the greater the percentage of the population with symptoms of post-traumatic stress disorder." *Id.*

¹⁴ *Id.*

¹⁵ Elsewhere I have dealt at length with the subject of trauma and animal advocacy. Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS (forthcoming 2006).

¹⁶ ALEXANDER ET AL., CULTURAL TRAUMA AND COLLECTIVE IDENTITY 8 (2004).

the community. The community's acknowledgement or rejection of the underlying truth of a claim of violence can allow or inhibit progress for the individual *and* the community. The cost to the community of rejecting evidence of violence is in failing to process that evidence in ways that move the community closer to its stated ideal of non-violence.

To address public disbelief, advocates for animals seek direct access to evidence of the actual actions that are taken against animals' bodies by industrial (ab)users of animals. Currently, institutional (ab)use of animals is difficult to expose because institutions own both the animals and the settings in which those animals are held. Animals' advocates build a picture of animal suffering through investigations that often involve trespass or other illegal conduct. If the data from investigations dispelled disbelief, the fact of lawbreaking to acquire the evidence would be offset by the importance of what is revealed about animal suffering. Unfortunately, it is difficult to dispel disbelief because (a) the public cannot verify for itself the claims made by (lawbreaking) activists; (b) it is inconvenient and troubling to acknowledge the extreme violence wreaked on animals because it would mean that consumers of animal-based products are complicit in the mistreatment of animals; (c) industry is quick to reassure the public that advocates' claims are false; and (d) since advocates must break the law just to find out what is going on, industry can readily characterize as "criminal trespassers" those who expose their practices.

From there it is a relatively easy descent into descriptions of advocates as "terrorists" willing to go to any length, including violence. It is, of course, a gross exaggeration to state that because an activist would trespass, the activist would blow up a building or kill people. Unfortunately that kind of descent into exaggeration is faster as a general matter in post-9/11/01 America. The tendency is exacerbated by the relative lack of public protest about other social justice issues by which animal activism could be compared. It is also exacerbated by institutional (ab)users' preemptively foreclosing advocates' claims through affirmative representations to the public that they treat animals humanely. For example, even without or before negative publicity specifically directed at them and their practices, entities like United Egg Producers and Foster Farms have attempted to shape public views of themselves and their products by labeling and advertising claims of humane care, secure in the knowledge that they control access to the facts that could refute such claims.¹⁷ Having already set in consumers'

¹⁷ For example, United Egg Producers (UEP) established a certification system of eggs as "Animal Care Certified," and Foster Farms claims on its website that its animals are well-cared for. Regarding UEP's certification, see United Egg Producers: Animal Care Certified, <http://www.animalcarecertified.com> (last visited Feb. 22, 2006) ("[W]e care about the welfare of our hens. This care provides our customers with the safest . . . eggs in the world"). For information on stopping its use, see COK Exposes Maryland Egg Industry, <http://www.cok.net/camp/inv/mdefi/index.php> (last visited Feb. 22, 2006) ("[T]he Better Business Bureau deemed the ACC logo misleading because it conveys to consumers a false message of humane animal care"); Federal Trade Commission Announces [on Oct. 3, 2005] End to Misleading Egg Logo, http://www.upc-online.org/battery_hens/10305egglogo.html; and Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. TIMES, Oct. 4, 2005, at C1 ("The Old [Animal Care Certified] label 'implied that the animals were treated humanely, when they are not.'). For information on Foster Farms, see <http://www.fosterfarms.com/faq/raise.asp>. For a description of the controversy between East Bay Animal Advocates and Foster Farms, see Suzanne LaBarre, *Foster Farms Threatens Litigation Against East Bay Animal Activists*, BERKELEY DAILY PLANET, Apr. 7, 2006, available at Archives, <http://www.berkeleydaily.org>.

Although UEP and its members can no longer use the certification, and Foster Farms' claims have been contested as well, it is difficult to attack such claims of humane treatment when there is no access to the very establishments in which the animals are held. Moreover, in response to a small contingent of animal advocate

minds the image of themselves and their products as “humane,” consumers will be even less likely to accept claims of animal suffering as justification for breaking into facilities where animals are held.

If the extent to which violence is a part of American society and culture were recognized, claims about its occurring in yet another area would not be met with as much initial skepticism. As it is, people don’t want to believe that such mistreatment and abuse of animals, as is described by animals’ activists, could really be happening in their society. While some may argue that Americans actually don’t care about animals, I believe that Americans do care on an ideological level and that advocates are working against public assumptions that there are laws that prevent the animal industry practices advocates describe, that animal industries actually do attend to the needs of animals, and that the society in which they live would not produce people or institutions capable of the type of cruelty animals’ advocates describe. Breaking down mythic notions about violence and non-violence is an important part of unraveling such assumptions and barriers to change.

III. THE PROBLEM OF OPPOSITIONAL CATEGORIES

I would like to be clear that my observation that violence is a regular feature of American society does not lead me to advocate a free-for-all among disputants, or violence-based advocacy, or tolerance of violence because so much of it is occurring. Rather I contend that recognizing that violence runs throughout our society is the necessary starting point for serious and nuanced consideration of when and how to *reduce* it. That is why I began with the example of America as a mythic “melting pot.” Once the myth was challenged, the underlying issue of racial rejection could be approached anew, with a wholly different response: respect for the diversity among us. While that, too, has seriously mythic dimensions, at least a dialectic that moves us forward could begin with initial questioning of the basis and reality of the first myth of the “melting pot.”

Because violence is rejected as part of our description and definition of ourselves, “violent” becomes an oppositional label. Some people/entities are characterized as “violent” (i.e., bad), and that gross categorization eclipses subtleties and differences in the positions of advocates who engage in different types of activism that make majority members of society uncomfortable. Similarly, some people/entities are characterized as “not violent” (i.e., good), and that gross categorization eclipses realities of conduct that refute the label. For example, agribusiness and laboratories that (ab)use animals define themselves, in opposition to trespassing advocates, as “law-abiding” and define their practices as non-violent by reference to the lawfulness of those practices, not by reference to the actual effect of those practices on animals’ bodies. Animals’ activists, on the other hand, are branded as “terrorists,” and their conduct as “violent” by reference to their unlawfulness, rather than by a sophisticated consideration of what is actually violent (or not) about their conduct and claims. In fact, once animals’ advocates are branded as violent or as terrorists, laws can be put in place that presume a need to control them. For example, the Office of the Tulare County (California) District Attorney has entered into a collaborative agency network whose goal is to monitor, investigate, and prosecute what it calls

investigators, United Egg Producers and Foster Farms can engage an army of lawyers to threaten civil trespass actions and libel suits.

“agricultural crimes.”¹⁸ Once laws and government action are premised on a belief that animals’ activists are “terrorists,” it is difficult to go back to a time when *whether* activists are terrorists was still an open question.

Although animals’ activists are regularly called “violent” or “terrorists” when they break the law, an actual review of so-called “direct action” activism reveals a spectrum of lawbreaking or violence. At one end is picketing and leafleting with images that the observer is likely to consider violent--violent either because of what is shown of animal (ab)use or violent because it speaks in harsh terms about the perpetrators of such violence. The activity of picketing and leafleting may, itself, be completely lawful and peaceful but, technical violations of protest regulations combined with a message that expresses anger and demands stopping violent conduct against animals can easily result in the whole activity being cast as “violent.” Indeed, just being “disruptive” seems to be popularly cast as “violent.”

When violence erupts during activism, the overly simple cultural definitions of violence lead to overly simple characterizations of actors and their conduct. The slide into such designation is, perhaps, exemplified by activists’ attempts to document seal massacres or to question seal killers. Such attempts can result in breaking the law, if the law provides that only authorized seal “hunters” can come within one-half nautical mile of an active seal “hunt.”¹⁹ Is it an act of violence when someone breaks that law to document or to challenge the seal massacre? I contend that it is perceived as an act of violence, or at least an act that welcomes violence, because the law may well have been enacted to prevent violent encounters between seal killers and activists. Having violated a law ostensibly enacted to prevent violence, the lawbreaker will be deemed the violent one when violence does occur, even if the activist did not initiate the actual violent encounter with the seal killer. Tellingly, activists can be called “terrorists” with impunity and without the charge of exaggeration, but activists cannot use the term “massacre” in reference to seal “hunts” without accusation of exaggeration and violent intent.

Is it violent to spray paint “murderer” or “puppy killer” on the home of the general manager of a traditional kill-oriented shelter? Of course, the act could easily be considered violent, but it need not be characterized as the act of a terrorist. It could be seen as illegally expressed anger or frustration, and it could be punished as such without fanning the flames of fear. By defining the angry or frustrated act as the “violent” act of a “terrorist,” it is, of course, easier to justify suppressing the message, subjecting the activist to more severe penalties, and discrediting the movement of which the activist is a part. Should recognition of that as a consequence lead activists to engage in less property damage? I don’t know. My point is that a significant part of the problem actually lies in the ease with which a label of “violent” attaches and that the ease with which it attaches is directly related to mythic non-violence as a means by which institutional (ab)users can frame such acts to their advantage. Regardless of what activists do or do not do, activists are susceptible of being labeled “violent” and, from there, being labeled “terrorist,” if the term “violence” is allowed to sweep in a wide range of acts and

¹⁸ The collaboration is called the Agricultural Crime Technology Information and Operations Network (“ACTION”), details of which are available at http://www.agcrime.net/request_publication.htm.

¹⁹ Jerry Vlasak and other animal rights advocates were convicted of coming within half a nautical mile of seal killers engaged in legal seal killing in the Gulf of St. Lawrence, Canada, on March 30, 2005. The charges were brought after an altercation broke out between animals’ activists documenting the killing and those killing the seals. *See Seal hunt protester turns himself in, announces plan for hunger strike*, THE GUARDIAN (Charlottetown, Canada), Mar. 28, 2006, available at Archives, <http://www.theguardian.pe.ca/>.

thoughts that are disquieting to majority members of society and activists' opponents control the definition and labels that flow from it.

If lawbreaking or expressed anger is glossed as "violence," then certainly the reach of the term "violence" is great. It is also a problem that the public participates in the shaping of the term with only partial knowledge of what "violence" is in the context of animal (ab)use. The discourse about violence that takes place in the public eye is of angry activists and cowering managers of shelters, research labs, and fur farms, for example. What takes place in private is the cowering of animals, if they can, from violent reductions of their bodies to consumer goods and exploiters who disregard clear signals of pain and fear. The discourse on view to the public enables enterprises that (ab)use animals to characterize animals' activists as "violent" because the private facts that would enable activists to contextualize what "violence" means are not generally available. Accordingly, the sociocultural meaning of "violence" in this context is one-sided.

My point is somewhat different from Tom Regan when he writes that the violence of activists is but a raindrop compared to the ocean of violence perpetrated against animals²⁰ but that animal (ab)user industries can be cast as "paragons of nonviolence versus beady-eyed flamethrowers"²¹ at least partially because some activists too often resort to violent advocacy without having pursued alternatives.²² I don't think there is adequate documentation to support the contention that activists have insufficiently pursued alternatives. However, my primary contention is that advocates' activism, whatever it may entail, is easily characterized as "violent" because their opponents control the definition, that a myth of non-violence allows for oppositional categorization of "beady-eyed flamethrowers" and "paragons of nonviolence," and that, in addition, the hidden nature of human-caused animal suffering unreasonably and inaccurately further restricts the general meaning of "violence." Precisely because of their ability to control what the public knows about their practices, institutional animal (ab)users can control the definition of violence just as they have controlled the definition of cruelty.²³ It is not animals' activists who control the definition of violence. Violence is socioculturally defined by those who benefit from definitions of violence that do not include them.

Enterprises that (ab)use animals have been so successful in painting activists ("terrorists") as the opposite of themselves ("law-abiding providers of consumer goods") that it was possible to embed that view in law. The Animal Enterprise Protection Act (AEPA) as enacted in 1992 creates penalties for "physically disrupting" animal enterprises, which are defined as commercial or academic enterprises that use animals for food or fiber production, agriculture, research or testing and enterprises that use or hold animals for entertainment purposes, such as zoos, rodeos, and fairs.²⁴ Since animals' advocates often have to trespass or "break into" animal enterprises just to document what is going on, physical disruption of an enterprise could be claimed even if actual damage to property does not occur. Just "physically

²⁰ Tom Regan, *How to Justify Violence, in TERRORISTS OR FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS* 235 (Steven Best & Anthony J. Nocella II eds., 2004).

²¹ *Id.*

²² *Id.* at 234.

²³ For description and analysis of the extent to which animal agribusinesses have defined "cruelty" so that animal "anti-cruelty" statutes do not apply to them, see David Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness and the Law: A Modern American Fable, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 205, 208 (Cass Sunstein & Martha C. Nussbaum eds., 2004).

²⁴ 18 U.S.C. § 43(a)-(b) (2000).

disrupting” an enterprise is so dangerous--so violent--that it warrants a federal law to supplement state criminal law and its sanctions? It is so violent that it warrants making the FBI available for investigations of “physical disruptions” of animal enterprises? Animal (ab)using enterprises successfully defined “physical disruption” as a form of violence that warrants just such precautions and penalties.

Amendments proposed in 2005 would further expand the definition of “animal enterprises” to include animal shelters and enterprises that sell animals or animal products such as pet stores and furriers. The proposed amendments would sweep “conspirators” to disrupt an animal enterprise explicitly into its reach and would expand the definition of wrongful acts to include “causing the loss of any property used by the animal enterprise (including records), or any property of a person or entity having a connection to, relationship with, or transactions with the animal enterprise.” The proposed amendments also provide for increased penalties, including the death penalty in cases in which someone has died as a result of the wrongful acts.²⁵

Significantly, breaking the law to obtain information about how animals are treated is the only way to get information about many kinds of animal (ab)use. But animal (ab)using enterprises do not describe activists as “breaking the law to obtain information.” Rather they are described as activists who break into animal enterprises in order to destroy those lawful businesses and to harm the law-abiding people who work in those businesses. Allowed to control the characterization of what activists are doing, animal (ab)using industries can control images that are then further embedded by way of legislation. That, in turn, furthers the image of activists as “terrorists,” increases the risks of obtaining needed information that is not available through other means, and emboldens animal abusing enterprises to make greater use of a law that already gives very broad protections to animal enterprises.

Meanwhile, advocates have made little progress in creating legal avenues to obtain information currently obtained only through trespass. I contend that it will become even more difficult to create those legal avenues and that blame for that is properly placed at the feet of animal (ab)using enterprises’ distortion of the meaning of “violence” in a society that swears allegiance to mythic non-violence. Since even low-level law-breaking has been defined as violence, I do not believe that primary blame for the characterization of advocates as violent terrorists lies with advocates who engage in law-breaking activities. Regardless of what activists are doing or not doing, in a fearful and insecure society the easiest way to suppress unpopular messages is by branding the messengers as “violent” and as “terrorists.”

IV. THE PROBLEM OF FEARFUL SILENCE AMONG ADVOCATES

Despite the extraordinary reach of the proposed amendments of the AEPA, few animal advocacy groups, if any, are monitoring its progress or attacking its premises. It is being tracked by groups *opposed* to goals of animal advocacy groups, but there is relative silence in the animal advocacy community itself about the law and about proposed amendments which, if enacted, could seriously diminish the already small amount and quality of documentation of violence

²⁵ Senate Bill 1926 provides for extension of the AEPA to include acts of intimidation and harassment (“§43 (a) ‘Offenses’ (2) (B)”), increased imprisonment terms in the event of property damage in excess of \$100,000 (“§43 (b) ‘Penalties’ (3)”) and the possibility of the death penalty if the offense causes the death of another person (“§43 (b) ‘Penalties’ (6)”), and extension of the definition of “animal enterprises” to include animal shelters, pet stores, breeders, and furriers (§43 (d) ‘Definitions’ (1)(B)). S.1926, 109th Cong. (2005).

against animals that occurs minute by minute in animal (ab)using industries in the United States.²⁶ Similarly, there seems to be little discussion about the recent convictions of members of the organization known as “Stop Huntingdon Animal Cruelty (“SHAC”) under the AEPA. This lack of debate about the law, its use in the SHAC prosecution, and proposed amendments is shocking considering none of the six defendants who ultimately were convicted were alleged to have carried out any of the substantive crimes laid out in the indictment, ranging from property damage to intimidation. Rather, the six were convicted of running the SHAC USA website, which allowed others access to information that could be used in such alleged crimes. The act of managing the website was defined as an act of conspiracy in furtherance of violating the AEPA.²⁷

Despite the appearance of a thought-provoking book about direct action tactics in animal advocacy,²⁸ it appears that the subject of direct action (too easily restated as “violence”) is taboo. There are several reasons for that reticence, but for purposes of this essay I propose only two. First, allegiance to mythic non-violence prevents sophisticated, thoughtful discussion of degrees and types of actions that are already and readily characterized as “violent” by the broader society. Even engaging in discussion about illegal forms of activism seems high risk because illegality is seen--in a fearful, insecure society such as ours--as a precursor to terrorist violence, and allegiance to the myth of non-violence means that one must avoid, at all costs, being seen as violent. Maybe it is less ideological than pragmatic; perhaps the lack of attention to the issue is a function of the fact that most advocacy is conducted by nonprofit organizations, which fear the loss of donor dollars. However, I would like to think that there are other responses to being marginal in an insecure and fearful society than to buy wholeheartedly into the fears of the majority society with the hope that doing so will earn us a little room to exist. It won't.

Second, through others' definitions of “violence” and our own distancing from the issue for fear of tainting, the subject of “violence” may well have been reduced to the point that it is perceived as “uninteresting” or “beside the point.” Surely, if we but began a discussion about “violence,” we would see within its current expansive boundaries troubling contradictions and misrepresentations. For example, like Tom Regan, I tend to believe that intentional harm to

²⁶ On March 3, 2006, a Google search using the parameter <in hofe 1926 “animal enterprise”> yielded only 72 hits total, of which the 11 below were organizations tracking the legislation. There were no hits related to animal rights organizations in that 72 hit list:

1. Animal Crackers blog (touts itself as an “anti-AR” site);
2. Fur Commission;
3. National Animal Interest Alliance (an organization of animal-using enterprises and private property proponents);
4. Office of Legislative Policy and Analysis (liaison between NIH and Congress);
5. Society of Toxicology;
6. Federation of American Societies for Experimental Biology;
7. American Association of Meat Processors;
8. American Feed Industry Association;
9. Connecticut Quarter Horse Association;
10. Minnesota Trappers Association; and
11. Western United Dairymen.

²⁷ Various news media reported on the trial and convictions. See, e.g., Brad Knickerbocker, *Crackdown on Animal-Rights Activists*, CHRISTIAN SCIENCE MONITOR, Mar. 7, 2006, available at <http://www.csmonitor.com/2006/0307/p03s01-usju.html>; and Thomas Walkom, *U.S. terror hunt targets animal activists*, THE TORONTO STAR, March 13, 2006, available at Archives, <http://www.thestar.com>. A description of the prosecution, conviction, and pending appeal sympathetic to SHAC is available at <http://www.shac7.com/cont.htm>.

²⁸ TERRORISTS OF FREEDOM FIGHTERS?: REFLECTIONS ON THE LIBERATION OF ANIMALS (Steven Best and Anthony J. Nocella II eds., 2004).

anything or anyone is an inherently violent act because, for purposes of considering whether an action is violent, I focus on the nature of the act itself rather than on the nature of the target or object of violence.²⁹ But I agree with Regan that when considering the *justice* of a particular act of violence, other considerations become important, such as the availability of non-violent methods to accomplish the particular goal, whether saving innocent victims is the primary objective, and whether the least amount of violence necessary has been used.³⁰ There may or may not be agreement among members of the advocacy community regarding the definition of violence and general criteria for acts of violence to be just. There will most certainly be disagreements as to specifics, such as whether violent acts that are not immediately incident to rescuing living animals are less just than violent acts that are immediately incident to rescuing living animals.³¹ There may be even more controversy associated with some views, such as ALF Press Officer Robin Webb's distinctions (1) between harm to sentient beings (violence) and harm to insentient objects (not violence), and (2) between "constructive destruction" of instruments of animal torture and mindless destruction of inanimate objects "just for kicks."³²

The point is that these issues are complicated and that debating and discussing them is not just an idle, intellectual exercise. Intra-community debate and discussion signals our intent to challenge opponents' definitions of "violence" of ourselves as "terrorists." *Not* to debate the issues and the definitions of "violence" leaves definitional control in the hands of those who would use that control to create a large gap between animals' activists, painted as "terrorists," and law-abiding, "humane" mainstream producers of valued consumer goods. As members of a movement currently at risk of definition as "terrorists," it behooves us to discuss and debate among ourselves issues of violence, justice, and advocacy, and to challenge outsider definitions that are inappropriate and inflammatory. For the sake of clarifying what is and is not violence and terrorism, it is necessary to take on legal representation of activists who have broken laws in the name of advocacy.

Refuting the definition of violence as something animals' advocates do but that animal (ab)using industries do not do, challenging the definition of violence as something unusual in our society, and replacing the definition of violence as a simple concept with a realistically complex definition are all difficult tasks. That is all the more true when the existing definitions of violence seem already fairly deeply inscribed. However, the situation could grow worse. Without intervention in the definitional process, protest itself could ultimately be deemed a violent affront to society. In other words, this is not just about violence in the animal advocacy movement. This is about painstakingly challenging mythic representations of non-violence so that our society as a whole can, as in the case of moving from "melting pot" to "diversity," move to the next mythic representation of our interest in living in peace.

²⁹ Regan, *supra* note 20, at 233.

³⁰ Tom Regan, for example, delineates specific criteria that include those aspects. *Id.* at 233.

³¹ For example, the line of justice that makes it unjust to burn down an "empty building" (that is only *presently* empty of living animals) but just to burn down a building as an incident to rescuing living animals is not as clear to me as it may be to Regan. *Id.* at 234.

³² *Staying on Target and Going the Distance: An Interview with U.K. A.L.F. Press Officer Robin Webb*, NO COMPROMISE (Fall 2003), available at <http://www.nocompromise.org/issues/22robin.html>.

THE ANIMAL WELFARE ACT

HENRY COHEN*

I. OVERVIEW

The Animal Welfare Act (AWA)¹ is a federal statute that directs the Secretary of the United States Department of Agriculture (USDA) to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.”² The AWA also requires the Secretary to “promulgate standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any . . . person . . . for transportation in commerce.”³ The Secretary has delegated these duties to the Animal and Plant Health Inspection Service (APHIS) in the USDA.

By requiring standards to govern the treatment of animals by dealers, exhibitors, and research facilities, the AWA protects animals that are sold or transported in commerce,⁴ exhibited in “carnivals, circuses, and zoos” (but not “retail pet stores, state and country [sic] fairs, livestock shows, rodeos, and purebred dog and cat shows”),⁵ or experimented upon in laboratories, except that the AWA covers only about five or ten percent of laboratory animals. The reason that it covers only about five or ten percent of laboratory animals is that it defines “animal” to exclude rats and mice bred for research,⁶ and rats and mice reportedly constitute 90⁷ or 95⁸ percent of animals used in research.⁹ The AWA also does not cover farm animals,¹⁰ of which more than 9 billion are slaughtered annually in the United States.¹¹

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¹ 7 U.S.C. §§ 2131-2159 (2006).

² 7 U.S.C. § 2143(a)(1) (2006).

³ 7 U.S.C. § 2143(a)(4) (2006).

⁴ See 7 U.S.C. § 2132(f) (2006) (definition of “dealer”).

⁵ 7 U.S.C. § 2132(h) (2006) (definition of “exhibitor”).

⁶ We presume that researchers use few rats and mice that were not bred for research.

⁷ NATIONAL RESEARCH COUNCIL, SCIENCE, MEDICINE, AND ANIMALS (2004) 16 (“90% of all animals used in U.S. research today are rats and mice.”); Ron Southwick, *Senate Votes to Block Expansion of Lab-Animal Regulations*, CHRONICLE OF HIGHER EDUCATION, Mar. 1, 2002, at A25 (“Mice and rats account for 90 percent of the animals used in laboratory studies.”).

⁸ Ron Southwick, *Congress Drops Birds and Rodents From Law Shielding Animals in Research*, CHRONICLE OF HIGHER EDUCATION, May 17, 2002, at A31 (“Rats and mice account for 95 percent of the animals in laboratory studies.”). Spokespersons for organizations on both sides of the animal rights debate have cited the 95 percent figure: “Rats and mice made up about 95 percent of all animals used in laboratory research, according to Trull and

The AWA requires every research facility to establish an Institutional Animal Committee of at least three members, at least one of whom shall not be affiliated in any way with the facility and who is intended to represent “general community interests in the proper care and treatment of animals.”¹² Federal research facilities must also establish Institutional Animal Committees.¹³ The Committee’s responsibilities include to review practices involving pain to animals and to file a report that shall be available for inspection by APHIS and any funding federal agency.¹⁴ The AWA also provides for the licensing of dealers and exhibitors, excluding “any retail pet store or other person who derives less than a substantial portion of his income . . . from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility.”¹⁵ It also prohibits research facilities from purchasing dogs or cats from unlicensed dealers or exhibitors.¹⁶

The AWA effectively prohibits most commercial animal fighting, with a limited exception for bird fighting,¹⁷ and prohibits dealers and exhibitors from selling or otherwise disposing of any dog or cat within five business days after they acquire it, except that this requirement does not apply to operators of auction sales.¹⁸ It also requires public and private pounds and shelters, and research facilities licensed by the Department of Agriculture, to “hold and care for” any dog

Wolff.” BNA DAILY ENVIRONMENT REPORT, Sept. 4, 2001, at A4 (citing Frankie Trull, president of the National Association for Biomedical Research; and Liesel Wolff, congressional liaison for People for the Ethical Treatment of Animals).

⁹ Rats and mice used in federally funded research have, on paper, some legal protection. The Public Health Service Act, 42 U.S.C. § 289d (2006), directs the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health (NIH) to establish guidelines for the proper care of animals used in biomedical and behavioral research funded by the Public Health Service. NIH, *Public Health Service Policy on Humane Care and Use of Laboratory Animals* defines “animal” as “[a]ny live, vertebrate animal,” and contains no exceptions. See <http://grants.nih.gov/grants/olaw/references/phspol.htm>. The National Research Council, *supra* note 7, at 30, notes that rats, mice, and birds “are protected under Public Health Service Policy, though this oversight applies only to those research facilities that receive federal funding.” An expert at the National Research Council informed me in a telephone conversation (Mar. 3, 2006) that most research using animals, including rats and mice, is federally funded and that the animals used are therefore protected by the PHS Act. However, unlike APHIS in its enforcement of the AWA, neither the PHS nor NIH regularly inspects laboratory animal research, but instead relies on assurances (required at 42 U.S.C. § 289d(c)) from grantees that they are complying with PHS policy.

¹⁰ 7 U.S.C. § 2132(g) (2006) (definition of “animal”). There is a federal Humane Slaughter Act, 7 U.S.C. §§ 1901-1906, but it does not apply to birds and it does not regulate the conditions under which farm animals are raised.

¹¹ See *U.S. Statistics for “Food Animals” Slaughtered in 2003*, <http://www.cok.net/lit/statistics2003.php> (last visited April 5, 2006); *Poultry Slaughter*, http://www.upc-online.org/slaughter/2000slaughter_stats.html (last visited April 5, 2006); *Number Of Animals Slaughtered For Human Use*, <http://www.veganoutreach.org/articles/chart.html> (last visited April 5, 2006).

¹² 7 U.S.C. § 2143(b)(1)(B) (2006). The AWA defines “research facility” as any person or entity “that uses or intends to use live animals in research, tests, or experiments,” and therefore includes both private as well as state and local government entities. 7 U.S.C. § 2132(e) (2006).

¹³ 7 U.S.C. § 2143(c) (2006). The AWA defines “Federal research facility” as “each department, agency, or instrumentality of the United States which used live animals for research or experimentation.” 7 U.S.C. § 2132(o) (2006).

¹⁴ 7 U.S.C. § 2143(b)(3), (4) (2006).

¹⁵ 7 U.S.C. § 2133 (2006).

¹⁶ 7 U.S.C. §§ 2137, 2138 (2006).

¹⁷ 7 U.S.C. § 2156 (2006).

¹⁸ 7 U.S.C. § 2135 (2006).

or cat they acquire for not less than five days.¹⁹ Sanctions for violations of the AWA include license suspensions and revocations, civil penalties, and misdemeanor criminal penalties.²⁰

This article will examine the original statute that became the Animal Welfare Act, and all its amendments, but does not note every provision in it, or every exception to every provision that it does note. It focuses on the statute itself, and not on APHIS regulations or case law. It will also examine the main provisions of recent bills that have been introduced in Congress but not, or not yet, enacted.

II. HISTORY

A. The 1966 Beginning

The first version of the Animal Welfare Act was enacted, without a name, in 1966.²¹ It had two main goals: to protect owners of dogs and cats from the theft of those pets for research purposes, and to regulate the treatment of six species of animals used in research: dogs, cats, monkeys, guinea pigs, hamsters, and rabbits.

The statute addressed its first goal by directing the Secretary of Agriculture to issue licenses to dealers,²² with “dealer” defined as any person who, for compensation, transports, buys, or sells dogs or cats in commerce for research purposes;²³ by prohibiting dealers from selling or buying dogs or cats to or from unlicensed dealers;²⁴ and by prohibiting dealers from selling or otherwise disposing of any dog or cat within five business days, or such other period as the Secretary specified, after acquiring it.²⁵ The statute also required research facilities that use dogs or cats to register with the Secretary,²⁶ prohibited research facilities from buying any dog or cat from anyone but a licensed dealer,²⁷ and prohibited unlicensed dealers from selling any dog or cat to a research facility.²⁸

To address its second goal, the 1966 statute directed the Secretary of Agriculture to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers and research facilities,”²⁹ and required federal entities with laboratory animal facilities to comply with such standards.³⁰ The statute defined “animals” so that the standards applied to all the animals named above: dogs, cats, monkeys, guinea pigs, hamsters, and rabbits.³¹ The congressional committee reports that accompanied the statute did not explain why these particular species and no others were granted protection.

¹⁹ 7 U.S.C. § 2158(a) (2006).

²⁰ 7 U.S.C. § 2149 (2006).

²¹ Pub. L. No. 89-544, 80 Stat. 350 (1966).

²² *Id.* § 3.

²³ *Id.* § 2(g).

²⁴ *Id.* § 4.

²⁵ *Id.* § 5.

²⁶ *Id.* § 6.

²⁷ *Id.* § 7.

²⁸ *Id.* § 4.

²⁹ *Id.* § 13.

³⁰ *Id.* § 14.

³¹ *Id.* § 2(h).

The Senate committee report noted, however, that the committee had heard “shocking testimony . . . concerning the existence of pet stealing operations which supply some animals eventually used by many research institutions.” The committee found that animals in the hands of both dealers and medical research laboratories “are faced with inhumane conditions. Quarters are cramped, uncomfortable, and unsanitary, with inadequate provisions for food and water.”³²

B. Animal Welfare Act of 1970:

Expansion to Other Warm-Blooded Animals; Exhibitors

The first amendment to the 1966 statute was the Animal Welfare Act of 1970.³³ The 1970 statute expanded the definition of “animal” to include not only the six species previously covered, but any “warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet.” (As discussed below, APHIS immediately construed “warm-blooded animal” to exclude birds, rats, and mice.”³⁴) The 1970 statute’s definition of “animal,” although it generally included warm-blooded animals, excluded “horses not used for research purposes and other farm animals . . . used or intended for use as food or fiber. . . .”³⁵ The new definition, by adding the phrase “exhibition purposes,” added not only warm-blooded animals (other than horses and farm animals) to those that the statute covered, but included such animals if they were used not only in research, but in exhibitions, which the statute defined to include “carnivals, circuses, and zoos,” but to exclude “retail pet stores, . . . State and country [sic] fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.”³⁶

The 1970 amendment also expanded the scope of the standards that the Secretary of Agriculture was required to promulgate, by mandating that they include “the appropriate use of anesthetic, analgesic or tranquilizing drugs, when such use would be proper. . . .”³⁷ The statute provided, however, that it should not be construed to authorize regulations with regard to “actual research or experimentation by a research facility.”³⁸ “[T]he research scientist,” the committee report made clear, “still holds the key to the laboratory door.”³⁹ This meant that researchers were not required to balance the relative importance of an experiment against the amount of pain the experiment might cause, or otherwise to justify the infliction of suffering on animals.

³² S. Rep. No. 1281 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636.

³³ Pub. L. No. 91-579, 84 Stat. 1560 (1970).

³⁴ See notes 66-67.

³⁵ Pub. L. No. 91-579, § 3(3) (amending § 2(g)), 84 Stat. 1560 (1970).

³⁶ *Id.* § 3(3) (amending § 2(h)).

³⁷ *Id.* § 14 (amending § 13).

³⁸ *Id.*

³⁹ H.R. REP. NO. 91-1651 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. The report added: “This committee and the Congress, however, expect that the work that’s done behind that laboratory door will be done with compassion and with care.” *Id.*

*C. Animal Welfare Act Amendments of 1976:
Expansion to Animal Fighting Ventures*

The 1976 amendments,⁴⁰ which formally named the act the “Animal Welfare Act,”⁴¹ expanded the act in various respects, including to cover dogs used for hunting, security, or breeding purposes,⁴² and to require intermediate handlers and carriers, in transporting animals covered by the act, to adhere to standards promulgated by the Secretary.⁴³ The 1976 amendments also made it a misdemeanor “to knowingly sponsor or exhibit an animal in an animal fighting venture to which any animal was moved in interstate or foreign commerce”⁴⁴; “to knowingly sell, buy, transport, or deliver” an animal in interstate or foreign commerce for purposes of having the animal participate in an animal fighting venture,⁴⁵ or “to knowingly use the mail service . . . or any interstate instrumentality for purposes of promoting . . . an animal fighting venture . . .”⁴⁶ An exception to the animal fighting venture prohibitions was included: the prohibitions applied “to fighting ventures involving live birds only if the fight is to take place in a State where it would be in violation of the laws thereof.”⁴⁷ None of the accompanying committee reports states a reason for the exception.

D. Animal Welfare Act Amendments of 1985: Expansion to Actual Research

The 1985 amendments to the Animal Welfare Act made the act applicable, for the first time, to actual research.⁴⁸ The Secretary was directed to promulgate standards “for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia.”⁴⁹ In addition, the Secretary was to require “that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal.”⁵⁰ If a researcher engages in a practice that would cause pain to animals, then the Secretary must require “the use of tranquilizers, analgesics, and anesthetics,” except “when scientifically necessary.”⁵¹ In addition, no animal may be “used in more than one major operative experiment from which it is allowed to recover except in cases of--(i) scientific necessity; or (ii) other special circumstances as determined by the Secretary.”⁵²

The 1985 amendments, however, permitted exceptions to all AWA standards “when specified by research protocol.”⁵³ In addition, the 1985 amendments specified that the Secretary

⁴⁰ Pub. L. No. 94-279, 90 Stat. 417 (1976).

⁴¹ *Id.* § 2 (amending § 1(a)).

⁴² *Id.* § 3 (amending § 2(f) (definition of “dealer”)).

⁴³ *Id.* § 6 (amending § 6).

⁴⁴ *Id.* § 17 (creating § 26(a)).

⁴⁵ *Id.* (creating § 26(b)).

⁴⁶ *Id.* (creating § 26(c)).

⁴⁷ *Id.* (creating § 26(d)).

⁴⁸ Pub. L. No. 99-198, tit. XVII, subtit. F, §§ 1751-1759, 99 Stat. 1645-1650 (1985).

⁴⁹ *Id.* § 1752(a)(3)(A); 7 U.S.C. § 2143(a)(3)(A).

⁵⁰ *Id.* § 1752(a)(3)(B); 7 U.S.C. § 2143(a)(3)(B).

⁵¹ *Id.* § 1752(a)(3)(C); 7 U.S.C. § 2143(a)(3)(C).

⁵² *Id.* § 1752(a)(3)(D); 7 U.S.C. § 2143(a)(3)(D).

⁵³ *Id.* § 1752(a)(3)(E); 7 U.S.C. § 2143(a)(3)(E).

was not to regulate “the design, outlines, or guidelines of actual research or experimentation,” or to regulate the performance of actual research or experimentation beyond the above requirements regarding pain and distress.⁵⁴ Researchers, in other words, would still not be required to balance the relative importance of an experiment against the amount of pain the experiment might cause, or otherwise to justify the infliction of suffering on animals. To consider alternatives would be sufficient. The Secretary, however, was directed “to show upon inspection, and to report at least annually, that . . . professionally acceptable standards governing the care, treatment, and use of animals are being followed by the research facility during actual research or experimentation.”⁵⁵

*E. Animal Welfare Act Amendments of 1990:
Protection of Pet Dogs and Cats*⁵⁶

The 1990 amendments required public and private pounds and shelters, and research facilities licensed by the Department of Agriculture, to “hold and care for” any dog or cat they acquire “for a period of not less than five days to enable such dog or cat to be recovered by its original owner or adopted by other individuals before such entity sells such dog or cat to a dealer.”⁵⁷ Does this provision prohibit a pound, shelter, or research facility from euthanizing a dog or cat before five days? Perhaps not on its face, but that would seem to be its intent, as to read it otherwise would defeat its purpose.⁵⁸

*F. AWA Amendments of 2002: Expansion of Animal Fighting Venture Prohibition;
Exclusion of Birds, Rats, and Mice Bred for Use in Research*

As noted above, the 1976 provisions that prohibited any person to knowingly sponsor or exhibit an animal in an animal fighting venture, or to knowingly sell, buy, transport, or deliver animals to be used in animal fighting ventures, included an exception for birds if the fighting venture was legal in the state in which it was to occur.⁵⁹ The 2002 amendment expanded the prohibition by limiting the exception, which now provides:

With respect to fighting ventures involving live birds in a State where it would not be a violation of the law, it shall be unlawful under this subsection for a person to sponsor or exhibit a bird in a fighting venture only if the person knew that any bird in the

⁵⁴ *Id.* § 1752(a)(6)(A); 7 U.S.C. § 2143(a)(6)(A).

⁵⁵ *Id.* § 1752(a)(7)(A); 7 U.S.C. § 2143(a)(7)(A).

⁵⁶ Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Pub. L. No. 102-237, § 1004, 105 Stat. 1894 (1991), made a technical correction to the 1990 amendments, which does not warrant a section in this article titled “1991 Amendments.”

⁵⁷ Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, tit. XXV, § 2503, 104 Stat. 4066-4067 (1990); 7 U.S.C. § 2158. A “dealer” is defined to include any person who buys an animal, and could therefore include a research facility. 7 U.S.C. § 2132(f). The five-day requirement in the 1990 amendments should not be confused with the one applicable to dealers and exhibitors, which was in the original 1966 act and remains in effect. 7 U.S.C. § 2135.

⁵⁸ The regulations do not address this question. *See* 9 C.F.R. § 2.133(a) (2005).

⁵⁹ *See supra* text accompanying note 47.

fighting venture was knowingly bought, sold, delivered, transported, or received in interstate commerce for the purpose of participation in the fighting venture.⁶⁰

Thus, for it to be legal to sponsor or exhibit a bird in an animal fighting venture, it is no longer sufficient that the venture be legal under state law; now, the person sponsoring or exhibiting the bird must also have been unaware that a transaction involving a bird had occurred in interstate commerce. The 2002 amendments expanded the animal fighting ventures prohibition in another way too. Since 1976, it had been a crime “to knowingly sell, buy, transport, or deliver” an animal to participate in an animal fighting venture.⁶¹ The 2002 amendments added “received” to the other four verbs, and did away with the exception, insofar as it applied to the prohibition involving these five verbs.⁶²

The 1976 amendments had also prohibited any person “to knowingly use the mail service . . . or any interstate instrumentality for purposes of promoting . . . an animal fighting venture . . . ,”⁶³ and this prohibition had also been subject to an exception for birds if the fighting venture was legal in the state in which it was to occur. This provision and the exception were not amended in 2002 and remain in effect.

The 2002 amendments’ exclusion of birds, rats, and mice bred for use in research⁶⁴ is of major importance, because rats and mice constitute 90 or 95 percent of animals used in research.⁶⁵ Its importance, however, is in denying *future* protection to those animals, not in depriving them of protection that they had previously had. This is because, under APHIS regulations, birds, rats, and mice had never been protected, despite their inclusion in the AWA beginning with the 1970 amendments.⁶⁶ (An exception is that birds, rats, and mice not bred for research are protected today and received some protection in the past.⁶⁷) The statute’s definition of “animal,” from 1970 until today, begins:

any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being

⁶⁰ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10302, 116 Stat. 492 (2002); 7 U.S.C. § 2156(a)(2).

⁶¹ See *supra* note 45.

⁶² The new exception applies only to the prohibition on sponsoring or exhibiting a bird, and could not logically have been applied to the “five verbs” prohibition. See *supra* text accompanying note 60. The new exception requires a lack of knowledge that someone had knowingly engaged in one of the five verbs with respect to a bird. The “five verbs” prohibition prohibits a person from knowingly engaging in one or more of the five verbs, but, if a person had knowingly done so, then he would know that someone, namely he, himself, had knowingly done so.

⁶³ See *supra* note 46.

⁶⁴ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 491 (2002); 7 U.S.C. § 2132(g).

⁶⁵ See *supra* notes 7 and 8.

⁶⁶ The expansion of the definition of “animal” to include other warm-blooded animals took effect December 24, 1971. Animal Welfare Act of 1970, Pub. L. No. 91-579, § 23 (1970). USDA regulations issued that day excluded birds, rats, and mice. See, 36 Fed. Reg. 24,919 (Dec. 24, 1971).

⁶⁷ The 1971 regulations did not limit the exclusion to birds, rats, or mice bred for research. Later versions defined “animal” to exclude “[b]irds, rats of the genus *Rattus* and mice of the genus *Mus* bred for use in research,” thereby excluding birds whether or not bred for research but protecting rats and mice not bred for research. See, e.g., 54 Fed. Reg. 36,120 (Aug. 31, 1989). The regulation today, conforming to the 2002 amendment to the statute, excludes “birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research,” thereby for the first time protecting birds not bred for research and continuing to protect rats and mice not bred for research. 9 C.F.R. § 1.1 (2005).

used, or is intended for use, for research, testing, experimentation, or exhibition purposes; but such term excludes⁶⁸

Prior to the 2002 amendment, the animals that followed the word “excludes” included “horses not used for research purposes and other farm animals,” with examples of farm animals named. The 2002 statute added to the excluded animals “birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research.”⁶⁹

Birds, rats, and mice are warm-blooded animals, and there was no plausible way that the statute, from 1970 to 2002, could have been read to exclude them if they were used or intended for use for research, testing, experimentation, or exhibition purposes. The statute on its face limited the Secretary’s discretion to determining whether warm-blooded animals were used or intended for use for such purposes, and the legislative history confirmed that reading.⁷⁰ If the Secretary found that they were used for such purposes, then the statute mandated their coverage.⁷¹

Not surprisingly, an animal advocacy group sued to overturn the regulation’s exclusion of birds, rats, and mice, and, not surprisingly, it won, with a federal district court in Washington, D.C., finding that the exclusion was “arbitrary and capricious and violates the Act.”⁷² The decision was overturned by the D.C. Circuit, however, on standing grounds.⁷³ Four years later, in a case unrelated to the birds, rats, and mice question, the en banc D.C. Circuit expanded the grounds for standing to include injuries to one’s “aesthetic interest in observing animals living under humane conditions.”⁷⁴

Subsequently, another suit was brought to challenge the exclusion of birds, rats, and mice, and a federal district court, citing the en banc D.C. Circuit case, denied the Department of Agriculture’s motion to dismiss for lack of standing.⁷⁵ As a result, the Department of Agriculture settled the case by agreeing to revise its regulations to include birds, rats, and mice.⁷⁶ Then Congress intervened, and, in the Department of Agriculture appropriations for fiscal year

⁶⁸ 7 U.S.C. § 2132(g).

⁶⁹ There was no debate on the floor of the House or Senate, and no committee report, discussing this amendment.

⁷⁰ See Henry Cohen, *The Legality of the Agriculture Department’s Exclusion of Rats and Mice from Coverage Under the Animal Welfare Act*, 31 ST. LOUIS U. L.J. 543 (1987).

⁷¹ The Department of Agriculture acknowledged, “The statutory definition of ‘animal’ specifically includes guinea pigs and hamsters, and we do not have the authority to remove these rodents from the regulations,” 54 Fed. Reg. 36, 113 (Aug. 31, 1989), thereby implying that they did have the authority to exclude other rodents. It is clear, however, that the reason that guinea pigs and hamsters were singled out in the 1970 amendments is that they were named in the original 1966 statute, and, when Congress expanded the statute in 1970 to include other warm-blooded animals, it did so by adding the reference to warm-blooded animals without deleting the names of the warm-blooded animals listed in the 1966 statute.

⁷² ALDF v. Madigan, 781 F. Supp. 797, 806 (D.D.C. 1992).

⁷³ ALDF v. Espy, 23 F.3d 496 (D.C. Cir. 1994).

⁷⁴ ALDF v. Glickman, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1064 (1999) (upholding plaintiffs’ standing to challenge allegedly inadequate regulations for primate dealers, exhibitors, and research facilities).

⁷⁵ Alternatives Research & Dev. Found. v. Glickman, 101 F. Supp. 2d 7 (D.D.C. 2000).

⁷⁶ The settlement was filed with the U.S. District Court for the District of Columbia on September 28, 2000, with the USDA agreeing to pay a portion of the plaintiffs’ legal fees in accordance with the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412(d)(1)(A), *available at* <http://www.aphis.usda.gov/ac/q4.html>. EAJA requires the federal government to pay the prevailing party’s attorneys’ fees only when the court finds that the position of the United States was not substantially justified and that no special circumstances make an award unjust. The Supreme Court has held that “substantially justified” means “reasonable.” *Pierce v. Underwood*, 487 U.S. 552, 565, 568 (1988).

2001, prohibited FY2001 funds from being used to “modify the definition of ‘animal’ in existing regulations pursuant to the Animal Welfare Act.”⁷⁷ The FY2002 appropriations contained effectively the same prohibition,⁷⁸ and then Congress amended the Animal Welfare Act to exclude birds, rats, and mice bred for research.⁷⁹

Why had the Secretary of Agriculture excluded birds, rats, and mice from coverage? In the 1992 federal district court case that found the exclusion arbitrary and capricious, the Department of Agriculture said that it had “considered the number of animals involved, the resources available, and the approximate cost of regulation.”⁸⁰ The court’s response to this claim was that “birds, rats, and mice could be included in the definition without requiring the expenditure of significant agency resources.”⁸¹ As the court noted, the cost of *enforcing* the law was not relevant:

The court recognizes that enforcement of these regulations would require some expenditure of agency resources. Yet even without any active agency enforcement, the inclusion of rats, mice and birds under the Act would send an important message to those responsible for their care--that the care of these animals is something for which they are legally accountable and is an important societal obligation. This message is much more consistent with the purposes of the Act than the current message the exclusion of these animals conveys: that the researchers may subject birds, rats, and mice to cruel and inhumane conditions, that such conduct is sanctioned by the Government and has no legal consequences.⁸²

In any event, the Secretary’s purported concern with the cost of policing the treatment of birds, rats, and mice must be viewed in light of the fact that “Agriculture officials lobbied in support of cuts in the program, but Congress has refused to go along. In this fiscal year [1985], for example, the USDA requested \$3.65 million for animal welfare, but Congress retained last year’s \$4.86 million.”⁸³ As one commentator put it, “the USDA has never wanted to enforce the animal welfare program.”⁸⁴

The 2002 amendments also directed the National Research Council, by May 13, 2003, to submit to the House and Senate Agriculture Committees “a report on the implications of

⁷⁷ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-387, § 772, 114 Stat. 1549A-45 (2000).

⁷⁸ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-76, § 732, 115 Stat. 736 (2001). Whereas the FY2001 appropriations act straightforwardly said that none of the funds appropriated by the act “shall be used to issue a notice of proposed rulemaking” or “promulgate a proposed rule,” the FY2002 appropriations act confusedly said that none of the funds appropriated by the act “shall be used to issue a proposed rule for which the comment period would close prior to September 30, 2002, final, or interim final rule pursuant to notice and comment rulemaking.”

⁷⁹ See *supra* note 64.

⁸⁰ Madigan, *supra* note 72, at 803.

⁸¹ *Id.*

⁸² *Id.* at 803 n.4.

⁸³ Keith B. Richburg, *Agriculture Inspectors Scored for Neglecting Animal Welfare*, WASH. POST, Nov. 9, 1984, at A25.

⁸⁴ Esther F. Dukes, *The Improved Standards for Laboratory Animals Act: Will it Ensure that the Policy of the Animal Welfare Act Becomes a Reality?*, 31 ST. LOUIS U. L.J. 519, 525 (1987) (capitalization altered). The act referred to in the title of this article was the title of the Senate amendment that became the 1985 amendments to the Animal Welfare Act. See H.R. CONF. REP. NO. 99-447, at 592 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2251, 2518.

including rats, mice, and birds within the definition of animal under the regulations promulgated under the Animal Welfare Act (7 U.S.C. 2131 et seq.).”⁸⁵ No report has been prepared.⁸⁶

III. PROPOSED BILLS TO AMEND THE ANIMAL WELFARE ACT

There are three bills to amend the AWA pending in the 109th Congress, which is in session during 2005 and 2006. We discuss those three, as well as a bill that was introduced in the 108th Congress (2003-2004) and the 107th Congress (2001-2002), but was not enacted and has not been reintroduced in the 109th Congress.

A. Animal Fighting

The Animal Fighting Prohibition Enforcement Act of 2005 was introduced as S. 382 and H.R. 817, 109th Congress. S. 382 passed the Senate on April 28, 2005,⁸⁷ but H.R. 817 has not been taken up in a House committee or on the floor of the House. This bill would enact a new 18 U.S.C. § 49, which would not be part of the Animal Welfare Act, but presumably would supersede 7 U.S.C. § 2156, which is the section of the AWA that outlaws most animal fighting ventures. The bill, however, on its face would repeal only subsection (e) of section 2156, which makes violations of section 2156 a misdemeanor; the bill, by contrast, would authorize prison sentences of up to two years, thus making violations of its animal fighting prohibitions a felony.⁸⁸ The sponsor of the Senate bill said that he wished to increase the penalties because he had been “informed by U.S. attorneys that they are hesitant to pursue animal fighting cases with merely a misdemeanor penalty.”⁸⁹

The bill would not include a counterpart to the section of the AWA that authorizes the Secretary of Agriculture to investigate suspected violations.⁹⁰ The reason for this omission is presumably that the animal fighting prohibitions, because they would be moved from the AWA to title 18 of the U.S. Code, would be enforced solely by the Department of Justice.

Another major change that the new bill would make would be to make it unlawful “to knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture.” The Senate bill’s sponsor explained that the knives that are used in cockfights are commonly known as “slashers,” and that “slashers and icepick-like gaffs

⁸⁵ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10304, 116 Stat. 492 (2002); 7 U.S.C. § 2132 note.

⁸⁶ The National Research Council’s report, *supra* note 7, is not the report mandated by Pub. L. No. 107-171. An expert at the National Research Council informed me in a March 3, 2006 telephone conversation that the reason that the National Research Council did not prepare the report is that it received no federal funding for the purpose, either by congressional appropriation or from any federal agency. *See supra* note 9.

⁸⁷ 151 CONG. REC. S4,605 (daily ed. Apr. 28, 2005). The Senate passed the bill by unanimous consent, which means that it passed it without senators individually voting on it. There was no debate on the floor of the Senate and no Senate committee report concerning the bill.

⁸⁸ The bill’s not repealing all of section 2156 may be a drafting error, as it seems unlikely that the drafters intend that two similar but not identical statutes exist simultaneously, with one of them containing no penalties.

⁸⁹ 151 CONG. REC. S1,500 (daily ed. Feb. 16, 2005) (statement of Sen. Ensign).

⁹⁰ 7 U.S.C. § 2156(f).

are attached to the legs of birds to make the cockfights more violent and to induce bleeding of the animals.”⁹¹

B. Sources of Dogs and Cats for Research

The Pet Safety and Protection Act of 2005 (S. 451, 109th Congress) would prohibit research facilities and federal research facilities from using “a dog or cat for research or educational purposes if the dog or cat was obtained from other than a [permissible source].” It would also prohibit any person who is not a permissible source from selling, donating, or offering a dog or cat to any research facility or Federal research facility. A permissible sources would be (1) a licensed dealer that has bred and raised the dog or cat, (2) a publicly owned and operated pound or shelter that is registered with the Secretary, is in compliance with 7 U.S.C. § 2158 (requiring it to hold dogs and cats for five days), and obtained the dog or cat from its legal owner, but not from another pound or shelter, (3) a person or entity that is donating the dog or cat and that bred and raised it, or owned it for not less than one year immediately preceding the donation, (4) a licensed research facility, or (5) a licensed federal research facility. The penalty for violating the bill would be \$1,000 in addition to any other applicable penalty.

C. Coverage of Retail Pet Stores that Breed Animals; Sellers of Dogs and Cats

The Pet Animal Welfare Statute of 2005 (PAWS) (S. 1139 and H.R. 2669, 109th Congress) would, among other things, amend the AWA’s definition of “dealer.” The AWA defines “dealer,” in part, as a person “who, in commerce, for compensation or profit,” sells any animal “for research, teaching, exhibition, or use as a pet.”⁹² The AWA defines “commerce” to include a transaction “between a place in a State and any place outside of such State.”⁹³ Therefore, if you and I live in different states, and I sell you my dog or cat for \$1, then I am a “dealer” under the AWA.⁹⁴ A retail pet store, however, under one of the two exclusions in the definition of “dealer,” is not a “dealer” under the AWA, unless it sells animals to “a research facility, an exhibitor, or a dealer.”⁹⁵

PAWS would not change the fact that a retail pet store that does not sell animals to “a research facility, an exhibitor, or a dealer” is not a “dealer” under the AWA, but it would add a restrictive definition of “retail pet store” to the AWA. A “retail pet store” would be “a public retail establishment that sells animals commonly kept as pets in households in the United States, including--(A) dogs; (B) cats; (C) guinea pigs; (D) rabbits; and (E) hamsters.” This list of

⁹¹ See *supra* note 89.

⁹² 7 U.S.C. § 2132(f).

⁹³ 7 U.S.C. § 2132(c)(1).

⁹⁴ If I sell you some other non-wild animal, then I am not a “dealer” unless I derive more than \$500 gross income from the sale of animals other than wild animals, dogs, or cats, during any calendar year. 7 U.S.C. § 2132(f)(ii). APHIS regulations, however, make a person a “dealer” if he sells an “exotic animal,” as the regulations define the term, even if the exotic animal is not a wild animal. 9 C.F.R. § 1.1 (2005). “Wild animal” is not defined in the AWA, but is defined in the regulations to include “any animal which is not or historically has been found in the wild, or in the wild state, within the boundaries of the United States, its territories, or possessions.” 9 C.F.R. § 1.1 (2005).

⁹⁵ 7 U.S.C. § 2132(f)(i).

animals is not exhaustive, but would prevent APHIS or a court from finding that any of the animals on the list are *not* commonly kept as pets in U.S. households. But PAWS' definition of "retail pet store" does contain exclusions, one of which is "a person breeding animals to sell to the public as pets."

Thus, under PAWS, a person breeding animals to sell to the public as pets would no longer be excluded from the definition of "dealer" by virtue of being a retail pet store, because such a person would not be defined as "a retail pet store." He might look like a retail pet store, smell like a retail pet store, and bark, meow, and chirp like a retail pet store, but he would not be a "retail pet store" under PAWS. Therefore, he would not be excluded from the definition of "dealer," but would be a "dealer," subject to regulation under the AWA, if he sold any animal in commerce, for compensation, and for use as a pet. And that seems to be a purpose of PAWS--to make the AWA applicable to retail pet stores that breed animals. The sponsor of the Senate bill said: "Because the AWA only covers breeders and others who sell at wholesale, many puppy mill owners have successfully avoided AWA requirements by selling directly to the public."⁹⁶

The second exclusion in the AWA's current definition of "dealer" is "any person who does not sell . . . 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."⁹⁷ PAWS would replace this exclusion with a provision that would exclude from the definition of "dealer" any person who, during any calendar year, "sells not more than 25 dogs or cats at wholesale or to the public; *or* [emphasis added] . . . does not whelp more than 6 litters of dogs or cats . . . ; and . . . derives not more than \$500 gross income from the sale of other animals."⁹⁸ With regard to the "*or*" that I italicized, note that, if a dealer is a person who does not do X *or* Y, then, to be a dealer, he must (at the least) do X *and* Y. This means that, if we consider the universe of people who derive not more than \$500 gross income from the sale of animals other than dogs or cats, then a person who sells more than 25 dogs or cats would not be a dealer unless he also whelps more than 6 litters of dogs or cats. Likewise, a person who whelps more than 6 litters of dogs or cats would not be a dealer unless he also sells more than 25 dogs or cats. Perhaps the "*or*" that I italicized is a drafting error and should be "*and*," so that a person would not be a dealer if he sells not more than 25 dogs or cats, and would also not be a dealer if he does not whelp more than six litters of dogs or cats. In other words, if the "*or*" is changed to "*and*," then a person could be a dealer if he sold more than 25 dogs or cats, or if he whelped more than 6 litters of dogs or cats.⁹⁹

Still in the universe of people who derive not more than \$500 gross income from the sale of animals other than dogs or cats, remember that the AWA currently excludes from the definition of "dealer" any person who does not sell any dog or cat.¹⁰⁰ If PAWS is enacted, then the AWA would exclude from the definition of "dealer" any person who sells not more than 25 dogs or cats *or* does not whelp more than 6 litters of dogs or cats. PAWS, therefore, either with the "*or*"

⁹⁶ 151 CONG. REC. S6,031 (daily ed. May 26, 2005) (statement of Sen. Santorum).

⁹⁷ 7 U.S.C. § 2132(f)(ii). See *supra* note 94.

⁹⁸ PAWS would thus eliminate the exclusion of a person who sells a wild animal from the definition of "dealer."

⁹⁹ A statement by the sponsor of the Senate bill suggests that this was the intention: "PAWS would regulate breeders who raise seven or more litters of dogs or cats each year. . . . In addition, this broad ranging legislation would cover importers and other non-breeder dealers who sell more than 25 dogs or cats per year. . . ." 151 CONG. REC. S6,031 (daily ed. May 26, 2005) (statement of Sen. Santorum).

¹⁰⁰ See *supra* note 97. The sentence accompanying the present footnote oversimplifies by omitting the AWA's reference to "wild animals," which is quoted in the sentence accompanying note 97.

I italicized or with “and” instead, would increase the number of people who could be regulated as “dealers” under the AWA.

D. Limiting the Breeding of Female Dogs

The Puppy Protection Act of 2003 (H.R. 3484, 108th Congress) was introduced in 2003, but not considered in committee or on the floor of the House, and has not been reintroduced in the 109th Congress. It would have prohibited dealers, research facilities, and exhibitors from breeding a female dog before she is one year old, and prohibited them from whelping her more frequently than three times in any two-year period. It would also have toughened the penalties under the AWA. A similar bill had been introduced in both the House and Senate in 2001, but had not been considered in committee or on the floor of either body (H.R. 3058, S. 1478, 107th Congress).

IV. CONCLUSION

The Animal Welfare Act’s failure to cover the more than 9 billion farm animals slaughtered annually in the United States, and failure to cover 90 or 95 percent of animals used in research, makes it an exaggeration to say that the United States has a general animal welfare act. The AWA is more like the Bald and Golden Eagle Protection Act,¹⁰¹ the Chimpanzee Health Improvement, Maintenance, and Protection Act,¹⁰² the Endangered Species Act,¹⁰³ or the Humane Slaughter Act,¹⁰⁴ all of which protect a limited number of species in particular ways. Like these statutes, the AWA benefits some animals, but it does not prevent the most widespread violations of animal rights, including unnecessary experimentation and horrible factory-farm conditions, from being inflicted on most animals whom Congress could protect under its power to regulate interstate and foreign commerce.

¹⁰¹ 16 U.S.C. §§ 668-668d.

¹⁰² 42 U.S.C. § 481C.

¹⁰³ 16 U.S.C. §§ 1531-1544.

¹⁰⁴ 7 U.S.C. §§ 1901-1906.

WHO LET THE DANGEROUS DOGS OUT? THE GERMAN STATES' HASTY LEGISLATIVE ACTION, THE FEDERAL LAW ON DANGEROUS DOGS AND THE "KAMPFHUNDE" DECISION OF THE FEDERAL CONSTITUTIONAL COURT

CLAUDIA E. HAUPT *

I. INTRODUCTION

Germany has been struggling with legislative efforts to regulate the import, breeding and ownership of dangerous dogs on the state and national level since the late 1990s.¹ The states (*Länder*) individually regulated the issue of dangerous dogs after it became clear that a uniform nationwide regulation could not be arrived at.² Subsequently, many of these state regulations did not pass review in state administrative courts and before the Federal Administrative Court. In 2001 federal legislation was passed, but the German Federal Constitutional Court in a 2004 decision struck down parts of it, including the newly introduced Section 143 (1) of the Criminal Code (*Strafgesetzbuch, StGB*).³

Part II, will briefly explain why looking abroad on this issue matters and provide a short introduction to the German court system and the role of the Federal Constitutional Court within the system. Part III then will turn to the somewhat misguided legislative efforts at the state and national level that resulted in largely divergent laws which, as mentioned above, subsequently did not pass judicial muster in the state and federal courts in some key aspects. Part IV will outline the "*Kampfhunde*" decision of the Federal Constitutional Court. While upholding parts of the federal law against dangerous dogs the Court found that the dangerousness of a dog cannot be determined solely by breed. Absent any reliable scientific method to determine the

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¹ Andreas Gängel and Timo Gansel, *Die rechtlichen Regelungen zum Schutz vor gefährlichen Hunden-- Gesetzgebungsnotwendigkeiten oder Alibigesetzgebung?*, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1208, 1209 (2001); Thomas Kunze, *Verfassungsrechtliche Aspekte der Gefahrenabwehr*, 20 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1608, 1609 (2001).

² Verena S. Rottmann, *Die Gefahrhunde-Judikatur als Impuls für eine einheitliche Landesgesetzgebung?*, 36 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 439, 440 (2003).

³ *Infra* Part IV.

dangerousness of dogs, however, it stated that for the time being, breed only was a sufficiently appropriate factor. At the same time, the Court instructed the legislature to closely monitor scientific developments and adjust the legislation accordingly. Part V, finally, will provide an analysis of the decision and illustrate the lessons to be learned from Germany's largely failed legislative attempts to effectively come to grips with the "dangerous dogs" issue.

II. CONSTITUTIONAL LAW IN COMPARATIVE PERSPECTIVE

Germany can fairly be considered a rather advanced country as far as animal rights are concerned; this assessment is easily supported by the amendment of the German Constitution to include the protection of animals as an objective of the state in Article 20a of the Basic Law (*Grundgesetz, GG*).⁴ Historically, animal welfare and protection have been issues of high public interest and they continue to be firmly rooted in contemporary public discourse.⁵ Yet, most recently, Germany has been struggling to come to grips with a particularly contentious issue involving animals, the issue of dangerous dogs.⁶

The story of the legislative efforts to curb potentially fatal attacks by dogs in Germany, as will be shown, can be characterized as a story of misguided legislative activism based on insufficient policy analyses, incomprehensive data sets, extreme media pressure and an overall lack of deliberate and careful analysis of the problem.⁷ In the end, Germany was left with a patchwork of incomprehensive dog laws, unconstitutional provisions of the Animal Protection Law and a partially unconstitutional section of the Federal Criminal Code.⁸ This, then, is an example of how not to tackle an important and potentially contentious issue.

This discussion will provide insight into the employment of the states' police powers to regulate the issue absent a uniform national regulation. The subsequent passing of legislation on the national level predictably led to federalism concerns that eventually proved to be so significant as to (partially) invalidate the federal legislation. Inevitably, the question arises why looking abroad--particularly in a decision that was largely concerned with federalism issues--might prove to be informative.

⁴ For an extensive discussion of the Amendment and the amendment process, see Kate M. Natrass, ". . . und die Tiere" *Constitutional Protection for Germany's Animals*, 10 *ANIMAL L.* 283 (2004).

⁵ See *id.* at 285-88 (discussing a historical perspective of animal welfare in Germany).

⁶ For a discussion of problems in the area of dangerous dogs legislation in the United States, see for example Heather K. Pratt, *Canine Profiling: Does Breed-Specific Legislation Take a Bite out of Canine Crime?*, 108 *PENN ST. L. REV.* 855 (2004); Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 *NOVA L. REV.* 415 (2003); Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 *ANIMAL L.* 313 (2004).

⁷ Rudolf Wassermann, *Gesetzgebungshektik?*, 53 *NJW* 2560, 2561 (2000) speaks of the apparent "hastiness"; Thomas Fischer, § 143, *No. 3a*, in *STRAFGESETZBUCH UND NEBENGESETZE* 940-41 (Herbert Tröndle & Thomas Fischer eds., 53d ed. 2006) addresses the media campaigns that surrounded the highly emotionally charged debate and blew it out of proportion; Bernd von Heintschel-Heinegg, § 143, *No. 7*, in 2 *MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH* 724 (Wolfgang Joecks and Klaus Miebach eds., 2005) summarizes the criticism in legal literature that charged the legislatures with generating symbolic politics of a populist character.

⁸ *Infra* Part IV.

A. Why Looking Abroad Can Be Instructive

There have been repeated calls for an increased study of constitutional decisions outside of the United States.⁹ Considering federalism issues before foreign constitutional courts, however, may prove more difficult than the discussion of foreign constitutional courts' treatment of questions involving individual rights.¹⁰

Professor Jackson cautions:

First, federalism provisions of constitutions are often peculiarly the produce of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests. Each federal "bargain" is in important respects unique to the parties' situations, in contrast to constitutional provisions asserted to guarantee universal, or natural, or necessary rights of women and men as persons. Similar phrases or provisions concerning federalism may have different historical meanings in a particular polity, tied in different ways to the political compromises that are usually at the foundation of a federal union. Second, not only are federal systems agreed to as a compromise, but the compromise typically constitutes an interrelated "package" of arrangements. No one element of the package can be compared to a similar-seeming element in a different federal system without more broadly considering the comparability of the whole "package" and the role of the particular element within that federal package.¹¹

Yet, knowledge of the way other federal systems, especially "strongly federal nations such as Germany,"¹² deal with such issues is not without merit. At the very least, illustrating the structural concerns of other countries can raise awareness about federalism concerns in the United States.¹³ Even though the Court invalidated parts of the legislation on federalism grounds, it did engage in a discussion of the issue that went beyond a mere consideration of legislative powers assigned to the states and the federation respectively. Thus, the decision is instructive despite the problems that the study of foreign federalism issues might entail. Finally, this discussion of the decision of the Federal Constitutional Court also serves as an explanation of German constitutional law doctrine in the area of individual rights, particularly of Article 12 jurisprudence. In exemplary fashion, the Court engages in a doctrinal analysis of the right to choose and work in one's profession.¹⁴

⁹ Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. CONST. L. 583 (1999). For a discussion of the benefits of comparative constitutional study, see for example Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); and *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., 2002).

¹⁰ Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272-73 (2001).

¹¹ *Id.*

¹² Jackson, *supra* note 10, at 276.

¹³ For in-depth discussions of comparative constitutional law in the area of federalism, see also Jackson, *supra* notes 9 and 10.

¹⁴ Brugger, in his analysis of the treatment of hate speech in Germany, explains the steps and standards of judicial review as performed by the Federal Constitutional Court:

B. The German Court System and the Role of the Federal Constitutional Court

The case to be discussed came to the Federal Constitutional Court as a constitutional complaint following a decision of the Federal Administrative Court. Constitutional complaints are filed by citizens claiming a violation of their basic rights.¹⁵ The Federal Administrative Court is the (only) federal court in the German administrative court system. The Constitution establishes the federal courts: for civil and criminal matters the Federal Court of Justice (*Bundesgerichtshof*), for administrative matters the Federal Administrative Court (*Bundesverwaltungsgericht*), for social matters the Federal Social Court (*Bundessozialgericht*), labor and employment matters the Federal Labor Court (*Bundesarbeitsgericht*), and for fiscal matters the Federal Finance Court (*Bundesfinanzhof*).¹⁶

The Federal Constitutional Court is not a “supra-appellate court” but rather exclusively deals with constitutional claims.¹⁷ Thus, as a general rule, the Federal Court of Justice has appellate jurisdiction in civil and criminal matters, and the Federal Administrative Court has

Whenever a violation of a constitutional right is alleged, the Federal Constitutional Court follows a multi-level analysis, as do most other constitutional and human rights courts. The first question regards the definitional coverage of the right and whether it embraces the activity of sphere of life threatened by the state action. . . . [T]he Court must next ask if the state action ‘encroaches’ on the right in the technical sense and whether that is permissible under an explicit or implicit clause limiting the right. If the state action is allowed under a limitation clause, the Court must still question whether the limitation to the right is ‘proportional.’ While the principle of proportionality is not explicitly mentioned in the German Constitution, it forms an implicit standard gleaned from the general prioritization of personal liberty over governmental regulation. For a state action to be found proportional, the Court must be satisfied of the following three elements: (i) the means used by government (i.e., regulation or prohibition) are suitable to further a legitimate objective of governmental action; (ii) there is no equally effective but less restrictive means available to further the same public purpose; and (iii) there is an appropriate, defensible relationship between the importance of the public good to be achieved and the intrusion upon the otherwise protected right.

Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 3.12 GERMAN L.J. 9 (2002), available at http://www.germanlawjournal.de/pdf/Vol04No01/PDF_Vol_04_No_01_01-44_Public_Brugger.pdf (last visited Jan. 30, 2006) (Part I was originally published in 3.12, but online is published in .pdf along with Part II; Part II was originally published in 4.1.).

¹⁵ Art. 93(1) Nr. 4a GG reads: “The Federal Constitutional Court decides on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights or one of his rights under Article 20 IV, 33, 38, 101, 103 or 104 has been violated by public authority.” THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 74 (May 23rd, 1949) (Axel Tschentscher, trans., JWV 2003), available at http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf (last visited Jan. 30, 2006). See also Rincken, *infra* note 17, at 62 and 66-69; Heun, *infra* note 18, at 129-39.

¹⁶ Art. 95(1) GG.

¹⁷ Rincken elaborates: “In the case of constitutional complaints, the Court can only refer to the basic rights and equivalent rights listed in Article 93 I 4a of the Basic Law. The compliance with this seemingly unambiguous rule makes the review of court cases--and these constitute the majority of all constitutional complaints--very difficult. On the one hand, the Court is obliged to review any final court decision for possible violation of basic rights. On the other hand, the Court tries to avoid becoming a supra-appeal court, which would reduce the constitutional authority of the comprehensive specialist judiciary. It uses the formula that it will only deal with court decisions if these breach a ‘specific constitutional right.’” Alfred Rincken, *The Federal Constitutional Court and the German Political System*, in CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT (CCC) 55, 67-68 (Ralf Rogowski and Thomas Gawron eds., 2002).

appellate jurisdiction in administrative matters.¹⁸ Consequently, the Federal Constitutional Court did not decide on the “dangerous dogs” issue until 2004 on the challenge of the 2001 federal law against dangerous dogs.¹⁹

III. LEGISLATION GONE WRONG: THE STATES’ SOMEWHAT MISGUIDED LEGISLATIVE EFFORTS

Failed attempts to address the issue on the national level led to the successive adoption of laws by the German states based on their police powers in the area of public safety and public welfare.²⁰ Following several fatal incidents involving dogs, especially the death of a child in Hamburg in 2000, those German states which had not yet adopted any laws addressing the issue tried to calm down the public by rapidly enacting laws prohibiting the import, breeding and ownership of dangerous dogs.²¹

Within a very short period of time, diverging laws were on the books in all of the 16 German states and eventually, a federal law was enacted that prohibited the import, breeding and ownership of dangerous dogs and added a new Section 143 to the Criminal Code.²² I will summarize the contents of the state legislation in general terms, then briefly turn to the state administrative court and Federal Administrative Court decisions and finally provide an outline of the federal law against dangerous dogs.

A. Implementation and Critique of Breed Specific Legislation and Attempts at Measuring the Dangerousness of Dogs

Within just a few weeks in the summer of 2000, all German states with the exception of Thuringia and Bavaria (which had pre-existing legislation) adopted regulations or legislation regulating the ownership of dangerous dogs or changed existing regulations.²³ They were

¹⁸ *Id.* at 67 (“Constitutional complaints can challenge administrative actions only once these actions have been declared valid by a final judgment of a court. As an extraordinary remedy, constitutional complaints can only be commenced once all other remedies have been exhausted. In the case of an administrative decision, all the remedies provided by the administrative, finance, or social security judicature must be exhausted before the Court can be petitioned as a final court of appeal.”). See also Werner Heun, *Access to the German Federal Constitutional Court*, in CCC, *supra* note 17, at 131-33.

¹⁹ *Infra* part IV.

²⁰ Christian v. Coelln, *Keine Bundeskompetenz für § 143 StGB*, 54 NJW 2834 (2001); Gängel & Gansel, *supra* note 1, at 1208.

²¹ Kunze, *supra* note 1, at 1609; Gängel and Gansel, *supra* note 1, at 1208; Carsten Rinio, *Schutz vor Kampfhunden mit Mitteln des Strafrechts?*, 54 NJW 3607, 3608 (2001); Rottmann, *supra* note 2, at 439.

²² Gängel & Gansel, *supra* note 1, at 1213; Kunze, *supra* note 1, at 1610; v. Coelln, *supra* note 20, at 2834; Rinio, *supra* note 21, 3608-09; Tröndle & Fischer, *supra* note 7, at 940.

²³ Gänsel & Gansel, *supra* note 1, at 1210. For a comprehensive list of the state laws, see Gängel & Gansel, *supra* note 1, at 1012 n.21. For analyses concerning prior legislative activity in the area of dog laws, see for example Wolfram Hamann, *Zur Haltung von “Kampfhunden”--Ordnungs--und steuerrechtliche Probleme der Normsetzung*, 11 NVwZ 1607 (1992); Wolfram Hamann, *Rechtsgültigkeit einer Hundehaltungsverordnung*, 12 NVwZ 250 (1993); Wolfram Hamann, *“Kampfhunde”verordnungen: Endlich ein Ende in Sicht?*, 18 NVwZ 964 (1999).

enacted either by the state legislatures based on their legislative powers in the area of public safety and welfare or state administrative agencies through their rule-making authority.²⁴

The regulations either addressed all dogs, dangerous dogs (“*Kampfhunde*”) or dangerous animals.²⁵ In the states of Berlin, Brandenburg, Hamburg, Bremen, Mecklenburg-West Pomerania and Schleswig-Holstein the keeping of dogs was comprehensively regulated while all other laws exclusively addressed the prevention of injuries caused by dangerous dogs.²⁶ Brandenburg and North Rhine-Westphalia extended the coverage of the regulations beyond breed and behavior to all dogs with a height of at least 40 cm and a weight above 20 kg.²⁷ Lower Saxony further addressed other dangerous animals in its “dangerous animals” regulations, such as big cats, wolves, bears and even crocodiles and put ownership of them under the condition of prior permission.²⁸

At the core of the legislative efforts was the definition of “dangerous dogs” that can be found in basically three different versions throughout the state legislation: (1) the dangerousness of dogs is determined by their breed, (2) the dangerousness of dogs is determined by various abstract characteristics in their individual behavior, or (3) a combination of breed and individual behavior.²⁹ Generally, the legislation distinguishes between the dog as defined by its breed and the dangerous behavior of a dog as the source of the danger.³⁰ The breed-specific legislation employs “breed catalogues” modeled after the Bavarian example, but these breed lists greatly differ in their coverage of different breeds.³¹ They range from the four “classic” dangerous dog breeds--Pit Bull Terriers, American Staffordshire Terriers, Bull Terriers and Staffordshire Bull Terriers--to as many as forty-two different breeds in the state of North Rhine-Westphalia.³² In the case of more extensive breed lists, there are usually gradual differences in the assigned dangerousness of the breed.³³

If the legislation defines dangerous dogs by dangerous behavior, there are “behavior checklists.” According to the behavior checklists, the typical instances in which dogs would be deemed dangerous are (1) dogs that have a heightened readiness to attack or fight--thereby endangering humans or other animals--because of traits stemming from their breeding or training, (2) dogs that are deemed to have a predisposition to bite because they have caused injury to a human or another animal by biting without being attacked or provoked or because they have bit another dog despite its obvious submissive gestures, (3) dogs that have shown that they uncontrollably hunt and kill other animals, or (4) dogs that have repeatedly endangered humans or have dangerously jumped on humans without being attacked or provoked.³⁴ Almost all regulations subjected the ownership of dangerous dogs to prior permission and granting the

²⁴ Rottmann, *supra* note 2. For a critical assessment of administrative rule-making in the area of dangerous dog laws, see Wolfram Hamann, *Die Gefahrenabwehrverordnung--ein Gebrauchsklassiker des Ordnungsrechts?*, 13 NVwZ 669 (1994).

²⁵ Gängel & Gansel, *supra* note 1, at 1210; v. Coelln, *supra* note 20, at 2834.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Gängel & Gansel, *supra* note 1, at 1210.

³⁰ *Id.*; v. Coelln, *supra* note 20, at 2834.

³¹ *Id.*

³² *Id.*; see also Tröndle & Fischer *supra* note 7, at 943 (counting only three breeds as the minimum number).

³³ Gängel & Gansel, *supra* note 1, at 1210; v. Coelln, *supra* note 20, at 2834.

³⁴ Gängel & Gansel, *supra* note 1, at 1211.

permission was typically placed in the discretion of the appropriate administrative agencies.³⁵ Generally, permission was based on a number of different conditions: the owner is at least 18 years old, has proven his reliability, has proven the necessary expertise, and the dog has been marked in an unalterable fashion.³⁶ In addition, some regulations demand a personality and behavior test of the dog, proof of liability insurance or proof of a specific interest in owning a dog of a particular breed.³⁷

In legal literature, the states' dangerous dogs legislation and its breed lists have been repeatedly criticized.³⁸ The criticism extends not only to the legal uncertainty and unclear legal situation in which it puts the owners but also to the lack of efficiency of the newly enacted regulations.³⁹ The new laws did not successfully curb severe biting incidents involving dogs of various breeds or mixed-breed dogs.⁴⁰ Further, it has been suggested that at a closer look, the biting incidents are almost exclusively caused by errors in the way the dogs were kept or trained.⁴¹ The dog personality and behavior testing, moreover, has shown that those dogs which have been irrefutably classified as dangerous dogs in the breed lists--American Staffordshire Terrier, Pit Bull Terrier, Staffordshire-Bullterrier, and Bullterrier--did not cause any concerns regarding an increased or inadequate aggressive behavior.⁴² Dogs of these breeds, on the contrary, have been said to have outperformed other breeds.⁴³ The danger posed by dogs of the breeds included on the lists--because of their low overall population--is relatively low compared to the vast majority of dogs of other breeds: thus, it is asserted that even if the likelihood of a biting incident with a Bullterrier is ten times higher than the likelihood of a biting incident involving a German Shepard, the probability to be bitten by a German Shepard or a German Shepard mix is fifty times higher than to be bitten by a Bullterrier.⁴⁴ German Shepards, with an estimated population of at least 500,000 (excluding mixed breeds), for example, are not included on any of the breed lists.⁴⁵

It has been suggested that for an effective safeguard against injuries caused by all dogs, a different approach has to be taken--one that is free of breed specific classifications and instead primarily looks at responsible dog breeders and owners.⁴⁶ For example, a standardized proof of expertise has been proposed.⁴⁷ Further, a general personality and behavior test has been

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Rottmann, *supra* note 2, at 441; *see also* Tröndle & Fischer, *supra* note 7, at 942-43 (pointing out some very basic criticisms of the breed and mixed-breed classifications. As dog breeds do not have any discernable genetic traits that their classification can be based on, the breed lists instead employ phenotypes set by (private and sometimes competing) associations that can be changed at any time. For some "breeds" that were included in the lists, such as the "Bandog" in Bavaria and North Rhine-Westphalia, no such phenotype description exists, therefore, no "Bandog" has yet been found in Germany. Similarly, "Pit Bull" is sometimes used as a breed name and sometimes as a functional description (a dog used for the purpose of dog fighting)).

³⁹ Rottmann, *supra* note 2, at 441.

⁴⁰ *Id.*

⁴¹ *Id.*; Wassermann, *supra* note 7, at 2561.

⁴² Rottmann, *supra* note 2, at 441.

⁴³ *Id.*

⁴⁴ Tröndle & Fischer, *supra* note 7, at 940-41.

⁴⁵ *Id.* at 943.

⁴⁶ Rottmann, *supra* note 2, at 441.

⁴⁷ *Id.*

demanding as a prerequisite in order to obtain a breeding permit.⁴⁸ In the end, while the need to address the issue uniformly in the states had long been acknowledged by the Interior Ministers of all states no uniform response was arrived at despite extensive efforts to find a mutually agreeable solution.⁴⁹

B. The State Legislation's Fate in the Courts

As expected, it did not take long for dog owners to take legal action against the new dog regulations. The regulations were challenged in state administrative courts and state constitutional courts.⁵⁰ The state courts invalidated or partially invalidated some provisions, thus further increasing the regulatory chaos.⁵¹ Subsequently, the issue did make its way through the administrative court system and ended up before the Federal Administrative Court⁵² which struck down parts of state laws dealing with dangerous dogs that were identified only by breed.⁵³

The Federal Administrative Court held in several cases that a mere potential of danger does not justify the passing of a regulation based on the states' police powers. Based on current scientific research, the breed of a dog cannot be the sole determining factor in the assessment of the dangerousness of a dog.⁵⁴

Denying review of the North Rhine-Westphalia legislation in 2000,⁵⁵ the Federal Constitutional Court had explicitly required that the state administrative courts and, on appeal, the Federal Administrative Court try to resolve the issue.⁵⁶ Therefore, as mentioned above, it was not until 2004 that the Federal Constitutional Court decided.⁵⁷

C. The Federal "Law against Dangerous Dogs": Amplifying the Differences

In 2001, the German Parliament (*Bundestag*) passed the federal law against dangerous dogs ("*Gesetz zur Bekämpfung gefährlicher Hunde*"). At the core of this legislation was a provision banning the import of Pit Bull Terriers, American Staffordshire Terriers, Staffordshire Bull

⁴⁸ *Id.*

⁴⁹ *Id.* at 440-41.

⁵⁰ For an overview, see Kunze, *supra* note 1, at 1610-11; and Gängel & Gansel, *supra* note 1, at 1212-13.

⁵¹ v. Coelln, *supra* note 20, at 2835.

⁵² See, e.g., BVERWG 6 C 22.03 (June 28, 2004) and BVERWG 6 C 21.03 (June 28, 2004) (concerning the legislation in Rhineland-Palatinate); BVERWG 9 BN 1.03 (Feb. 27, 2003) (denying review of a decision of the state administrative court of Rhineland-Palatinate); BVERWG 6 B 72.04 (Apr. 27, 2005) (denying review of a decision of the state administrative court of Baden-Württemberg); BVERWG 6 BN 3.04 (Nov. 10, 2004) (denying review of a decision of the state administrative court of Hesse).

⁵³ See generally BVERWG (July 3, 2002), 22 NVWZ 95 (2003) (concerning Lower Saxony); BVERWG 6 CN 1.02 (Dec. 18, 2002) (concerning Schleswig-Holstein); BVERWG 6 CN 3.01 and 4.01 (Dec. 18, 2002) (concerning Mecklenburg-Pomerania) and BVERWG 6 CN 2.02, 3.02, 4.02 and 5.02 (Aug. 20, 2003) (concerning Brandenburg). See also Rottmann, *supra* note 2, at 439.

⁵⁴ See, e.g., BVERWG (July 3, 2002), 22 NVWZ 95 (2003). The court employed the same reasoning in the cases cited above. See also Rottmann, *supra* note 2, at 439.

⁵⁵ BVERFG 1 BvR 1329/00 (Aug. 18, 2000). The Court denied review because all other remedies were not exhausted at the time. *Id.*

⁵⁶ Gängel & Gansel, *supra* note 1, at 1212; Kunze, *supra* note 1, at 1610.

⁵⁷ *Infra* Part IV.

Terriers and Bull Terriers.⁵⁸ These breeds and cross-breeds among these four were not allowed to be imported from EU member states or other countries.⁵⁹ Further, the legislation prohibited the import of other breeds according to the dangerousness presumption of the breed lists of that state in which the dogs are to be permanently held.⁶⁰ The legislation also changed the Animal Protection Law (*Tierschutzgesetz, TierSchG*).⁶¹ The Federal Department of Consumer Protection, Food and Agriculture (*Bundesministerium für Verbraucherschutz, Ernährung und Landwirtschaft*) was authorized to make regulations prohibiting or limiting the breeding of vertebrates of specific kinds, breeds or lines if hereditary behavior defects or genetically increased aggressiveness occur.⁶² The change of the provision regarding breeding methods that cause suffering to animals was intended to address the issue that genetically increased aggressiveness can be relevant from an animal protection perspective even if it does not directly entail suffering of the affected animal; the breeding with increased aggressiveness was made illegal even if there was no suffering involved.⁶³ Section 12 (2) No. 4 TierSchG was designed to explicitly prohibit the import or ownership of animals if any actions were performed on the animal that violate the Animal Protection Law in order to achieve certain breeding traits, including physical abnormalities based on genetic defects, abnormal behavior and increased aggressiveness.⁶⁴ Finally, Section 143 was added to the Criminal Code. The law prohibits acting in violation of the state laws in breeding or commercially dealing with dangerous dogs. Further, it punishes those who own a dangerous dog without permission or in violation of a prohibition. The penalty is imprisonment up to 2 years or fine.⁶⁵

IV. THE “DANGEROUS DOGS” DECISION OF THE FEDERAL CONSTITUTIONAL COURT

In their constitutional complaint, the petitioners challenge the provision that prohibits the import of dangerous dogs and the corresponding penalties; further, they challenge the breeding prohibition and Section 143 StGB.⁶⁶ I will first outline the Court’s reasoning regarding the import ban, then turn to the breeding ban and finally the discussion of Section 143 StGB. The Court, as will be illustrated, divides its analysis into discussions of freedom of occupation (Article 12 GG),⁶⁷ property (Article 14 GG),⁶⁸ liberty (Article 2 GG)⁶⁹ and equality (Article 3 GG).⁷⁰

⁵⁸ Kunze, *supra* note 1, at 1609; Rinio, *supra* note 21, at 3608;

⁵⁹ Kunze, *supra* note 1, at 1609-10; Rinio, *supra* note 21, at 3608.

⁶⁰ Gängel & Gansel, *supra* note 1, at 1212; Kunze, *supra* note 1, at 1609-10; v. Coelln, *supra* note 20, at 2834; Rinio, *supra* note 21, at 3608.

⁶¹ For an overview of the Tierschutzgesetz, see Natrass, *supra* note 4, at 288-94.

⁶² Gängel & Gansel, *supra* note 1, at 1213; Kunze, *supra* note 1, at 1610; v. Coelln, *supra* note 20, at 2834; Rinio, *supra* note 21, 3608-09.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ BVERFG (Mar. 16, 2004), 23 NVwZ 598, 598 (2004).

⁶⁷ Art. 12 GG:

(1) All Germans have the right to freely choose their occupation, their place of work, and their place of study or training. The practice of an occupation can be regulated by or pursuant to a statute.

(2) No person may be forced to perform work of a particular kind except within the framework of a traditional compulsory community service that applies generally and equally to all.

A. Import of Dangerous Dogs

The import ban is measured against the right to freely engage in the exercise of one's occupation. The Court concludes that while there was an infringement on the right, it is constitutionally justified. The Court leaves open whether there was an infringement on the right to property and the liberty clause as it would have been justified for the same reasons as in the case of Article 12 GG. Regarding the equality clause, the Court finds that there was no violation by the import ban.

1. free exercise of occupation (constitutionality under Article 12 GG)

The Court first turns to the right to choose an occupation and work in the chosen occupation. The prohibition of import of dogs of the breeds Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier and Bull Terrier has to be examined regarding its constitutionality under Article 12 GG as the petitioners are dog breeders that breed these dogs.

The Court explains that the basic right protects both the choice of an occupation and the ability to work in the chosen occupation. Occupation means any activity intended to be executed for the purpose of earning money in order to create and support a basis for living. Secondary employment also falls under the protection of Article 12 GG. Even if dog breeding is only the petitioner's secondary employment, a claim under Article 12 GG is not precluded.

The Court finds that the prohibition of import according to Section 2 (1) sentence 1 HundVerbrEinfG infringes on the right. Even though the freedom to choose the occupation of dog breeder is not infringed upon, the ability to work in the chosen occupation is limited and thus the basic right to free practice of an occupation is infringed. Petitioners cannot import Pit Bull Terriers, American Staffordshire Terriers, Staffordshire Bull Terriers and Bull Terriers that they need for their breeding business. Insofar, the law has tendencies to regulate the practice of the

(3) Forced labor may be imposed only on persons deprived of their liberty by court sentence.

Tschentscher, *supra* note 15, at 22 (translation of Art. 12 GG).

⁶⁸ Art. 14 GG:

- (1) Property and the right of inheritance are guaranteed. Their content and limits are determined by statute.
- (2) Property imposes duties. Its use should also serve the public weal.
- (3) Expropriation is only permissible for the public good. It may be imposed only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation has to be determined by establishing an equitable balance between the public interest and the interests of those affected. Regarding disputes about the amount of compensation, recourse to the courts of ordinary jurisdiction is available.

Tschentscher, *supra* note 15, at 24-25 (translation of Art. 14 GG).

⁶⁹ Art. 2 GG:

- (1) Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or morality.
- (2) Everyone has the right to life and physical integrity. The freedom of the person is inviolable. Intrusion on these rights may only be made pursuant to a statute.

Tschentscher, *supra* note 15, at 18 (translation of Art. 2 GG).

⁷⁰ Art. 3 GG:

- (1) All humans are equal before the law.
- (2) Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages.
- (3) No one may be disadvantaged or favored because of his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.

Tschentscher, *supra* note 15, at 18 (translation of Art. 3 GG).

occupation. The Court finds, however, that the limitation placed on the right to work in the chosen occupation by Section 2 (1) sentence 1 HundVerbrEinfG is constitutionally permissible.⁷¹

Regulations of the practice of an occupation are permissible if they have been enacted according to the legislative powers of the legislature and do not conflict with other constitutional provisions. They have to be justified by sufficiently important reasons that pertain to the general welfare and have to be proportional. The legal limitation has to be suitable to further the objective the government has envisioned and it has to be necessary and appropriate.⁷²

The legislature has discretion not only regarding the goals to be achieved by the legislation but may also assess what is necessary and appropriate. This discretion is only subject to limited review by the Federal Constitutional Court. In assessing dangers to the public, and in taking measures to protect the public, the legislature only exceeds its discretion if there is no reasonable basis to take these measures. In the event that the legislature cannot make an informed assessment or judgment at the time of his legislative action, however, it can be necessary to monitor the further developments in the matter and to adjust the legislation accordingly if the original assessment proves untenable. This is particularly the case if the legislature is dealing with complex dangers that may not have been scientifically researched in a sufficient manner.⁷³

The Court finds that according to these standards of review, the import prohibition of Section 2 (1) sentence 1 HundVerbrEinfG is constitutional under Article 12 (1) GG.⁷⁴ The prohibition has been enacted according to the legislative powers assigned to the federal legislature. It regulates the import of dogs from member states of the European Union and other foreign countries into Germany and is as such a provision regulating trade with foreign countries. Under Article 73 No. 5 GG the federal legislature has exclusive legislative powers regarding trade with foreign countries.⁷⁵

The Court finds that the provision is not unconstitutionally vague because it sufficiently specifies dogs whose import is prohibited by their breed. Whether the provision concerning the mixed-breeds may be unconstitutionally vague was left undecided since none of the petitioners tried to import such a dog. The Court further states that the provision serves an important public welfare interest. The goal is to complement the state legislation to protect humans against injuries caused by dangerous dogs and the behavior of their holders. It intends to ensure that the legislative measures enacted by the states within their police powers are not undermined by the import of dangerous dogs from abroad. At the same time, it intends to make the enforcement of the state legislation easier.⁷⁶

In the Court's view, there was sufficient reason for the legislature to act. It is up to the legislature to decide for every area of life which issues to address. In situations that, according to the assessment of the legislature, may lead to danger, the legislature decides with which level of protection it wants to address these situations. The requirements regarding the certainty of such suppositions and the degree of probability that the danger will actually materialize depend upon the measure to be adopted. The challenged provision was based on the abstract

⁷¹ BVERFG, *supra* note 66, at 598.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 599-600.

⁷⁶ *Id.* at 600.

presumption that dogs of the breeds Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier and Bull Terrier are so dangerous to the health and life of humans that their import has to be prohibited.⁷⁷

The Court finds that this presumption is tenable and not obviously wrong. During oral arguments, there was no dispute that according to current scientific knowledge, the breed of a dog does not permit a prediction regarding its dangerousness. If and to what extent a dog may pose a danger to humans depends upon a multitude of factors aside from different breeding traits. Such factors are socialization, training, situational impulses, and most of all the reliability and knowledgeability of the holder. Legislative action, however, is not precluded if there is not a single factor that causes potential danger. The requirement of a multitude of factors interacting in order to cause a danger does not preclude legislative action. It only must be sufficiently probable that all factors may come together. To protect the life and health of humans, the legislature could take measures if it was sufficiently probable that dogs of certain breeds--even if only in the presence of other factors--may pose a danger.⁷⁸

The Court notes that it appears that the expert scientists agree that the aggressive behavior of dogs and its resulting dangerousness is not solely genetically determined. On the other hand, it cannot be generally ruled out that the dangerousness might have genetic reasons. According to expert witness testimony during oral arguments, dangerousness of a dog is not a breed-specific trait. According to the expert witness, however, it is undisputed that breeds such as Pit Bull Terriers, American Staffordshire Terriers, Staffordshire Bull Terriers and Bull Terriers have a hereditary potential to produce dangerous dogs with genetically raised levels of aggressiveness.⁷⁹ According to a 1991 report compiled for the Federal Ministry of Food, Agriculture and Forestry regarding the interpretation of Section 11b TierSchG, the type and scope of aggressive behavior is genetically determined to a large extent. Another expert witness asserted that aggressive behavior, including the aggressive behavior of a dog, is always the result of a differentiated interaction between genetics and outside stimuli.⁸⁰ The dangerous dog breeds addressed in this legislation have to be counted among those breeds whose aggressive behavior, seen against the backdrop of the history of their breed, is not unproblematic. Finally, an expert asserted that especially dogs of the breeds Pit Bull Terrier, American Staffordshire Terrier, and Staffordshire Bull Terrier and perhaps also Bull Terrier irrespective of the behavior or attitudes of their holders have been involved in incidents relatively often because of their heightened level of aggressiveness and their danger to humans.⁸¹

According to the Court, the data supplied by the federal government in this case does support the addressed breeds' particular dangerousness. The data supplied, the Court explains, is based on a poll conducted in 1991-1995 by the German Association of Cities and Towns (*Deutscher Städtetag*) that was conducted among its members. Ninety-three cities provided answers in the poll. The poll asked which dog breeds required protective measures. Among the breeds, Pit Bulls, Bull Terriers and Staffordshire Terriers were only ranked 4th, 6th and 7th. Other dog breeds, such as German Shepherds, have appeared more often in a negative fashion. The absolute numbers supplied in the poll, the Court finds, do not allow a conclusion regarding the level of dangerousness posed by the individual breeds. Such a conclusion would require putting

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

the absolute number of dogs of a particular breed involved in biting incidents into relation with the overall population of the respective breeds.⁸² To engage in this kind of comparison, the Court turns to data provided by the state government of Schleswig-Holstein to the state legislature in 2000. These statistics were put together based on data supplied by the German Dog Association (*Verband für das Deutsche Hundewesen, VDH*) for 1992-1997. According to the Court, it appears comprehensible and plausible that the German Association of Cities and Towns (*Deutscher Städtetag*) reaches the conclusion--as presented by the federal government in this case--that Pit Bulls are more often involved in biting incidents in relation to their overall population.

Polls of the states that were conducted by the federal government during the legislative debates support this conclusion. This data was submitted by the Interior Ministry in this case. In 2000 in the state of Brandenburg, dogs of the breeds Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier and Bull Terrier were in relation to their overall population eight times more often involved in biting incidents than dogs of other breeds. In 1998/99, Pit Bulls, American Staffordshire Terriers and Staffordshire Bull Terriers were involved in one-third of all biting incidents in Hamburg in which humans were injured. In Rhineland-Palatinate, dogs of the breeds were in relation to their overall population more likely to be involved. Finally, Mecklenburg-West Pomerania also reported that dogs of the breeds in question were more likely to be involved in biting incidents.⁸³

Taking into consideration that reliable statistics about biting incidents are not available for the state or federal level and accurate counts of individual dogs of each breed are not available, the Court finds that the data supplied in support is nevertheless not without merit. Consequently, the presumptions of the legislature that were based on this data are not obviously flawed. The degree of likelihood that is necessary to assume the danger has to be seen in relation to the objects of the legal protection. There, it has to be taken into account that dogs of the specified breeds have caused fatal injuries to humans. It is not predictable under which circumstances a dog of one of these breeds will escape the influence of his owner and attack humans. In light of the high priority that the protection of human life and health takes in the constitutional order of values and with respect to the grave consequences that biting incidents with these dogs can have because of their strength and biting power for these protected values, the presented data in conjunction with the expert literature cited provides a sufficient basis to permit legislative action aimed at provisions to protect the public from the infliction of injury by dogs of the mentioned breeds.⁸⁴

In light of this finding, the import prohibition is proportional.⁸⁵ The Court finds the measure to be suitable to further the indented objective. With the help of an import prohibition, the number of dangerous dogs will be diminished and biting incidents will thus be prevented. Thus, the intended goal to complement the states' regulations to protect the life and health of humans and to ensure the enforcement of the state provisions is furthered. This is sufficient to make the regulation suitable.⁸⁶

⁸² *Id.*

⁸³ *Id.* at 600-601.

⁸⁴ *Id.* at 601.

⁸⁵ *Id.*

⁸⁶ *Id.*

The suitability of the legislation is not impaired by reports of the states suggesting that the import prohibition is only theoretically monitored at the borders when in fact the border authorities do not have the necessary expertise to recognize the listed dog breeds let alone their cross-breeds. Absent any actual border controls within the EU, the import ban is difficult to monitor anyway. A regulation, however, does not become unsuitable merely because it is difficult to enforce as long as its enforcement remains possible. The legislature could trust that the legislation would be adhered to by the addressees. It also could assume that the authorities would take suitable measures to make sure the legislation was adhered to. Thus, there are no constitutional doubts regarding the suitability of the import prohibition.⁸⁷

The prohibition is moreover necessary to reach the stated goal. An equally effective but less restrictive measure was not available. The import could not be made dependent upon the individual proof that a dog is not dangerous. Behavior tests, veterinary evaluations and similar measures that are often employed in the state legislation do not provide an absolutely reliable basis for a sufficiently certain prediction of dangerousness even when these tests are performed by qualified experts.⁸⁸

Behavior tests are a conceivable instrument to determine the dangerousness of dogs and are employed by some states. Nevertheless, they only provide a snapshot of the behavior of the examined animal in a specific situation of crisis. This was affirmed during oral arguments by an expert witness. Another expert witness testified during oral arguments that it is possible to conceal the dangerousness of a dog for the duration of a test by prior administering of drugs.⁸⁹ It cannot be ruled out that a dog that has passed the behavior test and that has been found to be not dangerous may react differently under different circumstances and might then pose a threat to humans. There is always an element of unpredictability when dealing with animals. Therefore, the legislature did not have to see behavior tests as an equally effective measure.

The import prohibition finally is proportional in the strict sense. An overall assessment of the extent of the intrusion on the constitutional right and the weight of the protected public good yields an appropriate, defensible burden on the constitutional right for those affected by the law.⁹⁰ The effects of the infringement on the right to work in the chosen profession are limited. Whoever wants to import dogs that fall under the prohibition for breeding purposes will not be able to import them from abroad and use them to breed offspring. The breeding of other breeds of dogs, however, remains untouched by the regulation. Therefore, petitioners can still work in their profession as dog breeders.

In an overall assessment, the high value of the protected public goods gains importance. Life and health of humans have an especially high value. The public good that is served by the legislation is significantly more important than the economic and the idealistic value of the interests of the affected breeders to continue to import dogs of their preferred breeds from abroad. Irrespective of the question whether the import ban concerns the protection of animals at all, Section 2 (1) sentence 1 HundVerbrEinfG is an acceptable limit on the exercise of the profession.

The legislature is required, however, to monitor further developments. The Court notes that there is still a significant amount of uncertainty regarding the reasons for aggressive

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

behavior of dogs of different breeds and the interrelation of different causes. Also, the factual assumptions of the legislature are somewhat uncertain. Therefore it is necessary to monitor the dangerousness that can be caused by dogs and the causes for dangerous behavior. Especially the biting behavior of the specified breeds has to be studied more than in the past. In the event that the prognosis regarding the danger of these dogs will not be verified in its full scope, the legislature has to adapt the legislation to the new findings.

2. property and liberty (constitutionality under Article 14 GG and Article 2 (1) GG)

The Court leaves open whether the petitioners' right to property was infringed by Section 2 (1) sentence 1 HundVerbrEinfG at all even though petitioners wanted to import dogs of the breeds specified. Even if there was an infringement on the right to property, it was not unconstitutionally violated under Article 14 standards. The Court finds that any potential infringement was in any case justified for the same reasons that justified the infringement of Article 12 (1) GG. Moreover, the court finds that the same justification applies to a potential infringement under Article 2 (1) GG.⁹¹

3. equality (constitutionality under Article 3 GG)

Turning to the equality provision of Article 3 (1) GG, the Court finds that Section 2 (1) sentence 1 HundVerbrEinfG did not violate Article 3 GG. The equality clause of Article 3 GG demands that what is the same be treated equal and allows what is different to be treated unequal. It does not, however, preclude all differentiation. Neither does it demand that different things be treated unequal. The legislature would, however, violate the equal protection clause if it passed legislation treating two groups of people differently even though the differences between those groups are not of the scope or magnitude to justify the unequal treatment.⁹² The same principle applies when the legislature does not sufficiently take into account such factual differences in the matter to be regulated that are of such magnitude that they have to be taken into consideration when looking at the issue with fairness in mind. It is important what the effects of the equal or unequal treatment will be on civil liberties. Moreover, it has to be examined in how far deference has to be awarded to the legislature regarding its judgment of the starting point and the possible effects of its legislation. Especially important in that context are the specifics of the area addressed and the importance of the object of legal protection in question. Also, the amount of prognosis depends upon the possibility to make a judgment on the issue at the point of the decision.

The Court cannot determine a violation of equal protection. Rather, it finds that the legislature correctly exercised its discretion. In a constitutional fashion, the legislature assumed to have sufficiently reliable criteria that dogs of the breeds specified in Section 2 (1) sentence 1 HundVerbrEinfG are especially dangerous to the lives and health of humans. Prior to the legislation, those dogs were found to have been involved in biting incidents in numbers that do not proportionally represent their overall population. Further, it was assumed that other breeds

⁹¹ *Id.* at 601-02.

⁹² *Id.* at 602.

such as German Shepherds, Great Danes, Dobermans and Rottweilers or Boxers have not been registered in biting incidents in the same quantity. Thus, the legislature presumed that they exerted a lower level of danger. This presumption was not rebutted during oral arguments nor has it been refuted in scientific literature. The equal treatment of those who want to import a dangerous dog that has been found to pose no danger in an individual personality and behavior test is constitutional. According to the legislature's analysis it would not be possible to check every single dog for its dangerousness at the border before deciding whether it may or may not be imported.

The legislature's analysis is rational and does not meet any constitutional doubts. In light of an effective enforcement of the law the equal treatment is therefore constitutionally sufficiently justified.⁹³ Again, however, the Court demands that the legislature follow further development. This especially relates to the unequal treatment of those whose dogs fall under the classification of Section 2 (1) sentence 1 HundVerbrEinfG and those whose dogs do not fall under the provision. It has to be ensured that the unequal treatment is still justified in the future. In the event that further studies of biting incidents reveal that dogs of breeds other than those covered by Section 2 (1) sentence 1 HundVerbrEinfG in relation to their population are over represented in biting incidents, the challenged law could no longer be upheld. It would then either have to be revoked or extended to those breeds not previously covered.⁹⁴

B. Breeding of Dangerous Dogs

Article 2 Nr.2 BgefHundG made it illegal to breed the specified dogs. The goal was to avoid an increased level of aggression in their offspring. The court found this provision to be unconstitutional. The federal legislature did not have the legislative authority to pass the law. Consequently, Section 11b (2)a alternative 2 TierSchG and Section 11 sentence 3 TierSchHundVO that specified the ban for Pit Bull Terriers, American Staffordshire Terriers, Staffordshire Bull Terriers and Bull Terriers are unconstitutional.⁹⁵

1. free exercise of occupation (constitutionality under Article 12 GG)

The law violates Article 12 (1) GG. Like the import prohibition it infringes on the freedom of freely working in the chosen occupation of the petitioners who professionally breed dogs of the breeds at issue. The infringement is not constitutionally justified because the federal legislature lacked the legislative power. The legislation that was introduced by the federal government was based on the legislative powers of Article 74 (1) No. 20 GG,⁹⁶ but did not meet the requirements of Article 72 (2) GG.⁹⁷

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Art. 74 GG:

(1) Concurrent legislative powers cover the following matters:
(1-19)

20. protection regarding the marketing of food, drink and tobacco, of necessities of life, fodder, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals

The Court remarks that it had not yet decided what animal protection under Article 74 (1) No. 20 GG means. The Court first turns to the intent of the amendment. According to the intentions of the constitution-changing legislature that amended Article 74 GG to include animal protection it was intended to serve as the basis for a comprehensive federal Animal Protection Law. The term “animal protection” therefore has to be widely construed. It relates primarily to the care, housing, transportation of animals, experimentation with live animals and slaughter of animals. A comprehensive federal Animal Protection Law is primarily concerned with provisions that have the goal to spare animals in the named instances pain, suffering and harm as much as possible. In the interest of effectively securing the success of this purpose, Article 74 (1) Nr. 20 GG allows the federation to take measures to monitor and secure the advancement of animal protection.

The Court, however, finds that Section 11b (2)a alternative 2 TierSchG in connection with Section 11 sentence 3 TierSchHundVO does not further animal protection in this sense. The prohibition of breeding aggressive dogs has the goal to more effectively protect humans from dangerous dogs. The federal government explained that it could complement the states’ regulations to prevent injuries caused by dangerous dogs. The objective of the regulation was not primarily avoiding pain, suffering and harm of animals but the protection of the lives and health of humans.⁹⁸

The Court finds an indication to that extent in the text of the new provision. Prior to the change, it was prohibited under the animal protection law to breed vertebrates if there was a danger that the offspring would suffer from hereditary heightened aggression. After the change, suffering of the animal is no longer a component of the law. The abandoning of the goal of animal protection becomes even more obvious in the authorization to make regulations of the federal department. Until then, the federal department was only authorized to adopt regulations that were specifically designed to protect animals. This limitation was dropped in the new authorization clause. A plausible explanation for these changes was not supplied in the legislative materials, which only said that hereditary increased aggression can be relevant under animal protection aspects even if it does not directly lead to suffering on the part of the animal. Especially when a danger is posed to other animals, some measures might have to be taken. There is no explanation, though, which measures may be taken, what the preconditions would be and what the extent of these dangers would be.⁹⁹

In the Court’s assessment, there is no comprehensible explanation regarding the changes to Section 11b (1) and (2) TierSchG. It cannot be assumed that the core of the new legislation would be in the area of animal protection. Rather, the new legislation is primarily intended to

Tschentscher, *supra* note 15, at 53-55 (translation of Art. 74(1) Nr. 20 GG).

⁹⁷ Art. 72 GG:

- (1) In the field of concurrent legislative power, the State [Länder] have power to legislate as long as and to the extent that the Federation does not exercise its right to legislate by statute.
- (2) In this field, the Federation has legislation if and insofar as the establishment of equal living conditions in the federal territory or the preservation of legal and economic unity necessitates, in the interest of the state at large, a federal regulation.
- (3) A federal statute can stipulate that a federal regulation for which the conditions of Paragraph II no longer hold true is replaced by law of the States [Länder].

Tschentscher, *supra* note 15, at 51-52 (translation of Art. 72 GG).

⁹⁸ BVERFG, *supra* note 66, at 602.

⁹⁹ *Id.*

protect humans from dangerous dogs. The Court points out that the federal government, in fact, made this point when the upper house (*Bundesrat*) introduced a legislative initiative to introduce similar legislation in 1991. Finally, the Court finds that the argument that the new legislation is simply an annex to animal protection cannot be followed.¹⁰⁰

2. property (constitutionality under Article 14 GG)

The Court finds that Section 11b (2)a alternative 2 TierSchG and Section 11 sentence 3 TierSchHundVO further violate the right to property of the petitioners who breed dogs. The right to property protects the right to own property and to use it. This right is infringed by the challenged breeding prohibition as the owners of the dogs are not allowed to use them for the purpose of breeding. The petitioners are not expropriated because the property is not taken from them. Rather, the law describes the contents and limits of property according to Article 14 (1) sentence 2 GG. As such, the legislation would be permissible if it was passed by the authorized body. For the same reasons as mentioned in the Article 12 analysis, this was not the case. Beyond those dogs mentioned in sentence 3, the Court found that the federal legislature lacks the power to regulate the matter and therefore extended the finding of unconstitutionality beyond sentence 3 to all of Section 11 TierSchHundVO.¹⁰¹

C. Constitutionality of Section 143 (1) StGB

The Court finds that Section 143 (1) StGB is unconstitutional because the requirements of Article 72 (2) are not fulfilled.¹⁰² It is unconstitutional under Article 12 and Article 14 GG. Section 143 (1) StGB penalizes the breeding or commercial trade with a dangerous dog in violation of state legislation. This legislation is unconstitutional under Article 12 (1) GG. It infringes the protection of Article 12 GG and enhances the infringement that is already posed by the breeding and trade. It is not constitutionally justified, because it is not based on legislative powers of the federation.¹⁰³ The federal legislature can base its action on the legislative powers concerning the criminal law according to Article 74 (1) Nr. 1 GG. Generally, that legislative power includes that federal penalties can be awarded for violations of state laws unless the federal legislature does not assume legislative powers that in fact belong to the states. To constitutionally make use of this authorization, however, depends upon the preconditions set forth in Article 72 (2) GG. The federal legislature only had the legislative power if the legislation was necessary to achieve equal living conditions in the federal territory or to preserve the legal and economic unity in the interest of the state at large. Whether these preconditions in fact existed has to be reviewed by the Constitutional Court. Insofar, there is no legislative discretion that is free from judicial review.¹⁰⁴

Upon review, the Court finds that Section 143 (1) StGB was not enacted under the provisions required in Article 73 (2) GG.¹⁰⁵ It already is questionable which goal the legislature

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 603.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 604.

is trying to achieve by enacting Section 143 (1) StGB. The legislative materials pertaining to the challenged law do not address this issue. Rather, they are limited to the assertion that federal legislative powers could be assumed because the states had not yet imposed penalties for the regulations and prohibitions regarding the prevention of injuries by dangerous dogs. During the course of the proceedings in this constitutional challenge, however, it could not be determined which goal the federal legislature was trying to achieve.

A further investigation into the legislative intent is not necessary, because Section 143 (1) StGB is not necessary to further any of the objectives in Article 72 (2) GG. Section 143 (1) StGB penalizes the violation of state laws that prohibit the breeding of and the trade with dangerous dogs. The federal legislature has put into place a unified framework for the criminal penalties of such violations. The actions that are subject to the penalty, however, are codified in state laws. Those are highly divergent, so that a unified standard cannot be achieved on the basis of the penalty. Generally, the referral of federal criminal law to state prohibitions is conceivable. Article 72 (2) however demands that those prohibitions are largely comparable. That is not the case.¹⁰⁶

The term “dangerous dogs” as such is not defined uniformly. Some states base the dangerousness on the breed and have extensive breed lists. Others demand an assessment of the dangerousness for each individual case. The breeding and trade are not prohibited in all states. While such prohibitions exist in Berlin, Bremen and Hessen, they are nonexistent or only exist for specific groups of dangerous dogs in North Rhine-Westphalia and Saxony. These differences lead to fundamentally different consequences of Section 143(1) StGB. The differences among the state regulations are transferred to the federal level. Rather than achieving an increased level of unity, the existing disunity is enhanced. Section 143 (1) StGB cannot be used to further the establishment of equal living conditions or to preserve the legal and economic unity in the interest of the state at large.¹⁰⁷ For these reasons, it is also unconstitutional under Article 14.¹⁰⁸

V. THE LESSONS: FEDERALISM, THE IMPORT BAN, AND THE FUTURE OF THE DANGEROUS DOGS LEGISLATION IN GERMANY

The Court invalidated the breeding ban and the provision in Section 143 (1) StGB and upheld the import ban. I will now examine the underlying federalism concerns as well as the Court’s findings regarding the constitutionality of the import ban which was based on breed specific concerns. Finally, I will turn to look at the possible fate of breed specific legislation in Germany in the future.

A. Federalism Concerns

The lack of legislative power regarding the breeding ban seems strikingly evident. In fact, the Court mentions that the federal government itself raised the issue when similar legislation was

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

introduced in 1991; it has also been suggested that the legislative materials introduced by the federal government reveal the “bad legislative conscience.”¹⁰⁹ The Court interpreted the term “animal protection” to only mean the welfare of animals (widely understood) but not the welfare of humans.¹¹⁰ The Court has been criticized for not trying to constitutionally salvage the law by only declaring the part unconstitutional that was referring to genetic behavior defects that did not cause any pain and suffering to the animal as the new law was not designed eliminate this factor but (unconstitutionally) extend the scope beyond the pain and suffering element.¹¹¹ The federal legislature can, of course, constitutionally restore the provision with these changes. Until then, absent any federal legislation, the states can enact their own laws. The preclusion for state legislative activity has been eliminated by striking down the federal law.¹¹²

The underlying issue regarding Section 143 (1) StGB is to what extent the federal legislature can qualify “foreign” prohibitions with a penalty. The prohibitions themselves were part of state laws, the federal law only referred to the state laws and imposed its own penalty. While the Court said that, as a general rule, there are no constitutional objections to this practice,¹¹³ it has been pointed out there might, in fact, be a true imposition of the federal legislature’s will on the states in violation of Article 74 (1) No. 1 GG.¹¹⁴ This is particularly true if the states decide to prohibit a certain activity without imposing a penalty. The federal penalty would then give the state law a particular character that was not intended by the state legislatures.¹¹⁵

The Court in this case understands the issue to be that imposing a federal penalty is generally acceptable if the federal legislature does not try to regulate a state matter.¹¹⁶ The Court never discussed the issue after stating that it would be generally acceptable, because it found that Section 143 StGB did not meet the requirements of Article 72 (2) which demands that the state laws are basically similar.¹¹⁷ Since they profoundly differed, and Section 143 StGB transferred these profound differences onto the national level, it could not be used to achieve uniform living standards and therefore did not meet the constitutional requirements of Article 72 (2).¹¹⁸

A further problem of Section 143 StGB, that the Court did not address because it invalidated the provision under Article 72 (2), was its vagueness.¹¹⁹ It did not mention which state regulations it was referring to. To prevent unconstitutional vagueness in cases in which the federal law refers to state laws, the text of the state laws should be repeated in the federal law.¹²⁰

¹⁰⁹ Christian Pestalozza, *Hund und Bund im Visier des Bundesverfassungsgerichts*, 57 NJW 1841 (2004).

¹¹⁰ BVERFG, *supra* note 66, at 603.

¹¹¹ Pestalozza, *supra* note 109.

¹¹² *Id.*

¹¹³ BVERFG, *supra* note 66, at 604.

¹¹⁴ Pestalozza, *supra* note 109, at 1842.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ von Heintschel-Heinegg, *supra* note 7, at 724-25.

¹¹⁸ Pestalozza, *supra* note 109, at 1843.

¹¹⁹ Tröndle & Fischer, *supra* note 7, 943-44.

¹²⁰ Pestalozza, *supra* note 109, at 1842-43.

B. The Import Ban: Constitutional . . . For Now

What makes the decision regarding the import of dangerous dogs particularly interesting is the clear statement that breed alone cannot determine the dangerousness of a dog.¹²¹ At the same time, the Court states equally clearly that it does not currently see a better measure to assess the dangerousness.¹²² The Court, in upholding the ban, tried to strike a balance between the asserted need to address the dangerous dogs issue by the legislature and the limited amount of reliable data available. The Court applied what in U.S. constitutional law terminology could be called a reasonable basis test to the import ban. It finds that prohibiting the import of dogs of certain breeds is not unreasonably unrelated to the prevention of biting incidents involving these dogs. By placing a condition on upholding the law--the continued monitoring of the situation and the accumulation of more data¹²³--the Court reached a "constitutional for now, but" decision. There has been some criticism, however, that the Court did not specify a schedule and a mode of review of the current laws.¹²⁴

For the regulations at the state level, the (temporary) presumption of the constitutionality of breed specific legislation also applies. While it has been suggested that those states that have not yet utilized breed-specific regulations should be encouraged to do so by this decision,¹²⁵ the cautionary remarks of the Constitutional Court seem to point in a different direction. Absent any scientifically reliable mode to determine the dangerousness of dogs, the Court is willing to accept breed despite the fact that it finds breed alone to be an insufficient measure. The states, in turn, should not be encouraged to follow the route of breed-specific legislation but instead try to come up with effective measures unrelated to breed.¹²⁶

In the face of mounting political and public pressure to act, the legislature may still be lacking the necessary data to base the desired legislation on. Both on the state and federal level in this case, there was a twofold lack of data. First, there was a lack of data on the effects of preexisting state regulations. It was not known whether those measures were insufficient or simply not properly enforced.¹²⁷ Secondly, the assessment of the dangerousness of dogs did not rest on secured scientific data. The dog bite statistics were erratic and experts had pointed out that there are no dangerous dog breeds per se, only dangerous individual dogs. The dangerousness of dogs, thus, could not be determined in general, yet reliable terms by breed, height and weight. There was no comprehensive data that could support the heightened dangerousness of specific breeds. The only thing that was known for sure was the goal of the legislation: injuries to humans caused by dangerous dogs were to be prevented.

There was no time left for a scientific study of the matter, but there was a growing public feeling that the state was incapable of protecting its own citizens.¹²⁸ The legislative action in this case was designed to protect particularly valuable interests. The Court, in this case, held that insufficient data does not prevent the legislature from taking action. Instead, it placed the

¹²¹ BVERFG, *supra* note 66, at 600.

¹²² *Id.* at 600-01.

¹²³ *Id.* at 601.

¹²⁴ Pestalozza, *supra* note 109, at 1841.

¹²⁵ *Id.*

¹²⁶ *Cf.* Rottmann, *supra* note 2, at 441.

¹²⁷ Gängel & Gansel, *supra* note 1, at 1208-09.

¹²⁸ *Id.* at 1209.

legislation under the condition that it be monitored and possibly revised as new data becomes available to compensate for the lack of scientific knowledge on the issue. Thus, while the legislation passes constitutional muster at the moment, more accurate data is clearly needed. The underlying question that goes beyond the dangerous dogs issue then is how to handle an issue that according to the assessment of the legislature requires legislative action when there is insufficient data. The Court decided to award a high degree of deference to the legislature in determining whether there is a need for legislative action.

C. The Future

The regional court of appeals of Hamburg found that Section 143 (2) StGB is likely to be unconstitutional for the same reasons as Section 143 (1) StGB. It has therefore with a decision of May 5th, 2004, pursuant to Article 100 (1) GG,¹²⁹ stayed the proceedings in order to ask for an opinion of the Federal Constitutional Court.¹³⁰ The Hamburg court points out that the definition of “dangerous dog” is not uniform in all the states and that there are various definitions regarding the dangerousness of a dog independent of its breed.¹³¹ The court, in short, summarized the criticism raised in legal literature that were not decided by the Federal Constitutional Court in the original case because of lack of standing of the petitioners.

Consulting a standard StGB commentary¹³² yields a strikingly unambiguous picture of the fate of the dangerous dogs legislation, especially in the form of Section 143 StGB. The practical importance of Section 143 StGB is found to be rather low and the underlying problem has only been addressed in a symbolic manner.¹³³ The breed lists in particular face a somewhat uncertain future at best. To paraphrase Judge Thomas Fischer of the Federal Court of Justice, the breed list specification of the “Liptak”--which is included as a “type” rather than a “breed” on the North Rhine-Westphalia breed list--“from Eastern Europe; hard to identify” raises suspicions regarding the seriousness of the legislature.¹³⁴ It does, however, speak volumes about the value of breed specific legislation. Enforcement of breed specific dog laws, in light of all the problems addressed with respect to mixed breeds and breed lists, in Judge Fischer’s distinguished and arguably accurate view, is merely a coincidence.¹³⁵ The decision of the Federal Constitutional Court on the Hamburg proceedings, in any event, might erase the breed based “dangerous dogs” legislation in its current shape from the Federal Criminal Code.

¹²⁹ Art. 100(1) GG states: “Where a court considers that a statute on whose validity the court’s decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from the State [Land] court with jurisdiction over constitutional disputes where the constitution of a State [Land] is held to be violated, or from the Federal Constitutional Court where this Constitution is held to be violated. This also applies where this Constitution is held to be violated by State [Land] law or where a State [Land] statute is held to be incompatible with a federal statute.” Tschentscher, *supra* note 15, at 77 (translation of Art. 101(1) GG) .

¹³⁰ OLG Hamburg (May 5, 2004), 9 NEUE ZEITSCHRIFT FÜR STRAFRECHT RECHTSPRECHUNGSREPORT [NSTZ-RR] 231, 231 (2004).

¹³¹ *Id.* at 232.

¹³² Tröndle & Fischer, *supra* note 7, at 940-41.

¹³³ *Id.* at 941.

¹³⁴ *Id.* at 943.

¹³⁵ *Id.* at 942.

ANTI-SPECIESISM: THE APPROPRIATION AND MISREPRESENTATION OF ANIMAL RIGHTS IN JOAN DUNAYER'S *SPECIESISM* (ABRIDGED)

JEFF PERZ, M.A.

INTRODUCTION

Speciesism is a book that, for the most part, makes highly progressive, radical and laudable claims regarding animal rights theory and practice. It is unfortunate that its author, Joan Dunayer, not only fails to argue for many of these claims but also borrows them from the meticulously argued-for conclusions of another author, Gary L. Francione. After basing the majority of her work on Francione's,¹ it is astonishing that Dunayer proceeds to mischaracterize and dispute some of Francione's conclusions, claiming that they contradict the animal rights theory that Francione developed in the first place, the very theory that Dunayer appropriates without providing adequate citation. These are the serious charges that I will now establish, drawing attention to merely one of the myriad examples of appropriation and misrepresentation found in *Speciesism*: Dunayer's treatment of Francione's suggested prohibition against battery cages. For an exhaustive treatment of the appropriation and misrepresentation found in *Speciesism*, see the unabridged version of this review at <http://www.speciesismreview.info>. Exposing Dunayer's appropriation and misrepresentation is of the utmost relevance to the increasingly prominent fields of non-human animal law, philosophy and political advocacy.² In a world in which non-human animal advocates compare the continuing U.S. "war on terrorism" in Iraq with the consumption of animal products³ and state legislatures introduce bills that define "animal rights terrorist organizations" as two or more individuals who "support" any action that

¹ Although Dunayer discusses the views of Steve F. Sapontzis, Tom Regan and others, her main source is Francione. It is the author's contention that the animal rights theory of the latter constitutes one of extremely rare consistent scholarly positions on the subject. For these two reasons, this review will focus upon Dunayer's treatment of Francione.

² As an animal rights philosopher and non-violent activist, I have written this review for two reasons. First, exposing the *appropriation* of Francione's work is important because, both prior to and after Francione's work, publications by other authors on the subject of "animal rights" fall far short of being consistent with what rights theory actually requires, as understood by moral philosophers past and present. So, regarding Francione's development of genuine animal rights theory, credit should be given where it is due. More importantly, the second reason for this review is that exposing the *misrepresentation* of Francione's views and supporting arguments has significant practical implications for the future plight of non-human animals. If the exploitation of non-human animals is to cease, the activists who bring about this result will have necessarily been informed by a consistent, well-supported theoretical framework that was readily and effectively applied to practical situations. In short, the misrepresentation of Francione's work does not do non-human animals any favors.

³ Alternet, PETA Calls For 'Cruelty-Free' War, <http://www.alternet.org/story/15041>; PETA, Terrorism at the Table, <http://www.peta.org/feat/turk-terr/>.

is intended to “deter” anyone from participating in *any* activity involving animals⁴--all while animal rights law is being taught at prestigious universities⁵--the need for clarity is paramount. Francione offers this clarity while Dunayer’s *Speciesism* obscures it.

II. PRONOUNCEMENTS

Dunayer defines “speciesism” as “a failure, in attitude or practice, to accord any *nonhuman* being equal consideration and respect.”⁶ This definition is highly questionable. If one fails to treat a *human* animal with equal moral consideration of interests and respect because that human animal lacks traits that are prevalently associated with non-human animals (or possesses traits that are prevalently associated with human animals) one has committed a speciesist act. For example, if one advocates that certain human prisoners, but no non-human prisoners, be the unconsenting subjects of vivisection due to the mere fact that they are human (or because human animals as a general class oppress non-human animals), then one has failed to respect and accord equal moral consideration of interests to those humans due to a morally irrelevant quality (their species). Dunayer’s definition fails to capture this instance of speciesism.

Moreover, if a human animal is equally likely to harm a human *or* non-human animal *as a result of* an irrational fit of anger (*not* the individual’s species nor the likelihood of legal consequences), such harm falls within Dunayer’s definition but is clearly not an instance of speciesism. The perpetrator in this case harms human and non-human animals alike without any regard, in attitude or practice, for their species. In this instance, Dunayer’s definition is too broad.

Thus, perhaps a better definition of speciesism than Dunayer’s is “a failure, in attitude or practice, to accord any *sentient* being equal moral consideration of interests and respect due to that being’s species or having characteristics that are generally associated with a particular species.” Indeed, the fact that Dunayer limits her definition to non-human animals alone entails that it necessarily excludes the equal consideration and respect of one group (*homo sapiens*) purely on the basis of their species; a fact that arguably entails that Dunayer’s definition of “speciesism” is, itself, speciesist.

Furthermore, it is noteworthy that Dunayer grounds her questionable definition of speciesism by arguing that it is *not* immoral to kill or otherwise harm human animals *for the reason that* they possess abstract reason, language and so on--and this is so because it is immoral and illegal to kill or otherwise harm *humans* who lack those qualities.⁷ This argument begs the question; the alleged truth of its conclusion is contained within its undefended premises. That is, it is logically equivalent to the claim that killing or otherwise harming human animals (who may

⁴ H.R. 433, 78th Leg. (Tex. 2004), available at <http://www.capitol.state.tx.us/tlo/78r/billtext/HB00433I.HTM>; S.R. 6114, 58th Leg. (Wash. 2004), available at <http://www.leg.wa.gov/pub/billinfo/2003-04/senate/6100-6124/6114.pdf>; H.R. 4439, 115th Leg. (SC 2004), available at http://www.scstatehouse.net/sess115_2003-2004/bills/4439.htm; H.R. 3518, 72d Leg. (Or. 2003), available at <http://www.leg.state.or.us/03reg/measures/hb3500.dir/hb3518.intro.html>.

⁵ Harvard University School of Law offers a course entitled, “Animal Rights Law,” available at <http://www.law.harvard.edu/academics/registrar/Bulletin/publication/courses.html>. In my view, this course does not teach genuine animal rights law. For a course in genuine animal rights law, see Rutgers School of Law, Upper Class Elective Courses, “Animal Rights Seminar,” http://www.law.newark.rutgers.edu/students_course.html.

⁶ JOAN DUNAYER, *SPECIESISM* 5 (2004) (emphasis added).

⁷ *Id.* at 4.

or may not possess abstract reason and so on) is immoral because it is immoral to kill or otherwise harm *non-human* animals (who do not possess abstract reason and so on). While Dunayer's claim may be true, she does not support it with valid argument. Dunayer goes on to argue that killing or depriving any human or non-human animal of well-being (except in emergencies) is immoral because, as sentient beings, harming them causes them to suffer and killing them deprives them of future (sense) experiences.⁸ Again, without further argument,⁹ this is a non-sequitur. Thus, Dunayer's argument for giving (sentient) human and non-human animals full and equal moral consideration--and her definition of speciesism that is grounded in this argument--are inadequate. In fact, this argument of Dunayer's is a version of the classic "argument from marginal cases," which has been refuted.¹⁰ Conversely, in Francione's *Introduction to Animal Rights*, a unique, well argued moral theory is presented--intended for general audiences--that is grounded in principles that most everyone already accepts.¹¹

III. DUNAYER IN 2004

Dunayer begins her discussion of a prohibition against battery cages for hens who are used for their eggs by noting that People for the Ethical Treatment of Animals (PETA) successfully lobbied McDonald's (and later Burger King and Wendy's) to increase the size of the battery cages that they confine hens within. Objecting to this, Dunayer states that it violates the moral rights of hens to confine them to the old standard of 48 square inches, the new standard of 67 square inches, or to any amount of confined space.¹² Similarly, Dunayer rejects a Swiss law requiring that hens who are used for their eggs be exploited in cages that have at least 124 inches of floor space, which has the effect of replacing the cages with an alternative and profitable form of confinement.¹³ Furthermore, Dunayer asserts that the emancipation of non-human animals will be perpetually delayed unless advocates demand emancipation and cease focusing on regulating specific practices within the larger "needless" system of exploitation.¹⁴

⁸ *Id.*

⁹ Francione offers such an argument. See generally GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000).

¹⁰ DAVID SZTYBEL, EMPATHY AND RATIONALITY IN ETHICS 7-41, 64-76 (2000), available at http://sztybel.tripod.com/thesis_menu.html.

¹¹ Although Francione does discuss the immorality of killing and harming human animals who lack abstract reason, language and so on and compares this with the immorality of killing non-human animals who also lack those qualities, he places this discussion within the context of a much broader argument that refers to the contradiction between the widespread acceptance of the humane treatment principle and the widespread violation of this principle in practice. As such, Francione does not employ the argument from marginal cases since his comparisons of "marginal" humans and non-human animals do not lead to any conclusions unless they are first placed in the context of Francione's wider argument. Although Sztybel's thesis both refutes the argument from marginal cases and could be used to refute Francione's theory, Sztybel's thesis has less claim over the latter because Francione's theory is founded upon axioms that are generally accepted and Francione does not purport to further justify those axioms with abstract meta-ethical theory. In short, Sztybel's thesis is for academic moral philosophers whereas Francione's theory is for the people and is thus founded in common sense. Admittedly, common sense regarding the widely held moral principles that Francione discusses may be open to philosophical scrutiny, but Francione readily acknowledges this. See FRANCIONE, *supra* note 9, at xxxiv-xxxvi.

¹² *Id.* at 59-60 (throughout this article all quoted material that contain footnotes and/or citations are omitted unless otherwise noted).

¹³ *Id.* at 68-69.

¹⁴ *Id.* at 60.

More specifically, Dunayer criticizes advocates who pursue prohibitions that fail to remove non-human animals from exploitative situations.¹⁵ For example, Dunayer objects to campaigns that seek to prohibit the forced molting¹⁶ of hens who are used for their eggs, as they are really regulations that specify that hens receive “adequate” food and water until they are killed.¹⁷ Dunayer states:

The forced-molting issue epitomizes the *trade-offs* that “reforms” often entail. . . . To a rights advocate, the whole idea of attempting to *calculate which causes more suffering*--torturing and killing fewer chickens over a longer period of time [with forced molting] or torturing and killing more chickens over a shorter period [without forced molting]--is morally objectionable. Either way, chickens suffer and die. Either way, their moral rights are completely violated. Remember: *chickens shouldn't be imprisoned in the first place*.¹⁸

Returning to her rejection of a prohibition against battery cages, Dunayer argues that this prohibition fails to address the underlying cause of hens being subject to cruelty; namely, the exploitation itself.¹⁹ Instead, prohibiting cages merely focuses upon one cruel aspect of the exploitation.²⁰ Dunayer strengthens this point by citing Francione’s comment that most human animals merely question the necessity of particular practices such as branding cows without questioning the eating of cows.²¹ To this, Dunayer adds that the importance of abstaining from eggs is obscured by a campaign to prohibit caging hens.²² Moreover, Dunayer argues that prohibitions that fail to stop exploitation imply that the exploitation can continue in a “fixed” or morally acceptable form.²³ Again, Dunayer makes the point that those who consume animal products feel better about doing so and do not address the inherently immoral exploitative industries if the animal products are considered “humane.”²⁴ Also, Dunayer notes that prohibiting the caging of hens who are used for their eggs implies that confining hens without cages is moral and wrongly suggests that supposed “free range” hens are genuinely free.²⁵ Lastly, Dunayer argues “a ban that *replaces one method of enslaving or killing with another method* can make the exploitative industry more profitable”²⁶ and provides an example of non-cage confinement systems increasing the profits of hen exploiters and making eggs more attractive to consumers.²⁷ Dunayer notes that prohibiting the caging of hens modifies the method by which hens are imprisoned but fails to prohibit their being imprisoned, exploited and bred.²⁸ As such, Dunayer concludes that prohibiting the caging of hens is speciesist, welfarist and is more aptly referred to as a standard that requires hens to receive “adequate” space.²⁹

¹⁵ *Id.* at 65-66.

¹⁶ For example, the removal of food, water and light at the end of the period during a hen’s lifecycle when she lays the most eggs, thus forcing her body into one last egg-laying cycle before she is killed.

¹⁷ DUNAYER, *supra* note 6, at 66.

¹⁸ *Id.* at 66-67 (emphasis added).

¹⁹ *Id.* at 67.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 67-68.

²⁵ *Id.* at 68.

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

²⁸ *Id.* at 69.

²⁹ *Id.*

Importantly, she states, “[n]onhuman advocates can’t predict such a ban’s economic consequences and shouldn’t attempt to, just as they shouldn’t attempt to calculate which of two abusive situations causes more suffering. They should oppose the egg industry’s very existence.”³⁰

Dunayer objects to Francione’s conclusion that prohibiting the caging of hens can be consistent with rights theory.³¹ First, she bases her objection solely on her comments discussed above.³² Then, Dunayer describes Francione as holding that a hen’s moral right to freedom of movement must be *completely* respected in order for a prohibition on cages to be justified.³³ Dunayer objects that completely respecting a hen’s right to freedom of movement is impossible in a context in which the hen is being exploited for her eggs, as captivity and the limitation of freedom of movement are inherent to such exploitation.³⁴ Dunayer further describes Francione as holding that, under a cage prohibition, hens would still be regarded and exploited as property, but must be treated as if they were not regarded as property if the prohibition is to be justified.³⁵ Dunayer objects that since regarding hens as property is an inherent aspect of the egg industry, it would be impossible not to treat hens as such when they are being used for their eggs.³⁶ Dunayer further asserts that Francione contradicts himself when he says that prohibitions within exploitative industries should not substitute or endorse alternative forms of exploitation in order to accord with rights theory, and also says that prohibiting cages is consistent with that theory.³⁷ That is, Dunayer asserts that a prohibition of cages condones other methods of confining hens:³⁸

Any distinction between a ban that permits the continued exploitation of the animals in question (“You can’t cage hens”) and new requirements as to how that exploitation is carried out (“You must provide each hen with at least 124 square inches of floor space [which effectively would eliminate cages]”) is largely academic. Francione apparently recognizes this because he expresses a caveat: It *is* acceptable to “explicitly endorse” an “alternative form of confinement” if that confinement “fully recognizes the animals’ interests in freedom of movement.” Again, no exploitative confinement does that. . . .

. . . .

Any proposal to modify the confinement of exploited hens endorses their property status. . . .

. . . .

[P]lease ask yourself which makes more sense: to oppose a form of speciesist exploitation or to oppose, one after another, the countless abuses that it breeds? [Y]ou can’t protect animals who remain in the hands of their

³⁰ *Id.* at 68-69.

³¹ *Id.* at 69-71.

³² *Id.* at 69.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 69-70.

³⁸ *Id.* at 70.

oppressors.³⁹ Keeping hens in cages violates their rights, but so does keeping them in cageless warehouses or breeding them in the first place.⁴⁰

Conversely, two prohibitions that do satisfy Dunayer's definition of an abolitionist prohibition are one that precludes the use of leg-hold traps in the fur industry and another that precludes the use of exotic "pets." Lastly, Dunayer contends that part of a vegan lifestyle includes not "buy[ing] nonhumans (except to save them from abuse or death)."⁴¹

IV. FRANCIONE IN 1995, 1996, 2000 AND 2002

Contrary to Dunayer's depiction, Francione opposes welfare regulations that increase cage-size specifications for hens who are used for their eggs. Like Dunayer after him, Francione also argues that PETA's successfully pressuring McDonald's to do so illustrates the failure of non-human animal welfarism.⁴² Francione wrote in 2000:

[A] proposal to increase the size of cages used to hold laying hens assumes the legitimacy of treating animals as property; it is aimed at regulating our ownership of animals. A proposal that we abolish the egg industry *altogether* as a violation of the basic right of animals not to be used as our resources is an animal rights position.⁴³

It is ironic that Dunayer's objections regarding Francione's proposed abolitionist prohibitions are peppered with unreferenced insights from Francione's writing. For example, Dunayer's comment--that certain prohibitions such as banning the withholding of water (in forced molting)⁴⁴ can be understood as animal welfare standards that specify and regulate things such as the amount of water non-human animals receive--is Francione's original insight.⁴⁵ Furthermore, Dunayer's discussion of "trade-offs," replacing one method of exploitation with another and modifying methods of exploitation are also reflective of Francione's work.⁴⁶ For example, Dunayer's condemnation of replacing cages with alternative confinement systems for hens who are used for their eggs is found in Francione's work.⁴⁷

Regarding Dunayer's objections to Francione's view that--under highly qualified and limited circumstances--a campaign that seeks a prohibition against battery cages may be abolitionist, Dunayer both misinterprets Francione and makes logical fallacies in her rebuttal. While Dunayer asserts without rationale that prohibiting cages, even in narrowly defined circumstances, fails to address the exploitation that causes hens to be subject to cruelty, Francione offers an argument that concludes such a prohibition could serve to chip away at the

³⁹ *Id.* at 70-71.

⁴⁰ *Id.* at 157.

⁴¹ *Id.* at 155.

⁴² FRANCIONE, *supra* note 9, at xxxi; Friends of Animals, *An Interview with Professor Gary L. Francione on the State of the U.S. Animal Rights Movement*, ACTIONLINE, Summer 2002, available at <http://www.friendsofanimals.org/programs/animal-rights/interview-with-gary-francione.html>.

⁴³ FRANCIONE, *supra* note 9, at xxxi (emphasis added).

⁴⁴ Francione discusses standards regarding the provision of water not constituting prohibitions both generally and with respect to vivisection whereas Dunayer discusses the same point within the context of forced moulting.

⁴⁵ GARY L. FRANCIONE, *RAIN WITHOUT THUNDER*, 194-96, 200-01 (1996).

⁴⁶ *Id.* at 203-11.

⁴⁷ *Id.* at 196-98.

property status that is the underlying cause of the hens' exploitation, which subsequently makes them subject to cruelty. While Dunayer asserts that even a carefully crafted prohibition against cages only focuses upon one aspect of hens being exploited for their eggs, Francione notes that the aspect in question is liberty (of movement) and completely respecting the interest involved in that aspect of exploitation results in the overall property status of hens being partially removed. To understand why Francione draws these conclusions, it is necessary to examine his analysis.

Francione's view that a prohibition against battery cages--with certain provisos--may be abolitionist is based on his view that the prohibition could satisfy certain criteria that stem from two central pillars of rights theory. These pillars are that the property status of non-human animals must be abolished and, when pursuing this goal, the interests of non-human animals cannot be violated in the present in order to prevent the interests of other animals from being violated in the future.⁴⁸ From these central features of rights theory, Francione derives and argues for five criteria that must be met in order for a legal measure intended to benefit non-human animals to be productive and consistent with rights theory. The first of these criteria is that "An Incremental Change Must Constitute a Prohibition," but it was Francione and not Dunayer who originally argued that this criterion on its own is not enough.⁴⁹ Francione's second abolitionist criterion is that "The Prohibited Activity Must Be Constitutive of the Exploitative Institution." Francione argues that a proposal "to reduce the number of hens confined in a battery cage (floor space usually is a twelve-inch square) from four hens to three hens [thus increasing cage space for the remaining hens]," and a proposal to increase the size of battery cages from 144 to 196 inches of floor space do *not* satisfy this criterion.⁵⁰ By the application of Francione's abolitionist criteria, all similar welfarist proposals such as increasing battery cage size from 48 to 67 square inches would likewise be rejected, contrary to Dunayer's innuendos. Francione notes that replacing battery cages with coops that afford more movement does satisfy the second criterion, but he also argues that the first two criteria are insufficient to respect rights on their own.⁵¹

The third criterion that "The Prohibition Must Recognize and Respect a Noninstitutional Animal Interest"⁵² is relevant to Dunayer's view that the economic consequences of a prohibition against battery cages cannot and should not be predicted. In an example to the contrary, Francione illustrates the third criterion with a class of prohibitions that fail to satisfy it: "Temple Grandin's animal-handling guidelines, which have been adopted by the American Meat Institute and endorsed by McDonald's, are based on the notion that animal welfare is important *because* failure to observe certain standards will result in carcass damage and worker injuries . . . [that can] 'mean the difference between profits and losses. . . .'"⁵³ Thus, Francione observes that such welfare guidelines help non-human animal exploiters maximize the economic value of their property⁵⁴ and "have nothing to do with recognizing the interests of the animals--except instrumentally as means to human ends",⁵⁵ something Francione rejects. Francione states: "The

⁴⁸ *Id.* at 190.

⁴⁹ *Id.* at 192-96.

⁵⁰ *Id.* at 196-98, 208-10.

⁵¹ *Id.* at 198.

⁵² *Id.* at 199-203.

⁵³ *Id.* at 199-200.

⁵⁴ *Id.* at 200-01.

⁵⁵ *Id.* at 201.

test for [respecting a non-institutional interest] . . . necessarily admits of degrees^[56]: if the interest imposes a significant cost or tax on the ownership of animal property under circumstances in which the cost is clearly not justified in light of the ‘benefit’ to the property owner, then the interest recognized is extra- or noninstitutional.”⁵⁷ Dunayer’s claim that the economic consequences of a prohibition cannot be predicted is anticipated by Francione:

The test [for respecting a non-institutional interest] is simple to apply because, at least in theory,⁵⁸ it requires merely that we identify what costs are imposed by the regulation on property ownership and whether those costs will significantly^[59] exceed any benefit that animal property owners derive. *In most cases, the property owners will be more than pleased to identify such regulations through their opposition to the proposals.*⁶⁰

Francione anticipates the possible objection that, although an animal exploiter’s vocal opposition to a given proposal is an *indicator* that the opposition is attributable to the exploiter’s own economic self-interest, the truth of this motivation is *not necessarily guaranteed*.⁶¹ Hence, Francione advises non-human animal rights advocates to also make their own assessments of whether the costs to exploiters *significantly*⁶² exceeds any benefit to them--which would in turn indicate that the interest that the proposed change protects is a non-institutional interest.⁶³ Anticipating a related objection, Francione states:

The property owner may, of course, try to pass such costs along to consumers. The problem is that the demand for just about any food is elastic and will change as the price changes. So, for example, if the costs of the regulation added \$3 per pound to the price of hamburger, many people would shift to another food.⁶⁴

If a sustainable niche market could be found that was willing to pay more for “free-range” meat or eggs, the above analysis of Francione illustrates that the cost to exploiters would be trivial⁶⁵ and therefore the proposed change would *not* protect a non-institutional interest. As such, Francione’s view *requires* that such a proposal be rejected. In other words, Francione absolutely rejects replacing battery cages with alternative systems of confinement *even if* the public is willing to pay more for “free-range” meat and eggs. Note that Francione’s economic test for

⁵⁶ “This criterion admits of degrees insofar as the ‘significance’ of the difference between the costs imposed on property ownership and the benefits reaped by property owners will vary. Many proposed reforms will add costs to property ownership, costs that represent recognition of a noninstitutional animal interest, but many of these costs may be trivial. For example, [in the previously rejected proposal to reduce the number of hens in a battery cage from four to three], the removal of one bird from the battery cage may be proposed for ‘moral’ and not economic reasons (i.e. the property owners, if completely rational [in pursuing self-interest] but left to their own devices, would not institute such a change), but it is still questionable whether the proposed change is ‘significant’ or is so trivial that its acceptance might constitute cost-effective appeasement offered by property owners to placate moral sentiment in favor of animals.” RAIN WITHOUT THUNDER, *supra* note 45, at 202. Since Francione previously rejected this proposal, he obviously maintains that the economic costs that the proposal imposes are trivial and therefore the proposal not satisfy the third criterion for an abolitionist measure.

⁵⁷ *Id.* at 201.

⁵⁸ *See supra* note 56.

⁵⁹ *See supra* note 56.

⁶⁰ RAIN WITHOUT THUNDER, *supra* note 45, at 201 (emphasis added).

⁶¹ *Id.*

⁶² *See supra* note 56.

⁶³ RAIN WITHOUT THUNDER, *supra* note 45, at 201.

⁶⁴ *Id.* at 261n.12.

⁶⁵ *See supra* note 56.

whether a given proposal would protect a non-institutional interest of a non-human animal *does not require one to predict* economic consequences or the future price of meat and eggs. The reason why this is so is found in Francione's fifth abolitionist criterion, discussed in subsequent paragraphs. (The fourth abolitionist criterion states that if the non-institutional interests of non-human animals are to be recognized, then these interests cannot be violated, or traded away, just because doing so would secure a benefit to humans.⁶⁶ For example, a prohibition against religious animal sacrifices benefits those in power who do not regard this use of animals as "necessary" to produce a socially acceptable benefit that is recognized by those in power.⁶⁷ Thus, even though it protects a non-institutional interest, this prohibition of animal sacrifices would not satisfy the fourth abolitionist criterion.⁶⁸)

Francione's fifth and final criterion that any abolitionist change must satisfy--which, like the others, is grounded in the central features of rights theory--is "The Prohibition Shall Not Substitute an Alternative, and Supposedly More 'Humane,' Form of Exploitation."⁶⁹ According to Francione, replacing battery cages with larger cages, coops or *any* other confinement system--with the "*possible*" exception of the territory arrangement that would exist in the environment if humans never took any eggs--would reinforce and explicitly endorse the property status of hens who are used for their eggs.⁷⁰ This is because their interest in freedom of movement would still be impinged upon for the purpose of taking eggs from them and this violates the central features of rights theory that inform Francione's analysis.⁷¹

Francione's abolitionist criteria are *incremental*. As such, following them in any given campaign to impose a legal restriction on non-human animal exploiters will not result in the complete abolition of non-human animal exploitation. Following Francione's abolitionist criteria will, however, result in the legal property status of non-human animals being chipped away such that many similar incremental steps will together eventually result in the total abolition of non-human animal exploitation. Importantly, when discussing abolitionist criteria three through five, Francione does state that the interests that the criteria protect are interests that the non-human animal would have *if* he or she were no longer property:

If, for example, laying hens were removed completely from the battery cage and placed in an environment where the treatment they received was consistent with that which these animals should receive were they no longer regarded as human property--that is, in a way that respected *completely* their interest in bodily movement--then that change would qualify [as abolitionist].

. . . .

[I]f egg batteries are abolished but hens, still regarded as property, are kept under circumstances that would be appropriate were their property status abolished entirely (i.e. they have freedom of movement and are otherwise kept as they would be were they no longer regarded as property), then, although the hens will continue to be exploited as property, the prohibition of battery cages

⁶⁶ Rain Without Thunder, *supra* note 45, at 203-07.

⁶⁷ *Id.* at 204.

⁶⁸ *Id.* at 204-07.

⁶⁹ *Id.* at 207-11.

⁷⁰ *Id.*

⁷¹ *Id.*

recognizes an interest that the animal would have were the animal no longer regarded as property. . . .

. . . .

If animal interests are to be taken seriously, then, to the extent that the law regulates the use of animal property beyond what is necessary to exploit the animal property, that regulation must be held as *eliminating* the property right [of humans over non-human animals] *to the extent necessary* to protect the [non-human animal] interest. Otherwise, the victory for animals will be illusory: as soon as the rights of human property owners are triggered, the animal interest will be ignored. Accordingly, the interest of the animal must be seen explicitly as an interest that is to be protected as would a true “right” within the legal system. The interest would not be a “right” in the full sense, in that animals would not yet possess the basic right not to be regarded as property . . . but animals would have something approximating nonbasic rights, something that could be said to be building blocks of the basic right not to be property. These nonbasic “rights” must, however, be treated as though they *were* rights, in the sense that they must be regarded as protecting interests from any interests balancing [or trading away of interests].

. . . .

[E]very time we recognize such a right, we move away from treating the being exclusively as a means to human ends; the problem is that the being’s most fundamental interests in not being eaten . . . have not yet been recognized. These incremental measures may be seen, however, as recognizing pieces of the basic right not to be regarded as property. So, although these interests represent nonbasic rights in one sense, the interests are more properly regarded as “parts” of the basic right of animals not to be treated exclusively as means to human ends. [This is] a “protoright” because it functions like a right but runs to the benefit of a nonrightholder, properly speaking. [A protoright] is something different from a right and something very different from what now exists under legal welfarism.⁷²

In the case of abolishing battery cages without replacing them with an alternative and supposedly more “humane” form of confinement, and where the other four abolitionist criteria are also abided by, Francione concludes that the proto-right to liberty (of movement) is being respected because the prohibition completely “eliminates the exploitation involved in the confinement system through a full recognition of the interest of the hens in their freedom of movement.”⁷³

It is of *paramount* importance that:

The animal advocate must not herself suggest an alternative [form of exploitation] and must not agree to any alternative offered by the exploiter. To do either would involve the rights advocate in sacrificing the basic right of animals not to be property in order to secure a less-than-basic protoright that . . . [supports] the notion that “bettering” the system of animal slavery can render it acceptable, which is to reinforce the notion that animal slavery itself is acceptable.

. . . .

⁷² *Id.* at 202-07.

⁷³ *Id.* at 210.

If animal exploiters . . . eliminate the battery cage in favor of some other form of hen enclosure that continues their status as property and does not fully respect their interest in, for example, bodily integrity [or movement], that does not necessarily undermine the incremental eradication of property status. . . . The battery hens will in all likelihood be placed in an alternative form of confinement. What the exploiter does in addition to [discontinuing the use of cages] cannot fairly be said to be a consequence of the rights advocate's action, *unless, of course, it is the rights advocate who actively urges this substitute exploitation*. But in the absence of such support for alternative forms of exploitation . . . the rights advocate who obtains . . . a prohibition on various practices that are constitutive of factory farming has nevertheless achieved one incremental step in the general eradication of the property status of the animal through the recognition of a noninstitutional, nontradable interest that is based on the inherent value of the animal.⁷⁴

Crucially:

What is essential in seeking any incremental change is that rights advocates recognize that their efforts must be accompanied by a *continuing and unrelenting* political demand for the complete eradication of the property status of animals.⁷⁵

The implication of all of the above is, when a rights advocate simultaneously demands an end to the use of battery cages (without suggesting an alternative form of confinement) and an end to all exploitation of non-human animals (which includes *any* other confinement system) and the exploiter fails to meet this demand but instead responds by implementing an alternative form such as coops, Francione's theory *requires* the rights advocate to continue to respond by relentlessly demanding an end to the use of the coops and any other system of confinement, coupled with the repeated demand to abolish the property status of non-human animals completely. Contrary to Dunayer's suggestion, whether or not the exploiter in this case increased the price of eggs to cover the cost of the new coops, and whether or not a pricier "free-range" egg market could be found, the rights advocate neither has to predict this in advance nor predict any other economic consequences of the prohibition. Rather, the assessment of a prohibition's cost to the exploiter can be both tentatively approximated beforehand and known with certainty *after* the exploiter has responded. Afterwards, if the exploiter responds by replacing the cages with an alternative form of confinement and this does not cause the economic value of the exploiter's slaves to reduce due to the "free-range" market, then it is clear that the cost to exploiters would be trivial under Francione's analysis discussed above. As such, the exploiter's response of replacing the cages with the alternative form would fail to protect a non-institutional interest of the hens. Again, Francione's theory requires that the activist never propose and always reject any alternative form of exploitation. Thus, under Francione's theory, the rights activist must reject the exploiter's new use of an alternative confinement system and continue to demand the complete abolition of both all forms of confinement and all non-human animal exploitation in general. Clearly, Dunayer's objections involve a gross misinterpretation of Francione's views.

⁷⁴ *Id.* at 211, 215-16 (emphasis added).

⁷⁵ *Id.* at 215-16 (emphasis added).

Francione's analysis (described above) of whether or not a legal measure that is intended to benefit non-human animals is productive and consistent with rights theory is practical, incremental and highly credible. In light of this analysis, Dunayer's objections to it collapse like a house of cards. Dunayer's charge that the importance of abstaining from eggs is obscured by a campaign to prohibit battery cages ignores Francione's call for education. Francione acknowledges that the likelihood of a campaign that is consistent with rights theory (i.e. prohibiting battery cages without replacing them with coops or any other form of confinement) succeeding in this point of history is low.⁷⁶ Nevertheless, Francione holds that such campaigns can be beneficial because they always include a call for the complete abolition of the property status of non-human animals and they serve to educate the public about this, thus provoking an ethical vegan social movement.⁷⁷

Furthermore, Dunayer's assertion that a prohibition against battery cages--even with Francione's strict qualifications--implies that the exploitation of hens can continue in a "fixed" or morally acceptable form because the hens are still being exploited for their eggs ignores the fact that their interest in liberty of movement is being *completely* respected, and this constitutes a proto-right or a piece of their property status being removed in an *incremental* fashion. That is, the prohibition entails that non-human animal exploiters are markedly and exceedingly less capable of using the hens in a way that property-law normally permits and encourages; benefiting the property owner and safeguarding her or his right to use the property in a way that maximizes efficiency of time, owner-autonomy and economic value. One indivisible interest of the hens is being completely respected (justly) at the expense of the owner losing her or his interests in profit and unfettered autonomy. The inherently incremental and progressive nature of Francione's abolitionist method entails that the hens will not continue to be exploited for their eggs or anything else: one interest after another will be protected until hens and every other non-human animal are not used as property at all.⁷⁸ In this abolitionist context, beginning the incremental process by completely respecting the interest in freedom of movement with a view to eventually respecting all interests does not, contrary to Dunayer's suggestion, imply that confining hens without cages in a supposedly "free range" environment is morally acceptable. Contrary to Dunayer's claim, Francione's guidelines for progressive abolitionist change obviously do not permit replacing one method of enslaving or killing with another, modifying the conditions of confinement or imposing standards that require non-human animals to receive

⁷⁶ *Id.* at 192, 211.

⁷⁷ *Id.* at 187, 162-63, 167, 169-73, 183.

⁷⁸ Dunayer makes a similar objection using different examples. Dunayer states that Francione does not categorically *reject* pursuing a prohibition on dehorning cows who are used for their meat and a prohibition on footpad injections in rats who are used in vivisection whereas Dunayer does reject these prohibitions because they leave the non-human animals in situations of exploitation and their exploiters will achieve their goals by using other, perhaps worse, methods. DUNAYER, *supra* note 6, at 70-71. Francione, however, makes clear that prohibitions on dehorning cows and injecting the footpads of rats arguably protect non-human animal "interests that go beyond those necessary to ensure that animals are fit for the type of exploitation at issue and its prohibition is not accompanied by a substitution of other forms of exploitation. . . . In both examples above, the prohibitions recognize interests that would be recognized were the animals not property at all." RAIN WITHOUT THUNDER, *supra* note 45, at 214-15. In other words, just as Francione argues that a prohibition on battery cages--that succeeds in fully protecting the interest of hens in freedom of movement at significant financial detriment to their human owners--results in a piece of the hens' property status being eradicated in an incremental fashion, so too could prohibitions on dehorning and footpad injections completely protect non-institutional interests *without* substituting alternative forms of exploitation. As previously discussed, if a prohibition (e.g. on dehorning or footpad injections) failed to fully protect a non-institutional interest or, as Dunayer charges, substituted an alternative form of exploitation, then the prohibition would *not* satisfy Francione's stringent abolitionist criteria. As such, Francione would reject these prohibitions.

adequate space to exploit them in. Conversely, Francione's guidelines ensure that non-human animals will eventually no longer be bred, imprisoned or exploited at all. They ensure (for example) that hens receive, as a first step among many, the space that is adequate to completely respect their interest in freedom of movement--that is, the territory arrangement that would exist in the environment if human animals never took any eggs or otherwise exploited them. Dunayer's objection that doing so (in a context of exploitation in which eggs are still being taken and consumed by humans) would be impossible is unsound.

Before chickens were artificially bred by humans, their ancestors were jungle-birds who nested in trees. If birds such as these were being exploited for their eggs in battery cages today, the result of Francione's suggested prohibition would be that the birds would be removed from the cages and, after successful rehabilitation, returned to their jungle homes. The birds would be free to go anywhere in their environment they chose without any human intervention. There would be no fences or any other system of confinement. Humans would not touch or disturb the birds, save for stealing their eggs from their nests when the birds were away. This would still constitute wrongful exploitation, and Francione explicitly states this. Yet, this prohibition against battery cages would successfully respect the hens' interest in liberty of movement, and protect an indivisible proto-right, in a context in which the hens are still being exploited as property. After this prohibition has been successfully achieved, the rights activist proceeds to secure additional interests for the birds until they are no longer exploited at all. This is the nature of Francione's suggested prohibition.

Again, Francione wholly acknowledges that a campaign to introduce such a prohibition is unlikely to succeed at this point in history, and focuses instead on its important educational value. Contrary to Dunayer's objection, however, Francione's suggested prohibition against battery cages is not impossible *in principle*: it could be achieved now by an eccentric millionaire or in the future by an animal exploiter who is forced to follow the requirements of the above prohibition in a world in which a significantly larger proportion of the public has already accepted animal rights. Even in that future context, implementing Francione's suggested prohibition might put animal exploiters who use battery cages out of business--a goal that Francione says must be explicitly stated by the rights activist. In any case, Dunayer's claim that captivity and the limitation of freedom of movement are *necessary components* of the immoral practice of exploiting hens for their eggs is clearly unsound.

It might be objected that it is not the ancestors of modern chickens who are kept in battery cages. Since modern chickens have been artificially genetically selected for centuries, they are inherent slaves who have inborn traits that would frustrate their ability to survive and thrive in a non-exploitative context. Since the artificial genetic selection that they have been subject to cannot be undone, the rights of modern chickens can never be fully respected. Similarly, after human slavery was abolished in the United States, the fact that some slaves had been maimed and mutilated entailed that their rights could never be fully respected.⁷⁹ This limitation, however, was solely due to unchangeable and unwanted circumstances, and not the prohibition against human slavery that abolitionists achieved. Thus, after the abolition of human slavery, the ideal of *fully* respecting the rights of former slaves as much as genuinely

⁷⁹ For example, a human slave whose hands were cut off could never have her or his right to bodily integrity and freedom of movement fully respected.

unchangeable⁸⁰ circumstances allowed for was pursued. Regarding the future time after the complete abolition of all non-human animal exploitation has been achieved, Dunayer borrows Francione's insight that any remaining non-human animals who could not be rehabilitated would be placed in sanctuaries that, in Dunayer's words, "[a]s much as possible . . . provide natural fulfilling environments."⁸¹ As was the case in human slavery, any remaining non-human animals who were no longer property would have their rights respected as much as genuinely unavoidable circumstances allowed for. Since modern chickens who are exploited in battery cages have been artificially genetically selected for centuries, if they were returned to the jungle they would probably not survive. Hence, after complete abolition, they would be placed in sanctuaries that are acceptable to genuine abolitionists. *Before* complete abolition when non-human animals are still being exploited, but after a prohibition against battery cages that satisfies Francione's stringent criteria, the hens would be placed in an environment that in all respects was the "same" as a sanctuary environment, *with the exception* that eggs would be stolen. Again, although the hens would still be wrongfully exploited as property in this way, their interest in liberty of movement would be fully respected, and this would constitute an incremental step towards respecting *all* of their interests.

Note that both genuine sanctuaries and "environments-that-mirror-sanctuaries-with-an-important-exception"⁸² have fences, sometimes to protect against predatory non-human animals such as free-living coyotes. In order to respect the interests of hens as much as possible, the fences that both genuine sanctuaries and "environments-that-mirror-sanctuaries-with-an-important-exception"⁸³ would encompass areas that are appropriate to the normal ranging behaviors of their species. In this context, the fences do not constitute alternative confinement systems: just as genuinely unchangeable and unwanted circumstances prevented former *human* slaves from having their rights fully respected,⁸⁴ genuinely unchangeable and unwanted circumstances (that do not arise from the speech or actions of rights activists) may dictate that hens who were formerly exploited in battery cages are--*instead of being placed in a fenceless jungle amongst predators*--placed in a fenced environment that is the same as a sanctuary environment, save for the previously mentioned exception. Again, the only reason why the exception of humans stealing and consuming eggs is present is because the prohibition in question is incremental and, as such, it does not result in the complete abolition of all non-human animal exploitation. Additional incremental prohibitions, however, will together result in complete abolition. In any case, Dunayer's objection that Francione's suggested abolitionist prohibition against battery cages would be "impossible" is unsound.

Thus, contrary to Dunayer's false depiction, Francione does not contradict himself by suggesting that prohibitions should substitute or endorse alternative forms of exploitation. Contrary to Dunayer's suggestion, Francione does not suggest creating new requirements regarding cage sizes or guidelines about how confined exploitation is to be carried out. Francione does not propose modified confinement. Dunayer asserts that it makes more sense to oppose one entire form of non-human animal exploitation, but Francione does just that: directly

⁸⁰ See *supra* note 79.

⁸¹ DUNAYER, *supra* note 6, at 139 (emphasis added); FRANCIONE, *supra* note 9, at 170, 153-54; Gary L. Francione, *Wildlife and Animal Rights*, in *ETHICS AND WILDLIFE* 65-81 (Priscilla Cohn ed., 1999).

⁸² For example, instead of unfertilized eggs being consumed by the birds as is common practice in genuine sanctuaries, they are stolen and consumed by humans.

⁸³ See *supra* note 82.

⁸⁴ See *supra* note 79.

in 2000⁸⁵ and indirectly in 1996.⁸⁶ Therefore, in light of Francione's analysis of abolitionist incremental change, Dunayer's objections to it disintegrate into misrepresentations and appropriations.

Importantly, it should also be noted that Francione's incremental abolitionist criteria are tentative⁸⁷ and Francione cautions:

[T]he rights advocate may reasonably conclude that *all* attempts to eradicate the institutionalized exploitation of animals through incremental legislation and regulation do not, at this point in the history of the human/nonhuman relationship, represent the most efficacious use of temporal and financial resources. . . . But this does not mean that the rights advocate is left without an incremental program of practical change. On the contrary, the rights advocate is left with a most important and time-consuming project: education of the public through traditional educational means--protest, demonstrations, economic boycotts, and the like--about the *need* for the abolition of institutionalized exploitation on a social and personal level. . . . Moreover, in light of the structural defects of animal welfare, any legislative or judicial campaign will need to be accompanied by a vigorous educational campaign.⁸⁸

. . . .

I have offered several criteria that are intended to ensure that incremental measures erode the property paradigm, not support it. Although I hope that my criteria are useful, they are secondary to the *need* for an incremental eradication of the property status that causes the pain and suffering in the first instance.⁸⁹

In other words, the essence of Francione's view on incremental abolitionist change is that it should be accomplished through education. If, however, one is bent on perusing legal and regulatory change then Francione argues that one must follow his criteria in order for the change to be abolitionist. Following the criteria is not an absolute, objective guarantee that a change will be abolitionist, but only constitutes a useful negative test or imprecise guide, and the rights activist must further contemplate and examine whether the primary goal of incrementally abolishing the property status of non-human animals is actually being served.⁹⁰ It is in this spirit that Francione presents his example of abolishing battery cages without replacing them with an alternative form of confinement, a spirit that Dunayer ignores.

Regarding Dunayer's own proposals for abolitionist prohibitions, she contradicts herself when she both states that such prohibitions do not leave non-human animals in situations of exploitation and offers the example of a ban against leg-hold traps within the fur industry. For, even with Dunayer's suggested prohibition, non-human animals will continue to be exploited for their fur with the use of spring-loaded traps that hold them by the head or mid-section, closing-cage traps and battery cages in fur "farms." That is, Dunayer has suggested a prohibition against

⁸⁵ FRANCIONE, *supra* note 9, at xxxi.

⁸⁶ See comments above regarding Francione's suggested prohibition against battery cages having the probable effect of putting animal exploiters out of business.

⁸⁷ RAIN WITHOUT THUNDER, *supra* note 45, at 190-92, 217-19.

⁸⁸ *Id.* at 192.

⁸⁹ *Id.* at 222 (emphasis altered).

⁹⁰ *Id.* at 177-92, 217-19.

leg-hold traps that substitutes one form of exploitation (leg-hold traps) for another (head/mid-section traps and other methods) and leaves non-human animals in the situation of being trapped and killed for their fur. Likewise for Dunayer's suggested prohibition of exotic non-human animals who are used for companionship. A prohibition against the use of exotic or foreign non-human animals for human companionship fails to protect native or local non-human animals. Using one standard for foreign species and a different standard for local species is arbitrary and speciesist. Moreover, a non-human animal who is "exotic" to one part of the world is native to another. Thus, Dunayer's suggested prohibition against the use of exotic "pets," if applied at the Federal level, would prohibit chipmunks being used for companionship in Alaska but not Maine.⁹¹ Again, this is arbitrary and it leaves members of the same species of non-human animals in the same situation of exploitation.

Furthermore, Dunayer's view that it is immoral to buy non-human animals *unless* doing so would save them from suffering and death is problematic. If one sees a malnourished or otherwise unwell puppy in a "pet" store, buying the puppy in order to rescue her or him will instigate a chain of events beginning with the store owner contacting the store's wholesale supplier and ending with more puppies being bred and exploited at puppy mills. Following Dunayer's suggestion would result in increasing economic demand for puppies who are sold in "pet" stores as objects and cause more to suffer the same fate. Admittedly, this issue is not clear-cut. Seeing a non-human animal who is suffering or near death and coldly turning one's back because a rescue-by-purchase would cause others to be exploited, suffer and die in the future is also morally problematic. Dunayer's treatment of this issue, however, is oblivious to both of its highly morally problematic features; she categorically holds that buying non-human animals to save them from abuse or death is part of a vegan lifestyle.⁹²

Lastly, in an article defending her book *Speciesism*, Dunayer states that she does not disapprove of killing to avoid starvation:

It isn't speciesist to value some individuals (nonhuman or human) more than others. . . . If I'm starving in the Arctic, I'm entitled to kill and eat a polar bear, but I'm also morally entitled to kill and eat a human. In such rare circumstances a human's right to life genuinely competes with someone else's *equal* right to life. If I have no other food source, I--like a polar bear--must kill prey if I want to survive. There's nothing speciesist about that.⁹³

It may not be speciesist, when starving without any other option, to murder and eat either a human or a non-human animal with equal disregard, but it certainly is fundamentally immoral. Francione examines the classic case of *Regina v. Dudley and Stephens*, in which four men were stranded in a lifeboat without food or reasonable hope of rescue. Two of the men killed and ate a third man against his protests. After being rescued, the killers were convicted of murder by the Queen's Bench based upon the Court's findings. The Court found that there is no "absolute and unqualified necessity to preserve one's own life." The Court asked, "Who is to be the judge of this sort of necessity? By what measure is the [equal] comparative value of lives to be measured?"⁹⁴ Apparently, Dunayer is the judge and the measure is might makes right. While a polar bear has no capacity to make abstract, reasoned moral decisions and any moral sacrifice

⁹¹ Chipmunks are native to Maine, so a prohibition against exotic "pets" would not apply to chipmunks who are used as "pets" in Maine. The reverse is true of chipmunks in Alaska and Hawaii.

⁹² DUNAYER, *supra* note 6. at 154-55.

⁹³ Joan Dunayer, *Reply to a Self-Proclaimed Speciesist*, 23 VEGAN VOICE 15 (Sept.-Nov. 2005).

⁹⁴ GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* 21-23 (1995).

that might stem from such decisions, most human animals do have that capacity. To kill another in order to benefit oneself is the essence of what it means to violate a basic right. If I were in such an extreme emergency situation and decided to kill another sentient being, human or non-human, in order to save myself, I would be intensely aware at the time that what I was doing was fundamentally immoral, and that it would be entirely justified if I were convicted of murder afterwards. I would like to think that I would have the moral courage not to murder someone if faced with starvation. Apparently, Dunayer has no such scruples.

V. CONCLUSION

I have argued that *Speciesism* appropriates and misrepresents the animal rights theory of Gary L. Francione. The reader of *Speciesism*, Francione's books and articles and this review⁹⁵ must consider all three of these sources and judge for her or himself based upon the evidence. The following, however, gives one pause.

2004 Dunayer without reference to Francione:

U.S. law is even more speciesist than the U.S. public. Most U.S. residents believe that it's wrong to kill animals for their pelts, but the pelt industry is legal. Most believe that it's wrong to hunt animals for sport, but hunting is legal. Two-thirds believe that nonhumans have as much "right to live free of suffering" as humans, but vivisection, food-industry enslavement and slaughter, and other practices that cause severe, prolonged suffering are legal.⁹⁶

2000 Francione:

There is a profound disparity between what we [the public] say we believe about animals, and how we actually treat them. On one hand, we claim to treat animal interests seriously. Two-thirds of Americans polled by the Associated Press agree with the following statement: "An animal's right to live free of suffering should be just as important as a person's right to live free of suffering." More than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or hunt them for sport.

....

On the other hand, our actual treatment of animals stands in stark contrast to our proclamations about our regard for their moral status. We subject billions of animals annually to enormous amounts of pain, suffering and distress. . . . [W]e kill more than 8 billion animals a year for food. . . .

....

Hunters kill approximately 200 million animals in the United States annually. . . .

[W]e use millions of animals annually for biomedical experiments, product testing, and education.

⁹⁵ See the unabridged version of this review at www.speciesismreview.info.

⁹⁶ DUNAYER, *supra* note 6, at 49.

And we kill millions of animals annually simply for [fur] fashion.⁹⁷

2004 Dunayer without reference to Francione:

“Welfarists” seek to change the way nonhumans are treated within some system of abuse. They work to modify, rather than end, the exploitation of particular nonhumans.⁹⁸

1996 Francione:

Both [welfarists] Spira and PETA . . . seek to effect change within the system. This inevitably requires the acceptance of reformist measures. . . .⁹⁹

2004 Dunayer without reference to Francione:

[N]ew speciesists endorse basic rights for some nonhuman animals, those ostensibly most similar to humans.¹⁰⁰

2000 Francione:

[The work of (speciesist) cognitive ethologists] is also dangerous in that it threatens to create new hierarchies in which we move some animals, such as great apes, into a “preferred” [personhood-rights] group based on their similarities to humans, and continue to treat other animals as our property and resources.¹⁰¹

2004 Dunayer without reference to Francione:

We consider it immoral to treat any human, whatever their characteristics, as property.¹⁰²

2000 Francione:

We do not regard it as legitimate to treat *any* humans, irrespective of their particular characteristics, as the property of other humans.¹⁰³

All of this is not to say that two authors, working separately, cannot arrive at similar lines of thought and derive similar conclusions independently. Given that Dunayer cites all of the major and several of the minor works of Francione, however, it is clear that she is highly familiar with Francione’s ideas. In my view, the repeated and systematic¹⁰⁴ way in which Dunayer appropriates and misrepresents these ideas, as exposed in this review, is astonishing. Exposing this situation is important so that proper representation can be given to a moral and legal theory, and a method of effecting political change, that has the power to radically transform human society into one that respects the basic rights and personhood of non-human animals. Francione’s *Animals, Property and The Law*, *Rain Without Thunder* and *Introduction to Animal Rights* are absolutely invaluable to the theorist and activist alike.

⁹⁷ FRANCIONE, *supra* note 9, at xix-xxi.

⁹⁸ DUNAYER, *supra* note 6, at 58.

⁹⁹ RAIN WITHOUT THUNDER, *supra* note 45, at 65.

¹⁰⁰ DUNAYER, *supra* note 6, at 98.

¹⁰¹ FRANCIONE, *supra* note 9, at 119.

¹⁰² DUNAYER, *supra* note 6, at 98.

¹⁰³ FRANCIONE, *supra* note 9, at xxviii.

¹⁰⁴ *See supra* note 95.

OPENING THE LABORATORY DOOR: NATIONAL AND INTERNATIONAL LEGAL RESPONSIBILITIES FOR THE USE OF ANIMALS IN SCIENTIFIC RESEARCH-- AN AUSTRALIAN PERSPECTIVE†

KATRINA SHARMAN*

‘One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation.’ Thomas Brackett Reed (1839-1902)

When I first set out to write this article in the Spring of 2004, I sought to explore how the lives of laboratory animals could be improved within a legal system that classifies them as property, with no rights and no fundamental interests. I thought then (and think now) that the use of animals in scientific research is one of the hardest issues to write about in animal law. As advocates for the voiceless, we are torn between striving for a system that prohibits the use of animals for scientific purposes and recognising that liberation from the laboratory may be a long time coming.

Despite the ethical objections that advocates such as myself have towards the use of animals in research, certain of us feel a strong moral imperative to act for the silent victims locked behind laboratory doors today. Although their fate has already been determined, animal welfare law arguably serves as a platform to reduce their suffering.

In order to assess whether animal welfare laws could reduce suffering in the context of animal research, I conducted a case study of the legislative framework for animal research in my jurisdiction, New South Wales, Australia. At the time I wrote the article, I believed that these laws could serve a useful purpose if they promoted accountability, the three R’s (replacement, refinement, reduction) and a genuine battleground for the hearts and minds engaged in debating ‘the animal research question’. In the time that has elapsed since then, I have decided that while these principles appear to be tenets of a system that takes animal protection seriously; as a practical matter they rarely stand up to scrutiny. Worst still, they are often used as shields to justify ongoing experimentation on animals, diverting attention from important moral and scientific inquiries into why animals are being used as test models in the first place.

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In the initial version of this article, I also explored the question of whether creating tighter regulatory systems for animal research in industrialised countries would push animal research offshore into less regulated environments. On the assumption that it would, I argued emerging international animal research norms, or minimum standards, should be fostered to remove the worst aspects of scientific use of animals and to promote the development of alternatives. As I now question the ability of seemingly tight animal research laws to provide meaningful protections to many animals in my own jurisdiction, I am more reluctant to propose those laws as the basis for a global model.

Two years after completing the first version of this article, I remain undecided as to whether this is an area in which we should seek incremental legal change in recognition that the animal model is not going away in the near future; or whether we should focus our energies on educating the public about alternatives and lifting the veil to disclose the extent of 'unnecessary suffering' involved in animal research. As animal lawyers, with no clients to instruct us, I expect we will explore our own hearts and minds, and no doubt those of others, before we take a stance on this issue. I hope that my article (as revised) will help generate debate about the best legal solutions for animals.

I. INTRODUCTION

While the deliberate infliction of harm on animals is sanctioned in a wide range of industries in modern society, the horrors that take place behind laboratory doors in the name of science, education and progress raise some of the most difficult and confronting questions in animal law. Despite the increased availability of alternatives, laws and policies continue to be used as shields by those who gas, burn, confine, clone, infect, mutilate, force-feed, starve, poison and kill healthy animals in nations everywhere.¹ Although regulatory regimes for animal research are constantly evolving, few (if any) species are safe from the reach of the scientist.² Some jurisdictions have refused to accord the most basic protections to certain species, while others simply have no laws relating to the protection of animals in research.³

¹ This list is not intended to identify all forms of harm inflicted upon animals used in research. Many animal protection organisations seek to educate people about the use of animals in research and specific examples of tests involving animals can be obtained from those organisation's websites. For example in the EU, see the website of *The British Union for the Abolition of Vivisection* (BUAV) <<http://www.buav.org/aboutus/index.html>>; in the US, see the *Physicians Committee for Responsible Medicine* (PCRM) <<http://www.pcrm.org/>>; in Australia, see *Australian Association for Humane Research Inc* (AAHR) <<http://www.aahr.asn.au/>>.

² In New Zealand, 'non-human hominids' defined as gorillas, chimpanzees, bonobos and orangutans, have been accorded certain limited 'rights' relating to research and experimentation. See: *Animal Welfare Act 1999* §85 (NZ) discussed in Peter Sankoff 'Five years of the new animal welfare regime: Lessons learned from New Zealand's decision to modernise its animal welfare legislation (2005), *Animal Law* Vol 11, 7.

³ The US *Animal Welfare Act* does not apply to rates, mice, birds, fish or farm animals. It is thought that rats and mice account for approximately 90% of animals used in research in the US; 7 USC § 2132(g) (2000); Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R's and the Future of Animal Experimentation*, 2006 U. Chi. Legal F. 12; Until recently there was no law protecting animals used in research in Japan. Due to a recent revision of the *Law Concerning the Protection and Control of Animals* the welfare of animals used in experimentation is to be considered; however according to the animal protection group ALIVE almost no controls over animal experimentation have been included. See ALIVE, 'Revision of the Animal Protection and Control Law Achieved', Alive News August 2005 [9 March 2006] <<http://www.alive-net.net/english/en-law/L3-action.html>>.

In today's political climate, animal advocates who seek to challenge research on ethical or moral grounds are often mischaracterised as animal rights 'extremists' or unrealistic, utopian visionaries.⁴ Meanwhile, those who seek to steer a more conservative or scientific course by questioning the reliability or necessity of animal test models must arm themselves with sufficient expertise to engage in a highly technical debate about current medical technologies, research successes and failures.⁵

Irrespective of whether one approaches the issue from an ethical or scientific standpoint, in most industrialised countries that have established regulatory frameworks for animal research, the 'necessity' of the experiment has become the threshold question. Consistently with the expansion of animal welfare, the public appears increasingly willing to subscribe to the idea that it is wrong to cause an animal unnecessary suffering but it is morally acceptable to conduct animal research if this is perceived to be in the interests of humans or animals.⁶

Of course this threshold question only exists because the law classifies animals as property. Since people or institutions own them, animals have no legal right to life, freedom or bodily integrity and the law says we may do what we like to them, provided that it is done within the confines of our anti-cruelty or animal research laws. The concept of animals as property has become particularly pervasive in the laboratory with the advent of new areas of biomedical research such as genetic engineering, stem cell research, xenotransplantation and bioterrorism defence.⁷ Not only are these rapidly developing areas of science contributing to the increased use of animals in research;⁸ they are serving to entrench animals' property status by allocating them in some instances, to the special class of 'intellectual' property.

As long as society refuses to accept the words of Ingrid Newkirk that '*When it comes to feelings like pain, hunger and thirst, a rat is a pig is a dog is a boy,*⁹' the animal test model is likely to remain a feature of our national and global society. The important question that follows is whether animal research laws can ever be used to reduce the numbers of animals languishing behind the closed doors of laboratories today and most probably tomorrow. For some the answer is clear; the only useful animal research law is one which prohibits research on animals, as anything less will entrench and sanction the extensive suffering which is currently considered necessary.¹⁰ Others assert that animal research laws can serve a useful purpose if they promote scrutiny, accountability, humane treatment of animals and a genuine battleground for the hearts and minds of those involved in debating the threshold question of whether each animal experiment should take place.

In this article, I examine the elements of various legislative regimes for the use of animals in research with a view to assessing whether there is such a thing as a 'good' animal research law and if so, whether its features should be implemented on an international basis. The first part of

⁴ Consider Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement*, Temple University Press, 1996 (discussing whether animal rights is a 'utopian' theory).

⁵ See for example the website of *Americans, Europeans, Japanese for Medical Advancement*, [10 March 2006] <<http://www.curedisease.com/>>.

⁶ Caroline Flint, 'Speech to the Coalition for Medical Progress 3Rs event on 8 October 2003' (Paper presented at an event organised by the Coalition for Medical Progress), 10 November 2003, [10 March 2006] <<http://scienceandresearch.homeoffice.gov.uk/animal-research/documents/carolineflint.pdf?version=1>>.

⁷ Darian M. Ibrahim, above n 3, 3.

⁸ Darian M. Ibrahim, above n 3, 3 and 35.

⁹ Ingrid Newkirk quoted in: Deborah Blum, *The Monkey Wars*, Oxford University Press (1994), 143.

¹⁰ Consider Gary L. Francione, above n 4 (discussing different ideological approaches to animal protection).

this article involves an examination of the Australian framework for animal research and a case study of the New South Wales legislative regime for the conduct of scientific research involving animals.

In the second part of this article, I briefly examine some of the international principles that are emerging to regulate the use of animals in scientific research on a global basis. I assume that if animal research was to be prohibited or to become more tightly regulated in certain countries, a considerable proportion would be exported to less regulated environments. However I argue that this should not be used as a justification for deferring meaningful animal protection laws in industrialised countries. To the contrary, those countries should impose special responsibilities on persons and corporations carrying out animal research in less regulated environments.

II. ANIMAL RESEARCH IN AUSTRALIA

Australia's approach to managing the use of animals in scientific research is one of enforced self regulation. This means that the government is responsible for overseeing and enforcing industry compliance in all jurisdictions.¹¹ Unlike the United States and a number of other countries, Australia has no national legislation which regulates the conduct of scientific research on animals. Instead the legislative regime has two components. Firstly, each State and Territory has its own legislation, which regulates matters such as licensing, monitoring and enforcing prescribed conditions of animal research. Secondly, each set of legislation is underpinned by a national code of practice, known as the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* ('the Code').¹² The Code seeks to supplement State and Territory laws by defining the responsibilities of researchers and institutions that are authorised to carry out research. It contains general principles for the care and use of animals used for scientific purposes and guidelines for the humane conduct of scientific activities and for the care of laboratory animals, including their environmental needs.¹³

New South Wales is the only state that has enacted separate legislation concerning the use of animals in scientific research.¹⁴ The remaining States and Territories have incorporated scientific procedure provisions into their animal welfare or anti-cruelty statutes.¹⁵ It seems anomalous that laws which sanction patently cruel activities should be located in anti-cruelty statutes. However this is less surprising when one acknowledges that in Australia, as in many other countries, the swords and shields which allow us to use animals for food, sport and entertainment are often embedded in our anti-cruelty and animal welfare statutes.

¹¹ The legislative scheme regulating animal research in Australia also applies to the use of animals supplied for research purposes and the use of animals for teaching purposes. However those issues are beyond the scope of this article.

¹² *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*, 7th edition (2004), Australian Government National Health & Medical Research Council, 2004 (herein 'The Code').

¹³ *Ibid.*

¹⁴ *Animal Research Act 1985* (NSW) and *Animal Research Regulations 1995* (NSW).

¹⁵ *Animal Welfare Act 1992* (ACT) Part 4; *Animal Welfare Act* (NT) Part 5; *Prevention of Cruelty to Animals Act 1985* (SA) Part 4; *Animal Care and Protection Act 2001* (Qld) Chapter 4; *Animal Welfare Act 1993* (Tas) Part 4; *Prevention of Cruelty to Animals Act 1986* (VIC) Part 3; *Animal Welfare Act 2002* (WA) Part 2.

The establishment of eight sets of legislation regulating animal research is a product of Australia's federal system and its Constitution which does not specifically mention animals, other than fish.¹⁶ In the absence of an express allocation of power to the Commonwealth, State and Territory governments have assumed responsibility for enacting and enforcing the bulk of animal welfare laws, including those that relate to the use of animals in research.

Whilst there are certain common features of each jurisdiction's legislation, one of the most fundamental differences is the way that 'animal' is defined. An expansive definition of 'animal' would ensure that the protection offered by the legislation was extended to all vertebrates and cephalopods. However under the current system, States and Territories only protect vertebrates and some even exempt fish.¹⁷ Certain States have taken a more progressive approach and extended the reach of their scientific procedure provisions to live pre-natal or pre-hatched creatures in the last half of gestation or development.¹⁸ In contrast to countries such as the United States, all Australian jurisdictions include rats, mice, birds and farm animals in their definition of 'animal'.¹⁹ However the position is still unsatisfactory, in that animals can arguably lose the protection provided by the legislation simply by being transported across a State or Territory border.

A. A Macro View

If one was to adopt a macro view of the Australian legislation that regulates animal research, it would be possible to identify certain common features.²⁰ These include:

1. a requirement that authorisation be obtained by individuals or research establishments (or both) before scientific research can lawfully proceed;²¹
2. the establishment of animal ethics committees to authorise and oversee the conduct of scientific research;²²

¹⁶ Section 51(xxv) of the Constitution allocates certain powers to the Commonwealth to regulate fisheries in Australasian waters, although the Commonwealth, States and Territories have adopted a cooperative approach to jurisdiction and supervision over marine fisheries for the past century. See: 'The Development of Australian Fisheries Management' [11 March 2006] <http://members.trump.net.au/ahvem/Fisheries/National/Dev_AFM3.html#Jurisdiction>.

¹⁷ A more expansive definition of 'Animal' is included in the Code which includes 'fish, amphibians, reptiles, birds and mammals, encompassing domestic animals, purpose-bred animals, livestock, wildlife, and also cephalopods such as octopus and squid'. This broad definition is commendable and should be incorporated in all State and Territory anti-cruelty/animal welfare legislation by amendment; The Code, above n 12, 3. Fish are not included in the definition of 'animal' in the anti-cruelty/animal welfare legislation applicable in South Australia or Western Australia. See: *Prevention of Cruelty to Animals Act 1985* (SA), s3(b); *Animal Welfare Act 2002* (WA), s5(1).

¹⁸ *Animal Care and Protection Act 2001* (Qld) ss 11(1)(b) and 11(3).

¹⁹ 7 USC§2132(g)(2000); Darian M. Ibrahim, above n 3, 12; David Favre, 'Overview of the US Animal Welfare Act' (May 2002), Animal Legal & Historical Center, Michigan University DCL College of Law, <<http://www.animallaw.info/articles/ovusawa.htm>>.

²⁰ I acknowledge with thanks, Keith Akers, for making the following unpublished thesis available for consideration in connection with this section of the paper: Keith Akers, 'Australian Law on the Use of Animals in Scientific Procedures, Chapter 3 (in draft form)' of a Ph.D. to be submitted to the School of Law at Deakin University, Melbourne. Unpublished. 2004.

²¹ *Animal Welfare Act 1992* (ACT) ss 25 and 37; *Animal Welfare Act* (NT) ss 29 and 43; *Animal Research Act 1985* (NSW) ss 18 and 25; *Prevention of Cruelty to Animals Act 1985* (SA) s 16; *Animal Care and Protection Act 2001* (Qld) s 51; *Animal Welfare Act 1993* (Tas) ss 27 and 29; *Prevention of Cruelty to Animals Act 1986* (VIC) s 26; *Animal Welfare Act 2002* (WA) s 6.

3. an express or implied reference to the fact that the Code is to be considered part of the relevant State or Territory's legislative regime;²³ and
4. the inclusion of specific provisions relating to inspecting institutions and dealing with instances of breach of the relevant legislation.²⁴

While this analysis suggests that the Australian legislative framework relating to animal research has a number of shared themes, any descent into the detail of the legislation demonstrates clear disparities. For example, whilst all States and Territories empower an authorising body to impose conditions on the applicant in connection with any authorisation granted, the conditions that can be imposed vary considerably between jurisdictions.²⁵ Of greater concern are the inconsistencies both on paper and in practice, between each State's and Territory's provisions relating to monitoring and enforcement.

In short, a detailed examination of the legislation leads one to conclude that even if an animal is 'fortunate' enough to fall under the protective umbrella of an animal welfare law; its treatment will depend largely on the jurisdiction in which the proposed research is to be conducted.

B. Attempts to Create Robust Systems for Animal Research: The New South Wales Example

1. animal ethics committees

Theoretically, Animal Ethics Committees (AECs) are an important component of any legislative scheme designed to protect the use of animals in research, as they promote transparency and accountability in the research process. AECs are designed to bring a public voice to the research table. New South Wales (NSW) laws are a good example of this because they require both an independent person and a person with a demonstrated commitment to animal welfare to be a member of every research establishment's AEC.²⁶

²² *Animal Welfare Act 1992* (ACT) s 50 and *Animal Welfare Regulations 2001* (ACT) r 7; *Animal Welfare Act* (NT) s 41; *Animal Research Act 1985* (NSW) ss 13-16; *Prevention of Cruelty to Animals Act 1985* (SA) ss 23-25; *Animal Care and Protection Act 2001* (Qld) ss 52(2)(b) 73(3)(g); *Animal Welfare Act 1993* (Tas) s 30(2); *Prevention of Cruelty to Animals Act 1986* (VIC) s 28; *Animal Welfare Act 2002* (WA) s 9(1)(a).

²³ References to the Code include but are not limited to: *Animal Welfare Act 1992* (ACT) s 41(d) and *Animal Welfare Regulations 2001* (ACT) r 3; *Animal Welfare Act* (NT) s 48(d); *Animal Research Act 1985* (NSW) s 4 and *Animal Research Regulations 1985* (NSW) r 4; *Prevention of Cruelty to Animals Act 1985* (SA) ss 3 and 25(1)(a); *Animal Care and Protection Act 2001* (Qld) ss 49 and 91; *Animal Welfare Act 1993* (Tas) s 30; *Prevention of Cruelty to Animals Act 1986* (VIC) ss 25 and 26(2)(b); *Animal Welfare Act 2002* (WA) ss 6(b) and 8(b) and *Animal Welfare Act 2002* (WA) r 2 and r 5. Institutions that receive funding from the National Health & Medical Research Council (NHMRC) are required to certify compliance with the Code in addition to being subject to the applicable state/territory law in their jurisdiction. However these institutions only account for a proportion of those that use animals for scientific purposes. See: National Health & Medical Research Council 'Statement of Compliance', [10 March 2006] <<http://www.nhmrc.gov.au/ethics/animal/issues/index.htm#state>>.

²⁴ Above, n 15.

²⁵ *Animal Welfare Act 1992* (ACT) s 30; *Animal Welfare Act* (NT) s 34; *Animal Research Act 1985* (NSW) s 26; *Prevention of Cruelty to Animals Act 1985* (SA) s 19; *Animal Care and Protection Act 2001* (Qld) s 56; *Animal Welfare Act 1993* (Tas) s 30; *Prevention of Cruelty to Animals Act 1986* (VIC) s 26(2); *Animal Welfare Act 2002* (WA) s 11.

²⁶ The composition of AECs in New South Wales is drawn from the *Animal Research Act 1985* (NSW) and the Code. See: *Animal Research Act 1985* (NSW) s 13(5) and the Code, above n 12, clause 2.2.2.

In NSW, AECs are empowered to carry out the crucial task of evaluating research proposals submitted to their research establishment.²⁷ They must answer the threshold question of whether each research project is necessary. Unfortunately there are a plethora of factors which may affect whether this process produces *actual* benefits for animals. To cite a few examples; the quality of the research protocols provided for AEC members to consider; the willingness of AEC members to consider that material and voice their concerns; the depth of debate engaged in by AEC members about each research protocol and the individual philosophies held by the supposed animal welfare representatives.

In answering the question as to whether each experiment should take place, AEC members are encouraged to revert to a series of general principles set out in the Code.²⁸ Unfortunately these principles appear to be so heavily weighted towards ensuring the smooth functioning of a system which utilises animals, that most attempts to challenge the justification of an experiment would constitute an exercise in futility. For example, the introductory section of the Code suggests that an experiment may be justified if its aim is '*to improve animal management or production.*'²⁹ This facilitates the carrying out of research aimed at increasing productivity (the food and fibre produced by each animal). It also arguably serves as a platform for modern animal agriculture's obsession with genetic modification, viewed by some as a search for 'legless cows and featherless chickens.'³⁰

Other bases upon which scientific and teaching activities may legitimately be carried out according to the Code include '*to obtain and establish significant information relevant to the understanding of humans and/or animals,*' '*for the maintenance and improvement of human and/or animal health and welfare*' and '*for the achievement of educational objectives.*'³¹ These categories are so broad that it is hard to think of an example of an experiment that would not fall within them. The fact that the animal welfare and independent members of the AEC are required to deliberate within the confines of such principles clearly limits the extent to which they can meaningfully resist research proposals.

Furthermore, while the Code does seem to require a balancing of the predicted scientific/educational value of a project with its effects on animal welfare and even emphasises the need for 'particular justification' for potentially severe or ethically contentious procedures, it is difficult to see how animals could emerge victorious from this cost benefit analysis given the widespread faith in the current test model and the classification of animals as mere legal 'things'.³²

In addition to considering the justification for each research project, AECs must assess a detailed range of matters including the potential benefits of the project, the applicability of the principles of Reduction, Replacement and Refinement (The Three R's), the likely impact on the animals involved, the applicability of the proposed regime for monitoring the animals and the

²⁷ *Animal Research Act 1985* (NSW) s 14(1).

²⁸ *Animal Research Act 1985* (NSW) s 16 and the Code, above n 12, clause 1.1.

²⁹ The Code, above n 12, clause 1.1.

³⁰ D. Fraser, *The new perception of animal agriculture: Legless Cows, featherless chickens and a need for genuine analysis*, *J Animal Sci*, 2001, 79:634-641.

³¹ The Code, above n 12, clause 1.1.

³² Consider: Steven Wise, *Rattling the Cage: Towards legal rights for animals* (Perseus Books) 2000; Gary Francione, *Animals Rights & Animal Welfare*, 48 *Rutgers L Rev* 397 (1996) (discussing the classification of animals as legal things).

available procedures for preventing and alleviating distress.³³ Herein lies a further difficulty. Whilst the Code appears to be a comprehensive document, it prescribes principles as opposed to qualitative standards. The words *regularly*, *suitable*, *essential*, *adequate*, *wherever possible* and *necessary* appear frequently however they are never defined.³⁴ This has clear implications for enforcement of the Code, especially in 'borderline' cases. Furthermore, as AECs tend to work in isolation due to intellectual property and confidentiality issues, the malleability of the Code's principles raises the prospect of a serious lack of consistency in application. In NSW, a detailed site inspection process has been introduced to address this problem; however as discussed below, inspections should not be seen as a panacea.³⁵

AECs in New South Wales have a number of other notable responsibilities, which include conducting regular inspections of research animals and facilities.³⁶ AECs also have the power to terminate research and to call for the emergency care of animals.³⁷ They are assisted in their functions by the development of state departmental policies dealing with matters ranging from conflicts of interest to technical guidelines for animal health and welfare.³⁸

Notwithstanding the importance and scope of their functions, AECs remain largely unaccountable to the public due to the secret nature of much of their business and the sanctions that apply for breach of confidentiality. This creates a real likelihood of experiments being duplicated. It also makes the system more translucent than transparent as it means that only certain trusted members of the public are permitted to participate in the decision making processes that affect so many lives. In these circumstances, it is extremely difficult for an 'outsider' to accept that the system is working to protect the welfare of animals in any meaningful way.

2. *authorisation of research establishments and the role of the animal research review panel*

The legislative regime for the use of animals in scientific research in New South Wales has a second tier of public participation which takes the form of the Animal Research Review Panel (the Panel). Panel members are appointed by the NSW Minister for Primary Industries on the basis of nominations received from industry, government and animal welfare groups.³⁹ Of the twelve panel members, two are appointed as nominees of the Royal Society for Prevention of

³³ *Animal Research Act 1985* (NSW) s 16 and the Code, above n 12, clauses 2.2.16. In relation to the 'Three R's', see Russel & Burch, *The Principles of Humane Experimental Technique* (Methuen 1959) discussed in Section III(a) below.

³⁴ See the Code, above n 12, clauses 2.2.17, 2.2.29, 3.2.1, 3.3.1, 3.2.3, 3.3.5, 3.3.16, 3.3.38, 4.5.3, 4.5.7, 5.2.1 ('regularly'); 1.14, 1.17, 2.2.15, 2.2.40, 3.2.1, 3.3.28, 3.3.46, 4.4.12, 4.4.22, 4.4.25, 4.4.26, 5.2.1, 6.1.1, 6.1.2 ('suitable'); 1.1, 1.4, 1.11, 1.26, 2.2.1, 2.2.15, 2.2.42, 4.4.16, 4.7.1, 5.2.6, 5.8.1 ('essential'); 1.26, 2.1.1(xiv); 2.2.16(xiii); 3.3.27, 3.3.35, 3.3.41, 4.2.4, 4.4.4, 4.4.9, 4.4.16, 4.4.24, 4.5.3, 4.5.8, 5.4.4, 6.4.10, Appendix 1; Schedule 2 ('adequate'); 1.8, 1.27, 3.3.46, 5.2.2, 5.3.2, 5.9.5, 5.9.6 ('wherever possible'); 1.9, 2.2.6, 2.2.16(iii) and (vii), 2.2.117, 2.2.40, 3.3.14, 3.3.17, 3.3.18, 3.3.25, 3.3.29, 3.3.41, 3.3.44, 3.3.55, 3.3.67, 3.3.78, 4.3.5, 4.3.1, 4.4.19, 4.4.21, 5.1.1, 5.1.5, 5.2.1, 5.5.2, 5.7.1, 5.8.1, 6.2.2, 6.4.11, Appendix 1; Schedule 2.

³⁵ Refer to page 6 of this paper.

³⁶ *Animal Research Act 1985* (NSW) s 16 and the Code, above n 12, clause 2.2.29.

³⁷ *Animal Research Act 1985* (NSW) s 16 and the Code, above n 12, clauses 2.2.33.

³⁸ NSW Department of Primary Industries, Animal Research Review Panel New South Wales Annual Report 2003/04 (2005), 19. See also: Animal Ethics Infolink (NSW) [10 March 2006] <<http://www.animaethics.org.au>>.

³⁹ *Animal Research Act 1985* (NSW) s 6.

Cruelty to Animals and a further two, as nominees of the Animal Societies Federation (NSW), which is a coalition of animal rights and welfare groups.

The tasks of the Panel are broad in scope. However for the purposes of this article, the most significant are its role in evaluating applications for the accreditation of research establishments (including the specification of conditions of accreditation) and the opportunity for panel members to accompany departmental inspectors (who are qualified veterinarians) 'behind closed doors' on site inspections of research establishments.⁴⁰

The New South Wales method for conducting site inspections is based on methods used by the *Canadian Council on Animal Care and the Association for the Assessment and Accreditation of Laboratory Animal Care*.⁴¹ Site inspections, which tend to occur on a triennial basis, may take up to 2 weeks depending on the size of the institution, the number of sites involved and the type of research being conducted.⁴² There are three phases to the site inspection. Firstly, written material is provided by the institution to the site inspection participants. This material includes:

lists of research protocols considered by the AEC and also the people issued with research authorities, AEC minutes, the AEC annual report and records of inspections conducted, information about the procedures of the committee and the institutional policy on the committee's operation and decisions.⁴³

The second phase of the inspection involves a visit to the research institution to view its holding facilities and animals. Following the physical inspection, the inspection team attends a scheduled meeting of the AEC for the purpose of assessing its normal operating procedures and reporting on any issues of concern noted during the site inspection.⁴⁴ A meeting is also generally held with the head of the institution during the course of the inspection.⁴⁵

The final phase of the site inspection process involves preparation of a report by the inspection team. That report includes an evaluation of the AEC and an overall assessment of the well-being of the animals and their facilities amongst other issues.⁴⁶ The report may involve the identification of additional conditions to be placed on an institution's accreditation. It may also include non-compulsory recommendations for improved standards of animal care and management. Once the report has been considered by the Panel, it is sent to the institution and a written response is requested explaining the nature of the actions taken to implement the terms of the report. If concerns remain, the Panel may revisit an institution to assess the extent to which conditions have been implemented.⁴⁷

⁴⁰ *Animal Research Act 1985* (NSW) ss 10 and 19.

⁴¹ Lynette Chave, 'Audits of animal research institutions-the NSW experience', (2003) 'Animal welfare and animal ethics committees: where are the goalposts now?' *ANZCCART-Proceedings of a Conference held at the Gold Coast International Hotel, Queensland October 17-19, 2002*, Australian and New Zealand Council for the Care of Animals in Research and Teaching, 18-22.

⁴² Lynette Chave, above n 41, 2. See also: Animal Research Review Panel New South Wales Annual Report 2003/04, above n 36, 9 and 18.

⁴³ Animal Research Review Panel New South Wales Annual Report 2003/04, above n 38, 10.

⁴⁴ Lynette Chave, above n 41, 19; Animal Research Review Panel New South Wales Annual Report 2003/04, above n 38, 10.

⁴⁵ Lynette Chave, above n 41, 19; Animal Research Review Panel New South Wales Annual Report 2003/04, above n 38, 12.

⁴⁶ Lynette Chave, above n 41, 19.

⁴⁷ Animal Research Review Panel New South Wales Annual Report 2003/04, above n 38, 11.

The three-phase site inspection process is clearly an important component of a system of enforced self regulation because it makes research institutions more accountable to the government. Although the result is not a transparent system, the system does promote accountability and certain information about the process is available via the Panel's Annual Report, which is a publicly available document presented to the Minister for Primary Industries on an annual basis.⁴⁸

In summary, the concept of granting specified animal welfare advocates and independent persons a role in authorising and inspecting research institutions is important because it helps lift the veil of secrecy and the corresponding distrust which surrounds the activities of such institutions. Panel members who attend site inspections play a role in assessing and reporting back to the Department of Primary Industries (DPI), on the extent to which the relevant institution has complied with its accreditation conditions. While advocates for animals are rarely inclined to concede the necessity of animal research, some may agree that their nominees on the Panel give them a voice in the regulatory process. That voice may result in marginal improvements in the lives of those living behind laboratory doors today.

3. complaints and enforcement

Any analysis of a legislative scheme for animal research would not be complete without an assessment of whether the system has 'teeth'. Effective enforcement requires proper mechanisms for detecting breaches of the legislative scheme and a willingness to take remedial action, such as the suspension or revocation of research licenses or the prosecution of more serious offences.

The *Animal Research Act* establishes a formal complaints mechanism, which is triggered by the receipt of a written complaint to the Director-General of NSW DPI. Complaints may be made about independent researchers where animal research is carried out in the following circumstances: without appropriate authorisation; outside the terms of a research authority; without the approval or in contravention of the terms of the authority specified by the AEC; in contravention of the Code; for a purpose other than the previously specified research purpose; on animals obtained from an unlicensed supplier; or by a person that has been previously been 'disqualified' from obtaining a research authority or accreditation as a result of a conviction under certain provisions of the *Animal Research Act* or the *Prevention of Cruelty to Animals Act 1979* (NSW).⁴⁹ A complaint may also be triggered if the independent researcher is a director of a 'disqualified corporation' which is an establishment that cannot obtain accreditation to carry out research because it has been convicted of an offence under the equivalent provisions in the *Animal Research Act* or the *Prevention of Cruelty to Animals Act 1979* (NSW).⁵⁰

Where a person is carrying on any of the above activities on behalf of a research establishment, a formal complaint may also be made about that establishment.⁵¹ Additionally, a formal complaint about a research establishment may be lodged with the Director-General if: the

⁴⁸ For access to past Annual Reports of the Animal Research Review Panel, see: NSW Animal Agriculture, 'Animal Ethics Infolink' [11 March 2006] <<http://www.animaletics.org.au/reader/annualreports>>.

⁴⁹ *Animal Research Act 1985* (NSW) ss 22 and 28.

⁵⁰ *Animal Research Act 1985* (NSW) ss 17 and 28.

⁵¹ *Animal Research Act 1985* (NSW) s 22.

establishment does not have a duly constituted AEC; the establishment has not complied with a condition of its accreditation; or if the establishment is a 'disqualified corporation'.⁵²

The legislation provides that all complaints are to be referred to the Panel for investigation.⁵³ Following that investigation, the Director-General may take action to cancel or suspend the authority held by the subject individual or research establishment.⁵⁴ Alternatively, the Director-General may issue a caution or dismiss the complaint.⁵⁵ These sanctions are arguably too lenient, given that the circumstances giving rise to a complaint could cause pain, suffering or an excruciating death to a large number of animals. However any suggestion that the penalties under the complaints mechanisms are too weak, disregards the fact that certain activities giving rise to a formal complaint may be applauded if they were carried out in accordance with the procedures set out in the legislation. It also fails to consider that the prospect of suspension or cancellation of a research licence or accreditation may have a greater deterrent effect than the imposition of a fine, as the decision has clear and immediate personal and commercial implications for the individual or institution involved.

The ARRPs Annual Report for 2003-04 indicates that the Panel did not deal with any complaints during the relevant reporting period.⁵⁶ Although it is possible that the institutions regulated by the Act were fully compliant, 'perfect records' such as this lead one to query whether the complaints system is failing to detect breaches when they occur.

In addition to the formal complaints mechanism, the *Animal Research Act* creates a number of separate offences, which provide for the imposition of fines. These offences include the offence of: unlawfully carrying out animal research, unlawfully carrying on of the business of animal research,⁵⁷ failing to comply with inspection requirements,⁵⁸ obstructing inspectors in their duties,⁵⁹ giving false or misleading information under the Act,⁶⁰ and failure by a research establishment to keep records or to provide an annual report to the Director-General in the approved form.⁶¹ Significantly, the legislation provides a maximum penalty of 12 months imprisonment in relation to the first two of these offences.⁶²

The Director-General (or a person authorised by the Director-General) has the sole discretion to commence proceedings under the *Animal Research Act*.⁶³ Whilst this appears to be a consequence of the way in which the legislative scheme is structured and the fact that animals generally lack legal standing, it is clearly a limiting factor in enforcement, as the Act's sanctions will be rendered meaningless if there is little willingness to prosecute.⁶⁴ Proceedings under the Act have been commenced in relation to the supply of animals for research purposes, but not for

⁵² *Animal Research Act 1985* (NSW) ss 17 and 22.

⁵³ *Animal Research Act 1985* (NSW) ss 23 and 28A.

⁵⁴ *Animal Research Act 1985* (NSW) ss 24 and 28B.

⁵⁵ *Ibid.*

⁵⁶ Animal Research Review Panel New South Wales Annual Report 2003/04, above n 38, 19.

⁵⁷ *Animal Research Act 1985* (NSW) ss 46-47.

⁵⁸ *Animal Research Act 1985* (NSW) s 50.

⁵⁹ *Animal Research Act 1985* (NSW) s 53.

⁶⁰ *Animal Research Act 1985* (NSW) s 55.

⁶¹ *Animal Research Regulations 1995* (NSW) r 26(2).

⁶² Above, n 53. Under these provisions, individuals may face a fine, or imprisonment for twelve months or both.

⁶³ *Animal Research Act 1985* (NSW) s 57.

⁶⁴ Consider Cass R. Sunstein, 'Can Animals Sue?' (discussing the issue of legal standing and animals) in: Sunstein & Nussbaum, *Animal Rights: Current Debates and New Directions* (2004), Oxford University Press, chapter 11.

other matters.⁶⁵ In other models of enforced self-regulation (such as the Australian tax system) such low levels of prosecutions would raise serious questions about the adequacy of monitoring and enforcement. Given that animal research affect lives and not dollars in the first instance, I would argue that at the very least, these same questions should be asked.

III. IN SEARCH OF INTERNATIONAL NORMS

In the first part of this article, I argued that while the Australian system of enforced self-regulation for animal research is open to challenge, in theory it provides certain safeguards for laboratory animals. A number of these protective mechanisms are shared with regimes for regulating animal research in other industrialised countries. However there are notable disparities between legislative schemes regarding key issues such as the definition of 'animal', the functions and powers of animal ethics committees, opportunities for public participation and the mechanisms for monitoring and enforcement.

While the diversity of laws, cultures, traditions and religions inhibits the international harmonisation of animal research laws to some degree, certain principles have emerged which seek to define the responsibilities of researchers and institutions that carry out animal research.⁶⁶ The development of these principles has been facilitated by the burgeoning field of animal health and welfare and the globalisation of animal research. Both the scientific community and industry have been at the forefront of the development of these standards, motivated by changing public perceptions about animals and commercial incentives.⁶⁷

A. Emerging International Principles for the Use of Animals in Scientific Research

Although there is not yet an international treaty or declaration which sets out the principles for the use of animals in research, the following principles could be viewed as norms or 'best practice standards' as they appear in a number of international, regional and national legislative instruments and guidelines.⁶⁸ It should be noted that many of these principles are subject to the same deficiencies raised in the previous section of this article.

⁶⁵ NSW Agriculture, 'Complaints', Animal Research Review Panel Annual Report 1997/98, 25; Lynette Chave, Leader-Animal Research, Animal Welfare Branch, NSW Department of Primary Industries, *pers comm*, 13 March 2006.

⁶⁶ Consider: Council for International Organizations of Medical Sciences (CIOMS), 'International Guiding Principles for Biomedical Research Involving Animals (1985), (herein 'CIOMS Guidelines') [11 March 2006] <http://www.cioms.ch/1985_texts_of_guidelines.htm>.

⁶⁷ For example, the International Council for Laboratory Animal Science (ICLAS), was established on the initiative of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1956 to promote high standards of laboratory animal quality, care and health. Since that time, its goals have included promoting world-wide harmonisation in the care and use of laboratory animals and coordinating the development of laboratory animal science as a matter of priority in developing countries. The scientific members of ICLAS represent a diverse community of nations from South Africa to Thailand to the Baltic States. Consider: <<http://www.iclas.org/>>; Darian M. Ibrahim, above n 3, 8-9.

⁶⁸ This argument is based on a survey of the following instruments: *International Council for Laboratory Animal Science's International Guiding Principles for Biomedical Research Involving Animals* (1985), above n 66; *Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific*

Principle	Explanation
Justification for Research	Animals may be legitimately be used for the purpose of scientific research, where such research can be said to contribute to, inter alia, improved human and animal health. ⁶⁹
Reduction	Scientists should use the minimum number to obtain scientifically valid results. ⁷⁰
Refinement and Pain Minimisation	The suffering of animals should be reduced through procedural refinements such as the use of sedation, analgesia or anaesthesia or the provision of improved living conditions which minimise the distress of animals. ⁷¹ The species of animals used for scientific research should be carefully considered. ⁷²
Replacement	Scientists should be encouraged to adopt alternatives to the use of animals models such as mathematical models, computer simulation, in vitro biological systems clinical and epidemiological studies, microbiological studies and autopsy. Scientific researchers have an ethical duty to promote, research and endorse alternatives. ⁷³
Sentience	All animals should be considered sentient. Scientists should adopt a precautionary principle and assume that procedures that would cause pain in human beings cause pain in all species. On that basis, proper care of

purposes as amended by Directive 2003/65/EC (herein 'EU Directive'), *Official Journal L 358*, 18/12/1986 P. 0001-0028 <<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31986L0609:EN:HTML>>; the World Society for the Protection of Animal's Universal Declaration for the Welfare of Animals (2003), World Society for Protection of Animals, Universal Declaration for the Welfare of Animals (2000) (herein 'WSPA Declaration') [19 March 2006] <<http://ww2.wspa-international.org/action/declaration/index.html>>; The Code, above n 12; *Animal Welfare Act* 7 USC § 2132-2159 (2000).

⁶⁹ CIOMS Guidelines, above n 66, Basic Principles I and III; WSPA Declaration, above n 68, Articles 8(a); EU Directive, above n 68, Article 3; The Code, above n 12, clause 1.1-1.3.

⁷⁰ CIOMS Guidelines, above n 66, Basic Principle IV; EU Directive, above n 68, Article 7; WSPA Declaration, above n 68, Article 8(b); The Code, above n 12, clauses 1.9-1.13; *Animal Welfare Act* 7 USC § 2143(3)(b) (2000); Consider Darian M. Ibrahim, discussing Russel & Burch, *The Principles of Humane Experimental Technique* (Methuen 1959), and the implementation of the principle of replacement in the US Animal Welfare Act, above n 3, 4 and 14.

⁷¹ CIOMS Guidelines, above n 66; EU Directive, above n 68, Articles 5, 7 and 8; Basic Principle VII; WSPA Declaration, above n 68, Article 8(b); The Code, above n 12, clauses 1.14-1.28; *Animal Welfare Act* 7 USC § 2143(a)(3)(B) and (3)(C)(v) (2000); Consider Darian M. Ibrahim, discussing Russel & Burch, *The Principles of Humane Experimental Technique* (Methuen 1959), and the implementation of the principle of refinement in the US Animal Welfare Act, above n 3, 5 and 14.

⁷² CIOMS Guidelines, above n 66, Basic Principle IV; EU Directive, above n 68, Article 7(3); WSPA Declaration, above n 68, Article 8(b); The Code, above n 12, clauses 1.14-1.15.

⁷³ CIOMS Guidelines, above n 66, Basic Principle II; EU Directive, above n 68, Articles 7 and 23; WSPA Declaration, above n 67, Articles 8(c) and 8(d); The Code, above n 12, clause 1.9; *Animal Welfare Act* 7 USC § 2143(e)(3) and (3)(b) (2000); Consider Darian M. Ibrahim, discussing Russel & Burch, *The Principles of Humane Experimental Technique* (Methuen 1959), and the implementation of the principle of replacement in the US Animal Welfare Act, above n 3, 6-7 and 14.

Principle	Explanation
	animals and the avoidance or minimisation of pain and suffering should be considered an ethical imperative. ⁷⁴
Housing and Care	Animals kept for scientific purposes should be housed and cared for in accordance with certain minimum conditions of movement, food, water and care throughout their lives, although this does not absolve carers of their ethical duty to identify and implement higher standards. ⁷⁵
Qualifications and Training	Scientific procedures must always be carried out by qualified persons with appropriate experience in conducting procedures on animals. Training in humane animal care should be provided to both animal researchers and animal carers on an ongoing basis. ⁷⁶
National Obligations	<p>Each nation, or an appropriate tier of government within that nation should enact detailed legislation relating to the acquisition of research animals, the process of obtaining authorisation to carry out procedures or maintain animals for research purposes, transportation of animals, animal housing, environmental conditions, nutritional requirements, veterinary care and record keeping requirements applicable to each institution. In enacting such legislation, legislators should have recourse to current qualitative international standards.⁷⁷</p> <p>Each nation, or an appropriate tier of government within that nation should enact detailed legislation which provides for independent monitoring to avoid excessive or inappropriate use of research animals and to ensure appropriate care of animals for the entire period that the animal remains in the custody of a research institution. The provisions relating to monitoring should identify appropriate sanctions to be regularly enforced by a government inspectorate. Lay persons should be given a meaningful role in the monitoring process, possibly through the establishment of animal ethics committees.⁷⁸</p>

The following principles for the protection of animals in scientific research do not appear to be widely accepted by the international community at the time of writing; however they should also

⁷⁴ CIOMS Guidelines, above n 66, Basic Principle II; The Code, above n 12, 'Scope of the code', 1-2. Additionally, Principle 12 of the Declaration Of Helsinki refers to the fact that the welfare of animals used for research must be respected. See: World Medical Association 'Declaration Of Helsinki, Ethical Principles for Medical Research Involving Human Subjects', Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964 [19 March 2006] <<http://www.wma.net/e/policy/b3.htm>> (herein 'The Helsinki Declaration').

⁷⁵ CIOMS Guidelines, above n 66, Basic Principle X; EU Directive, above n 68, Article 5; WSPA Declaration, above n 68, Article 8(b); The Code, above n 12, Section 4, 33; *Animal Welfare Act* 7 USC § 2143 (2)(a) (2000).

⁷⁶ CIOMS Guidelines, above n 66, Basic Principle XI; EU Directive, above n 68, Articles 7 and 14; The Code, above n 12, clause 2.1.1(iii), 2.2.16(iii), 3.3.26, 3.3.45, 4.5.12, 5.2.7, 6.2.1(ii), 6.5.5(iv); *Animal Welfare Act* 7 USC § 2143(b)(5)(d) (2000).

⁷⁷ CIOMS Guidelines, above n 66, Special Provisions 2. This principle is incorporated to varying degrees in the legislative instruments surveyed and set out above, n 68.

⁷⁸ CIOMS Guidelines, above n 66, Special Provisions 3.2. This principle is incorporated to varying degrees in the legislative instruments surveyed and set out above, n 68.

arguably be incorporated into any international, regional, national legislation or codes of conduct that seek to regulate animal research.⁷⁹ Certain of these principles have been drawn from international legislative instruments concerning clinical research on human beings including the *Nuremberg Code (1947)*, the *Universal Declaration of Human Rights (1948)*, the *Declaration of Helsinki* and the *International Ethical Guidelines for Biomedical Research Involving Human Subjects*.⁸⁰

Principle	Explanation
Definition of animal	The protection offered by animal research legislation should be extended to all living creatures, or at least to all vertebrate animals. ⁸¹
Harmonisation of techniques	In order to avoid duplication of animal research, each nation should where practicable, recognise the results of research carried out in other nations and should certainly seek to facilitate data exchange within its own jurisdiction. ⁸² Each nation should also be willing to contribute to the international harmonisation of testing and training strategies.
Unlawful research	Each nation, or an appropriate tier of government within that nation should <i>at a very minimum</i> ensure that its animal research legislation prohibits certain types of animal tests. Examples of such tests include tests where the animal is likely to experience severe or ongoing pain, the draize test, ⁸³ the LD50 toxicity test ⁸⁴ any test which aims to determine the toxicity of a cosmetic, household or industrial preparation against a predetermined level of mortality. ⁸⁵ Serious consideration should also be given to prohibiting the use of animal

⁷⁹ It has been recognised that certain legislative instruments relating to animal research are in need of reform due to scientific developments and changing perceptions of animal welfare. For example the EU Directive is currently under review and is expected to be available in draft late in 2006. Certain of the principles identified in this section may be the subject of discussion when existing law and policy instruments are revised. See Europa, *Revision of Directive 86/609/EEC on the protection of Animals used for Experimental and other Scientific purposes*, European Commission 'Environment' [11 March 2006] <http://europa.eu.int/comm/environment/chemicals/lab_animals/revision_en.htm>; RDS, 'Revision of European Directive 86/609-an update', <http://www.rds-online.org.uk/pages/page.asp?i_ToolbarID=5&i_PageID=1994>.

⁸⁰ Consider: Nuffield Council on Bioethics, 'The ethics of clinical research in developing countries', Nuffield Council on Bioethics (1999), 7. [16 March 2006] <http://www.nuffieldbioethics.org/go/ourwork/developingcountries/publication_305.html>.

⁸¹ It is noted that the EU Directive covers all vertebrates, including free living larval and/or reproducing larval forms but excluding foetal or embryonic forms. EU Directive, above n 68, Article (2)(a); The Code does not refer to 'sentience' in its definition of an 'Animal' but the definition is comparatively broad, above n 17.

⁸² EU Directive, above n 68, Article 22.

⁸³ For example, the *Animal Research Act 1985* (NSW) ss 26(3) to (8) requires additional review and consent procedures to be complied with before research of this nature can proceed.

⁸⁴ *Ibid.*

⁸⁵ For example, the *Prevention of Cruelty to Animals Regulations 1997* (VIC) r 12(2) requires additional review and consent procedures to be complied with before research of this nature can proceed.

⁸⁶ Consider Darian M. Ibrahim, above n 3, 32-41 (discussing difficulties applying the 'Three R's' to new and emerging technologies; Some countries have sought to apply additional obligations on researchers involved in certain of these technologies, however an analysis of the merits of that approach is beyond the scope of this paper. Consider for example, the Code, above n 12, clauses 3.3.45-3.3.77.

⁸⁷ European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, opened for signature 18 March 1986 by member States and by the European Community and for accession by non-member States (entered into force 1 October 1991), Article 9.

Principle	Explanation
	<p>models in emerging fields of research such as stem cell research, cloning, xenotransplantation and bioterrorism defence on the basis (at least) that many of the emerging international norms in animal research are unlikely to be effectively applied to reduce the suffering of animals involved in these fields of research.⁸⁶</p> <p>If governments are not willing to prohibit such tests, they must ensure that a separate process for authorising such research has been established, to ensure greater scrutiny of the justification for the tests and the conditions in which they are to be conducted.⁸⁷</p>
Role of AECs	<p>AECs with clearly defined powers, should be established at institutional, local, regional or national levels to approve proposals for animal research on the basis of their scientific merit and ethical acceptability.⁸⁸ AECs should include equal numbers of researchers, veterinarians, animal welfare advocates and lay persons.⁸⁹ Regulatory authorities should promote uniform standards across committees within each country and should arrange for independent bodies to regularly review AEC performance and report any assessment to the public.</p>
Independence of AECs	<p>Whilst institutions have a responsibility to allocate sufficient resources to ensure that the AECs function properly, AECs must be independent of the applicant for animal research, the research sponsor or any other kind of undue influence.⁹⁰ All members of AECs should be required to declare any conflicts of interest they have in relation to any particular research proposal.⁹¹ Equally, any financial or other material benefit available to committee members for participating in the committee should not be contingent on the outcome of their review.⁹²</p>

B. The off Shore Phenomenon--Conducting Animal Research in Less Regulated Countries

For this purpose of this article, I have assumed that where scientific procedures in a researcher's home country are heavily regulated, there will be significant incentives to send that research offshore. Although I have not sought to identify particular instances of this phenomenon, the history of clinical testing serves as sufficient warning that individuals and corporations must be guided by specific principles when conducting research in developing countries that are more susceptible to unethical or exploitative research.⁹³ A failure to identify and impose such

⁸⁸ Consider Council for International Organizations of Medical Sciences (CIOMS Geneva), 'International Ethical Guidelines for Biomedical Research Involving Human Subjects, (2002), (herein 'CIOMS Human Subject Guidelines'), Guideline 2, <http://www.cioms.ch/guidelines_nov_2002_blurb.htm>.

⁸⁹ The Code, above n 12, clause 2.2.2.

⁹⁰ Adapted from The Helsinki Declaration, above n 74, principle 13.

⁹¹ Adapted from CIOMS Human Subject Guidelines, above n 88, guideline 2.

⁹² Ibid.

⁹³ The conduct of large scale trials in developing countries to see whether zidovudine (AZT) treatment for HIV infected women prevented perinatal transmission of HIV is discussed in: Nuffield Council on Bioethics, above n 80.

principles will expose animals in countries that lack animal protection laws to the prospect of intense suffering at the hands of the scientist. The kinds of principles that may be adopted can be broadly grouped into four categories.

1. funding obligations relating to animal ethics committees

Valid scientific and ethical review requires appropriately trained people and resources, which may be absent in many developing countries.⁹⁴ In relation to the ethics of clinical research in developing countries, the Working Party of the Nuffield Council on Bioethics stated that:

It is a fundamental ethical principle that those involved in research in developing countries, including research teams, pharmaceutical companies and governments, should not take advantage of the vulnerabilities created by the poverty or a lack of infrastructure and resources.⁹⁵

If one accepts that this ethical principle should apply to research involving all animals, it follows that any sponsor of research in a developing country ('external sponsor') should contribute sufficient resources to the ethical review process, to ensure that AECs are established and that participants in those AECs can conduct their duties in a meaningful and impartial manner.⁹⁶ Given that the receipt of funds from an external sponsor may raise questions about the ability of the AEC to perform its tasks independently, the costs of establishing and maintaining AECs should be directed to a central fund held by the local or national government in the host country and earmarked for the support of AECs. This proposal was raised by the Working Party of the Nuffield Council on Bioethics in the context of establishing ethical review committees for (human) healthcare in developing countries.⁹⁷ However it seems to me that it should apply equally to research involving animals in those countries.

In addition to the above, animal protection organisations and the research community should conduct programs to train and monitor those persons involved in AECs to ensure that their responsibilities are understood and carried out effectively. This would accord with the approach taken to developing capacity for the ethical review of human research in developing countries.⁹⁸

2. ethical review process

As an additional safeguard, where research is being conducted overseas, each research proposal should be reviewed by animal ethics committees in both the external sponsor's country and the host country.⁹⁹ The proposal should be scrutinised to at least the same ethical standards as apply

⁹⁴ Nuffield Council on Bioethics, above n 80, 5.

⁹⁵ Nuffield Council of Bioethics, 'The ethics of research related to healthcare in developing countries', The Nuffield Council on Bioethics (2002), 90. [19 March 2006] <http://www.nuffieldbioethics.org/go/ourwork/developingcountries/publication_309.html>.

⁹⁶ Consider Nuffield Council of Bioethics, above n 95, chapter 8. (discussing the ethical review of human research in developing countries).

⁹⁷ Nuffield Council of Bioethics, above n 95, 106-07.

⁹⁸ Nuffield Council of Bioethics, above n 95, 108-09.

⁹⁹ This principle was proposed by the Nuffield Working Party in relation to ethics committees established to review human research in developing countries. See: Nuffield Council of Bioethics, above n 95, 107.

in the external sponsor's country.¹⁰⁰ In relation to investigator's responsibilities for human subjects in developing countries, Marcia Angell's wrote in the *New England Journal of Medicine* that:

our ethical standards should not depend on where the research is being performed . . . the nature of investigator's responsibilities for the welfare of their subjects should not be influenced by the political and economic conditions of the region.¹⁰¹

This principle should apply equally to animal research.

3. funding obligations relating to animal management and care

The obligations of the external sponsor should not be limited to facilitating the functioning of a meaningful ethical review process. External sponsors should also be required to provide sufficient resources to ensure that research animals are managed and cared for in accordance with standards that are at least equivalent to those that apply in the external sponsor's country. This may involve making contributions to a general 'animal welfare fund' established for the purpose of providing sufficient animal housing, environmental conditions, nutritional requirements and veterinary care. The fund could also be drawn upon to train local animal care organisations.¹⁰²

4. 'home' government responsibilities

In addition to the principles set out above, where individuals and institutions would be required to seek approval for animal research if it were to be carried out in their own jurisdiction, legislative provisions should require 'home country' standards of care to apply as a minimum standard when that research is carried out overseas. Such legislation may take the form of 'report back' provisions to an appropriate government authority or an applicable AEC. Although ultimate responsibility for observing and applying a home country's standards lies with the researcher/institution involved, compliance could be facilitated if 'home country' legislation provided for research licences to be cancelled if minimum standards were found to be breached overseas. In the absence of a law to this effect, institutions may adopt this approach as a matter of policy, for ethical reasons and to ensure consistency in the quality of research being carried out in their name.¹⁰³

¹⁰⁰ Adapted from CIOMS Human Subject Guidelines, above n 88, guideline 3.

¹⁰¹ Marcia Angell, 'Investigator's responsibilities for human subjects in developing countries' (2002) 342 *New England Journal of Medicine* (13), 967-69, quoted in: Nuffield Council of Bioethics, above n 95, 89.

¹⁰² Adapted from Nuffield Council of Bioethics, above n 95, 106-07.

¹⁰³ A variation of this practice appears to have already been adopted by institutions in (at least) Australia. For example, the Animal Welfare Committee at Monash University in Melbourne, Australia has released a policy which states that 'When Monash University and an overseas institution are jointly involved in a research project involving animal use overseas, approval by a Monash University AEC is necessary before Monash University staff and research workers can proceed.' Monash University Animal Welfare Committee, 'Monash University Policy on the Conduct of Field Work; including Off-Campus, Overseas, and Collaborative Research Projects involving Monash University Personnel' (revised 14 September 2005) [19 March 2006]

<<http://www.monash.edu.au/research/ethics/animal/regguide/muawc.html>>; also consider 'Projects conducted in other countries in association with Australian institutions', the Code, above n 12, 2.2.45-2.2.46.

IV. CONCLUSION

Despite the increasing availability of alternative test models, millions of animals around the world today continue to be used for scientific purposes. Their suffering is often sanctioned by laws which condone the infliction of harm, subject to compliance with a range of requirements, responsibilities and general principles. In this paper I have suggested that while tight systems of regulation appear to reduce the suffering of animals within the context of ongoing research, each of these systems needs to be critically examined to determine their effectiveness as a means of preventing or reducing animal suffering.

I have also suggested that while there is substantial variation between national regimes for regulating animal research, certain international norms appear to be emerging. Some animal advocates would view the development of these principles as a backward step, on the basis that they entrench and legitimise the use of animals as research models. However this is not necessarily so, as international laws, like state laws, are subject to revision in accordance with our evolving community values and priorities. The Declaration of Helsinki, for example, has been revised five times since 1964, when it was first formulated.¹⁰⁴

There may also be a number of animal advocates who would be willing to support the adoption of these international principles on the basis that they are a step in the right direction. Despite their ethical opposition to animal research, these advocates would argue that in this current climate of fervent scientific endeavour, our best hope is to offer animals a little justice through the adoption of these international principles. That way we may find that next time we sit down at the table, either with our legislators or the scientific community, that our request to open the laboratory door a little further is regarded as a little less revolutionary.

¹⁰⁴ The Declaration of Helsinki was revised in 1975 in Tokyo, 1983 in Venice, 1989 in Hong Kong, 1996 in South Africa and 2000 in Edinburgh. A Note of Clarification on Paragraph 29 was also added by the WMA General Assembly in Washington 2002 and in Tokyo in 2004. See The Helsinki Declaration, above n 74.

AN ETHICAL CRITIQUE OF THE CANADIAN SEAL HUNT AND AN EXAMINATION OF THE CASE FOR IMPORT CONTROLS ON SEAL PRODUCTS†

ANDREW LINZEY*

SUMMARY OF MAIN POINTS

1. The Canadian seal hunt is the largest marine mammal hunt in the world. A total of 317,672 harp seals were landed during 2005, and over the past three years, nearly a million have been slaughtered (para 1.1).
2. In an attempt to justify the hunt, the Canadian Minister of Fisheries and Oceans claims that (1) the hunt is 'humane'. But a 2001 veterinary report concluded that the hunt results in 'considerable and unacceptable suffering', detailing 42 per cent of cases where there was not enough evidence of cranial injury to guarantee unconsciousness at the time of skinning, and 79 per cent of cases where sealers did not check to ensure that the seals were dead prior to skinning them (paras 2.3-2.5, 9.2).

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3. The Canadian Government cites a report that 98% of seals were killed in an 'acceptably humane' way. But any figure trying to show that the seals are killed humanely should calculate the time span between when they are clubbed or shot and when they die or lose consciousness, not the time between when they are shot and when they reach the sealing vessel (paras 2.8-2.13).
4. Basic principles of humane slaughter are violated by the hunt: neither 'immediate unconsciousness' nor 'non-recovery' can be 'guaranteed' or even, in most cases, regarded as likely. Both 'clubbing' and 'shooting' seals render the animals liable to high levels of suffering, and--other than in exceptional circumstances when a blow or shot renders the animals immediately unconscious--are inherently inhumane methods of killing (paras 2.36-2.37, 9.2).
5. The Minister claims that (2) the hunting of 'harp (whitecoat) and hooded (blueback) seal pups is strictly prohibited'. In fact, harp seals can be legally killed as soon as they begin to shed their white coats, at about 12 days after birth. Even though they have shed their white coats, they are still pups; the change is primarily cosmetic. Over the past five years, fully 96 per cent of the harp seals killed have been under three months of age (paras 3.1-3.6).
6. The Minister claims that (3) the hunt is 'closely monitored and tightly regulated'. In fact, the videotape evidence of the 2005 seal hunt reveals, *inter alia*, that seals are knifed opened without the required blinking reflex or skull palpitation tests having been administered, that many seals receive repeated blows to the head and body (including one case in which a seal received more than 20 blows), that animals are left unattended in obvious states of suffering, one trying to drag itself over the ice with blood streaming from its nostrils, and that some hooked seals are dragged over the ice whilst almost certainly conscious (paras 4.10-4.11, 9.3-9.4).
7. The Minister claims that (4) coastal communities rely on the hunt 'for their survival'. But while genuinely *subsistence* hunting *may* conceivably pass the test of necessity, it is impossible for *commercial* hunting to do so. And the annual Canadian seal hunt is a wholly commercial hunt, and is classified by the Government as a 'commercial quota'. Sealing is an economically marginal activity that could be easily replaced by the federal government (paras 5.2-5.7).
8. The Canadian Government regards seals as economic commodities. The 'official' government language used to describe the hunt consists of words such as: 'harvest' or 'harvesting', 'tools', 'resource', 'dispatch', 'replacement yield' all indicate a commodification of these marine mammals as if they were nothing more than lifeless or non-sentient resources here for us (paras 6.2, 6.5-6.10, 9.7-9.8).
9. The hunt is described as 'a . . . fishery'. The comparison is revealing since fish have little or no legal protection and are treated wholly as a resource. To place seals in the same category as other beings perceived almost wholly in economic terms and treated as fungible, disposable items is a serious category mistake. Seals are sentient and intelligent; they are highly developed social beings capable of experiencing intense pain and suffering (paras 6.4-6.7).
10. The Canadian Government is unreasonably partisan, and bears immense responsibility for failing to protect its own wildlife from cruelty. Government claims have been shown to be tendentious, misleading, or inaccurate. The magnitude of the suffering involved--almost a million animals during the past three years--is so great that action is now essential (paras 7.1-72, 9.9).
11. The Amsterdam protocol requires all European countries *to ensure animal protection*. Article 30 of EU regulations enables countries to take action on the grounds of 'public morality' and the Belgium Government has already banned seal products on this basis (paras 7.6-8.1). Under GATT and WTO, there is an exception to its free trade policy which states that embargoes could

be put into place in order to 'protect public morals', which has been understood historically as inclusive of animal welfare issues (paras 8.1-8.4).

12. There are strong legal and moral grounds for including animals within the GATT/WTO exception. These moral grounds are based on important philosophical considerations: animals, like children, cannot adequately represent themselves, cannot vocalise their own needs and depend upon benign representation. Moreover, they are also morally innocent, vulnerable and defenceless. They need protection within international trade agreements (paras 8.4-8.13, 9.11-12).

13. The Canadian Government should make the commercial seal hunt illegal. In the absence of action by Canada, other governments must act. Governments have to be made accountable by the international community for their support of cruelty. We know that trade bans work. When the EU banned the import of seal products in 1983, it had an immediate effect on the number of seals killed, down from 166,739 in 1982, to a record low of 19,035 in 1985 (paras 9.8, 9.10).

14. We urge governments to initiate bans on seal products as a matter of urgency based on the moral imperative to prevent unnecessary and prolonged suffering. The commercial hunt is devoid of moral justification (paras 9.5-9.6). There is no country in the world that accepts a definition of humane slaughter that includes being skinned alive (para 9.12).

I. INTRODUCTION

1.1 The Canadian seal hunt has been the subject of criticism since the middle of the nineteenth century, but it is only since the 1960s that it has become a focus of international controversy. Criticism has focused on the annual, commercial hunt of harp seals in the Gulf of St Lawrence. Both harp and hooded seals are killed in the course of the seal hunt, but harp seals have made up about 99 per cent of the seals killed during 2000 to 2005. The three-year quota, which ended in 2005, allowed 30,000 hooded and 975,000 harp seals to be killed. Figures indicate that a total of 317,672 harp seals were landed during 2005.¹ Over the past three years, nearly a million harp seals have been slaughtered. The Atlantic hunt is the largest marine mammal hunt in the world.

1.2 This document examines the putative justifications for the hunt and provides an ethical assessment.

1.3 On 17 March, 2005, the Canadian Minister of Fisheries and Oceans issued a statement titled: 'Canada's Seal Hunt: Beyond the Rhetoric'. 'Like the fishery', he argues, 'the annual seal hunt is an important industry and a time-honoured tradition for people in Canada's coastal

¹ The official source (ICES/NAFD) is provided in www.ifaw.org/ifaw/dimages/custom/2_Publications/Seals/sealsandsealing2005.pdf. See, Appendix 1, 'Quotas and Landed Catches of Harp Seals in Canada', p. 16. I refer to 'landed catches' because they are what the government reports after the hunt, i.e. the number of animals recorded 'landed' on sealing vessels or at the dockside--a count of pelts landed. But, of course, more animals are killed than are landed. Some are clubbed and shot, and not recovered ('struck and lost') and are therefore never 'landed'. Scientists attempt to estimate total kill by correcting landed catch statistics for animals struck and lost. They also attempt to account for seals taken incidentally in, for example, commercial fisheries. The total kill figures are used in population models to estimate local population size, replacement yields, and the like. So, when referring to the numbers 'killed' in the hunt, one needs to use the estimated kill and not the landed catch statistics, which underestimate the numbers of animals actually killed. I am obliged to Dr David Lavigne for this important qualification, which reinforces concern about the huge total number of kills involved in the hunt.

communities.’ Seals constitute ‘a valuable natural resource that provide income in remote towns and villages where few other opportunities exist’. He continues:

Unfortunately, this industry and its importance to thousands of Canadians are [sic] often misunderstood and clouded by misleading rhetoric and sensational images that tell a selective, biased and often false story about the seal hunt. The tragic result is that this industry, and the people who rely on it for a living, are undeservedly cast in a negative light by a few powerful organizations putting their own agendas ahead of the truth.

1.4 In an attempt to ‘set the record straight’, the Minister makes, *inter alia*, a number of claims:

1. The hunt is conducted in a ‘humane’ way.
2. The hunting of ‘harp (whitecoat) and hooded (blueback) seal pups is strictly prohibited’.
3. The hunt is ‘closely monitored and tightly regulated’.
4. Coastal communities rely on the hunt ‘for their survival’.²

1.5 These claims will be examined in turn.

II. FIRST CLAIM: THE HUNT IS HUMANE

2.1. The Minister maintains that to ‘prevent inhumane treatment, seals are killed quickly and according to strict regulations’. He elaborates:

Canada’s seal hunting methods have been studied and approved by the Royal Commission on Seals and Sealing, which found that the methods used in the seal hunt compare favourably to those used to hunt other wild animals, and those used to slaughter domestic animals--like cattle and poultry--for human consumption.³

2.2 Let us first focus on the methods of slaughter. According to the Marine Mammal Regulations (hereafter ‘MMRs’) that govern the hunt, the following may be used to kill (‘dispatch’) a seal:

a) *a round club* made of hardwood that measures not less than 60 cm and not more than 1 m in length and that, for at least half of its length, beginning at one end, measures not less than 5 cm and not more than 7.6 cm in diameter;

(b) *an instrument known as a hakapik*, consisting of a metal ferrule that weighs at least 340 g with a slightly bent spike not more than 14 cm in length on one side of the ferrule and a blunt projection not more than 1.3 cm in length on the opposite side of the ferrule and that is attached to a wooden handle that measures not less than 105 cm and not more than 153 cm in length and not less than 3 cm and not more than 5.1 cm in diameter;

(c) *a rifle and bullets* that are not full metal-jacketed that produce a muzzle velocity of not less than 1,800 feet per second and a muzzle energy of not less than 1,100 foot pounds [sic]; or

² ‘Canada’s Seal Hunt: Beyond the Rhetoric’, Commentary by the Minister of Fisheries and Oceans, Canada, March 17, 2005, pp. 1-2; see also www.dfo-mpo.gc.ca/media/statem/2005/20050317_e.htm (accessed 5.13.2005) (hereafter ‘Minister’s Statement’).

³ Minister’s Statement, pp. 1-2.

(d) *a shotgun* of not less than 20 gauge and rifled slugs.⁴

2.3 The most recent veterinary evidence showing the hunt is inhumane is from an independent, international team of five veterinary experts who studied the seal hunt in the Gulf of St. Lawrence (hereafter ‘Burdon’ or ‘the Burdon Report’) in 2001. The panel included experts in veterinary neurology and marine mammals, as well as a past chair of the Canadian Veterinary Medical Association (hereafter ‘CVMA’). The veterinarians studied the hunt from the air and from the ground, viewed videotape evidence, and performed random post-mortems on seal carcasses abandoned on the ice flows. The post mortem examination of 76 seal carcasses revealed that in 13 (17 per cent) there were no detectable lesions of the skull leading to the conclusion that these seals had been skinned whilst conscious. In 19 (25 per cent) of seal carcasses there were minimal fractures ‘including hairline or non-displaced fractures’ to moderate fractures. The latter is insufficient to render the animals fully unconscious, although it may be associated with some decrease of conscious awareness. Taken together these figures are the basis of the claim that up to 42 per cent of the 76 seals may have been skinned whilst conscious. The remaining 58 per cent of the carcasses indicated extensive fractures that would have been associated with some level of unconsciousness.

2.4 In addition, Burdon also examined the video footage obtained by the International Fund for Animal Welfare (hereafter ‘IFAW’) for the years 1998, 1999, and 2000. Their observations were as follows:

- a. The majority of hunters did not assess the level of consciousness prior to skinning or hooking; 79 per cent did not perform the ‘blinking reflex’ test (see paras 2.17 and 2.18) ‘indicating that many of these seals could have been skinned or hooked alive’.
- b. In ‘40 per cent of cases (32 per cent of the clubbed seals and 92 per cent of the shot seals) the hunter returned to strike the seal for a second time’ with an ‘average time to second strike of 27 seconds’. That means that the seals were alive and suffering at least until they were struck the second time, or until they received a blow that rendered them unconscious.
- c. Only 6 per cent of the seals struck were bled immediately and the ‘average time from initial strike to bleeding was 66 seconds’. Even the seals in this small, rather privileged, group, unless the first blow induced immediate unconsciousness, may still have been conscious--and experiencing pain to some degree--for more than one minute.
- d. Eighteen seals were observed being skinned and ‘on average this occurred 60 seconds after the initial strike’. It is ‘uncertain’ how many had been bled or had ‘a level of consciousness checked to ensure that they were not skinned while conscious.’

2.5 These facts reveal that the seals often experience a slow death preceded by suffering. The Burdon Report concluded that the hunt ‘is resulting in considerable and unacceptable suffering’.⁵

⁴ Section 28 of the Marine Mammal Regulations (hereafter ‘MMRs’); my emphases. See <http://laws.justice.gc.ca/en/F-14/SOR-93-56/118970.html#rid-119056>. These are the legal weapons. In practice, illegal weapons are also used. These include gaffs (long wooden pole with boathook on the end), handmade hakapiks that do not fit the regulation size and weight, and shotguns and rifles of inadequate gauge. All of this has been documented in video evidence, and is found in direct testimony from sealers obtained through access to freedom of information laws in Canada, see <http://www.gan.ca/campaigns/seal+hunt/factsheets/sealers+testimony.en.html>.

⁵ R. L. Burdon, J. Gripper, J.A. Longair, I. Robinson, and D. Ruehlmann, *Veterinary Report, Canadian Commercial Seal Hunt, Prince Edward Island, March 2001*, for classifications of consciousness see p. 7, observations from video

2.6 Supporting the Burdon Report are two earlier studies, which also show that a high percentage of seal carcasses examined did not have enough cranial injury to guarantee unconsciousness when skinned. The Simpson Report in 1967 found that 56 of 154 examined skulls (36.4 per cent) had not been fractured, and the Jordan Report in 1978 similarly found that 7 of 13 examined skulls (53.8 per cent) had unfractured crania.⁶

2.7 In the light of this, the question might not unnaturally be asked: on what grounds can the Canadian Government claim that the hunt is ‘humane’? The answer is that it relies on a study by Dr Pierre-Yves Daoust, a veterinarian from the Atlantic Veterinary College, and four other veterinarians (hereafter ‘Daoust’ or ‘the Daoust Report’) also of the same year. It concluded that ‘the majority of seals taken during this hunt (at best, 98% in the work reported here) are killed in an acceptably humane manner’.⁷

2.8 At first sight, the two sets of findings appear irreconcilable. As Dr David Lavigne comments: ‘People who are concerned about the humaneness of Canada’s commercial seal hunt are either left confused by the seemingly contradictory claims of experts, or are forced to choose between two apparently disparate opinions’. But, as Lavigne points out, on closer examination it transpires that the confusion arises because of the *different criteria* adopted by each study. Whereas the Burdon Report:

addresses the question of whether seals were likely [to have been] conscious or unconscious at the time they were skinned, using post-mortem examination of skulls, in marked contrast, the figure cited from the Daoust *et al.*’s report represents *the number of seals clubbed or shot that were brought on board sealing vessels while still conscious*. That number ignores any and all animal suffering that occurs between the time animals are clubbed or shot until they eventually reach a sealing vessel, usually on the end of a hook or gaff.⁸

2.9 It is difficult to understand why the Daoust Report did not set out to assess the issue of consciousness immediately subsequent to the act of intended killing, especially since this has been the most canvassed issue in public debates. In addition to this extraordinary oversight, it is also difficult to account for some other aspects of the study.

2.10 The first relates to the fact that the sealers knew that they were being observed. Daoust conducted the study on board a sealing vessel in the presence of DFO (Department of Fisheries and Oceans) enforcement officers when sealers knew not only that they were being observed, but also the uses to which such observations would be put. Daoust accepts that the presence of observers ‘may have incited sealers to hit the seals more vigorously’.⁹ If this were true, it would mean that less seals, or a smaller percentage, would be skinned alive when the hunters were

footage see p. 9, and for conclusion see pp. 1 and 13; see also http://www.ifaw.org/ifaw/dfiles/file_95.pdf, pp. 1-36 (hereafter ‘The Burdon Report’).

⁶ See E. Simpson, ‘Seal hunting in the Gulf of St Lawrence’, *Nature*, 1967, 214:1274, and W. J. Jordan, ‘The Killing of the Harp Seal Pups, 1978’ (Report following an investigation, 7-12 March, in the Magdalen Islands during the annual seal hunt), RSPCA (April 1978), see especially, pp. 3-7.

⁷ Pierre-Yves Daoust, A. Crook, T. K. Bollinger, K. G. Cambell, and J. Wong, ‘Animal welfare and the harp seal hunt in Atlantic Canada’, *Canadian Veterinary Journal*, September 2002, 43(9), pp. 687-694, see also <http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pmcentrez&artid=339547>, pp. 1-13 (accessed on 5.13.2005) (hereafter ‘The Daoust Report’). The reference is to the abstract, p. 687 in original, and p. 1 on the net. Future page references are to the net version.

⁸ David M. Lavigne, ‘Canada’s Commercial Seal Hunt is Not “Acceptably Humane”’ (hereafter ‘Lavigne’s Analysis’), IFAW, January 2005, p. 1; my emphases.

⁹ The Daoust Report, p. 8; Lavigne’s Analysis, p. 2.

being observed than would occur when the seals were hunted in the absence of observers. Even with observers, the numbers of seals skinned alive is unacceptable from a humane or moral point of view.

2.11 But the significance of observers goes further than this. As Lavigne points out, an observer's presence 'has the potential to modify other sealing practices, including checking for a corneal reflex and bleeding animals immediately after clubbing'.¹⁰ Given such a potentiality, it is difficult to understand why Daoust did not utilise (as did the Burdon Report), the method of conducting post-mortem examinations of carcasses during unobserved periods of killing. In addition, Daoust appears to make no allowance for the possibility of distortion of usual practice due to observation. It cannot be known whether the Daoust study reflects the usual method of killing of seals when there is no observer (see paras 4.6-4.9).

2.12 Secondly, according to the MMRs, sealers should check that each seal is unconscious before proceeding to hook or bleed it, and before killing another. In reviewing videotaped evidence provided by IFAW during the 2001 hunt, the Daoust Report accepts that

Most hunters . . . failed to palpate the skull or check the corneal reflex before proceeding to hook or bleed the seal, or go to another seal. Some sealers claim that they can feel the collapse of the calvarium as they strike the seal. *Nonetheless, the presence of an incompletely crushed skull in 14% of seals killed with a hakapik and the occasional occurrence of live seals being hooked and brought on board should justify a more diligent adherence to either of these 2 simple tests.*¹¹

2.13 But this admission of the failure of sealers to secure unconsciousness in 14 per cent of videotaped cases means that the conclusion in the abstract of the Daoust Report--namely, that 98 per cent are killed 'acceptably humanely'--is inaccurate or misleading. Whilst it may be true that Daoust found, according to its own criteria, that the 'majority of seals taken during *this* hunt [that is, the one observed] (*at best*, 98% in work reported here) are killed in 'an acceptably humane manner', it does not follow--as claimed by the Canadian Minister that 'virtually all harp seals--fully 98 per cent--are killed in a humane manner.'¹²

2.14 Thirdly, and in the same vein, the Canadian Minister referred to the Daoust Report as the report 'issued' by the CVMA as if it were an official report. This inference is bolstered by the reference in the abstract to the report being compiled by 'representatives of the Canadian Veterinary Medical Association'.¹³ But, in fact, as the Report itself indicates 'the views expressed in this article are those of the authors and do not constitute the official position of the CVMA'. It is therefore misleading to suggest, as Canadian Government sources do, that 'non-governmental associations such as the Canadian Veterinary Medical Association (CVMA) have also found that the large majority of seals taken during the seal hunt (98%) are killed in an acceptably humane manner' since no such collective judgment has been made by the CVMA. In fact, the report cited by the Canadian Government actually says '*at best* 98%' (that is, 'up to') which logically covers any eventuality from zero to 98 per cent. The attempt here to inflate the significance of one report, whilst failing to mention others, betokens partiality.

¹⁰ Lavigne's Analysis, p. 2.

¹¹ The Daoust Report, p. 10; my emphases.

¹² Minister's Statement, p. 2; my emphases.

¹³ Minister's Statement, p. 2, see also Lavigne's Analysis, p. 1.

2.15 We need now to turn directly to the issue of ‘humaneness’. The Daoust Report notes that since the prohibition on the commercial killing of ‘whitecoats’ (seal pups begin to moult shortly after weaning at about 12 days), and ‘bluebacks’ (young hooded seals, which do not shed their newborn coat until they are approximately 15 months old), ‘beaters’ (young harp seals, approximately 3-4 weeks old, that have completely shed their white coats) now constitute the bulk of the hunt. As Daoust acknowledges, these animals ‘are more wary than whitecoats and far more likely to move away and go into the water at the approach of sealers. Therefore, killing by fracturing the skull with a hakapik has become less practical, and sealers now often rely on shooting the animals with a rifle from their vessel.’¹⁴ These observations have obvious relevance to assessing the relative ‘humaneness’ of the hunt, especially shooting (see paras 2.25-2.30).

2.16 We need to begin by offering a definition of ‘humane killing’. The standard definition for vertebrates is the immediate inducing of unconsciousness, usually by means of the delivery of sufficient energy to the brain, which renders the animal insensible to pain. This definition is now accepted world-wide and is embodied in legislation in many countries. The United Kingdom Government maintains, for example in relation to whales, that the ‘aim must, as with the slaughter of terrestrial animals, be to render a whale immediately insensible to pain, and for its subsequent death to occur without avoidable pain, stress, or suffering. It is accepted that this is unlikely to be achievable in 100% of cases, but we would not wish to define as acceptable anything that falls short of this standard.’¹⁵

2.17 The question is: does seal hunting constitute ‘humane slaughter’ as defined above, namely the securing of immediate unconsciousness? In relation to the first method of killing, namely clubbing, the answer is almost certainly negative. The reasons are both physiological and practical. As the Burdon Report observes, in theory a blow to the brain stem is the most efficient way of killing a mammal, but the

brain stem in mammals is the most highly protected part of the central nervous system. It is located ventrally within the calveria, beneath the cerebellum and overlying skull. Furthermore, in seals, flexion of the neck places a thick layer of blubber over the base of the skull. Therefore, the only target area available in a seal is the skull overlying the cerebral cortex. Delivering a blow to this area and the underlying cortex is a much less efficient way of rendering an animal unconscious.¹⁶

2.18 The salient point is that even a ‘large blow to the cerebral cortex is unlikely to result in immediate brain stem herniation’ (that is, a rupture of the brain stem resulting in unconsciousness and/or death). Theoretically it *could*, and *might* do so (given optimum conditions), but--and this is the crucial point--*it cannot be relied upon* as a method of delivering immediate unconsciousness. For this reason, the Burdon Report concludes that clubbing (and shooting) ‘should be viewed as stunning methods *only*, producing a *potentially* temporary loss of consciousness’.¹⁷

¹⁴ The Daoust Report, p. 2.

¹⁵ As shown by the correspondence between High North Alliance and the UK Commissioner to the International Whaling Commission, concerning the UK position on humane killing standards, 21 March, 1995 at <http://www.highnorth.no/Library/Ethics/th-uk-po.htm>. The only exception allowed to this rule is religious slaughter, which has been opposed by the Government’s Farm Animal Welfare Council (hereafter ‘FAWC’) for this reason, see note 27 below.

¹⁶ The Burdon Report, p. 4.

¹⁷ The Burdon Report, p. 4; my emphases.

2.19 The question therefore arises: can clubbing--even though it cannot be relied upon as a reliable method in most cases of securing unconsciousness--nevertheless be justified as a means of stunning prior to slaughter? It is at this point that we encounter the *practical* grounds for concluding that clubbing is not a humane method of killing. In order to secure anything like humane killing, two further procedures must be carried out on each individual animal. The first involves using one of two tests to determine consciousness: the so-called 'blinking reflex' test or checking by palpation of the skull. Since it is very difficult to determine loss of consciousness through observation alone--because one cannot easily distinguish between voluntary and involuntary movement--the Burdon Report emphasises that it 'must be assumed that all movement seen could be due to conscious voluntary muscle activity until the corneal reflex has been checked.' Thus, the test must be performed *immediately* after clubbing, and, if necessary, followed by a further blow, or blows, to the head. Secondly, having determined stunning or temporary loss of consciousness, 'death should be completed by exsanguination (bleeding out)'. Burdon is clear that this action must be performed 'before the hunter is able to move on to the next seal'.¹⁸

2.20 Taken as a whole, there are a series of separate, practical steps that must be performed in order to secure humane slaughter or, more likely, to approximate it:

- * The seal's brain stem must be clubbed with precise accuracy, and with exactly the right amount of force, in order to render the animal fully unconscious.
- * In order to assess whether that has happened one of the two tests (above) for determining consciousness must be performed.
- * If that test indicates continuing consciousness then the seal has to be clubbed again.
- * Regardless of outward signs, the animal should be bled out immediately to ensure that consciousness is not regained.

2.21 It is important to emphasise that all these actions in relation to each seal need to be performed *before the sealer moves on to another*.

2.22 We have to consider how likely it is that sealers will faithfully and conscientiously operate these procedures *while they can see other seals slipping away from them into the water, and hence being unable to capture them, or in a context where other sealers and different sealing vessels will be competing for the same 'resources'*. Is it really likely that these procedures will be conscientiously followed when doing so may result in a loss of kills and therefore economic disadvantage?

2.23 To that question must be added other considerations. Sealers necessarily work in adverse conditions, that is, in freezing, below zero temperatures, on ice that is often unsteady or slippery, where one false move can result in a potentially life-threatening situation--for example--falling into freezing water and suffering hypothermia. Even in optimum conditions (when the animal is immobilised and in good weather) it would be difficult to guarantee securing the one blow that would render the animal immediately unconscious, but in adverse conditions, particularly when the sealers themselves get tired or suffer from muscle fatigue, the chances are considerably reduced. The adverse factors may be summarized as follows:

- below zero weather conditions;
- slippery, unstable and unsteady ice;

¹⁸ The Burdon Report, p. 5.

- tiredness and/or muscle fatigue (because of the fast rate of clubbing);
- the target animal is frequently moving and trying to escape;
- the round club is sometimes covered with blood which makes it slippery to hold and difficult to achieve a precise blow, and the
- need for quick immobilisation of one seal in order to prevent another escaping.

2.24 When these considerations are taken into account, it must be questioned whether the chances of humane slaughter in these circumstances can be anything other than remote. The point to be grasped is that these uncertainties should logically count *against* the use of animals in these circumstances. The more unlikely it is that anything like ‘humane slaughter’ can be approximated, the stronger the moral argument against it.

2.25 We need now to turn to the second principal means of killing seals, namely shooting. It is sometimes thought that shooting, perhaps because it appears more aesthetic than clubbing, must therefore be more humane, and it is true that an expert marksman can shoot a stationery target with great precision. But the word ‘stationery’ here indicates the nature of the problem. The harp seal pups are moving targets. The pups, the ice they lie on, and the vessels from which the sealers shoot are all moving, making it extremely difficult for a sealer to kill a seal with one bullet. Sealers loathe shooting seals more than once, and the reason is straightforward enough: the main purchasing plant deducts two dollars from the price of the pelt for every additional bullet hole. However understandable that rule may be from an economic perspective, it can only mean in practice that sealers have an economic incentive to leave wounded seals to suffer. Seals that are swimming are an even more difficult target, bobbing up here and there, and capable, especially when young, of swift movement. Even the ice is not static, since it moves up and down, as well. These considerations mean that securing a shot to the head, and thus a ‘clean’ kill, sufficient to induce instantaneous unconsciousness, is remote. It is much more likely that a seal would be shot somewhere in the body and wounded. In addition, there is the issue of recovering the wounded bodies from the water. Normally this is done through gaffing or hooking and, unless the animals concerned are dead or wholly insensible, this procedure alone must induce considerable pain and suffering.

2.26 The Daoust Report maintains that of the 47 carcasses it examined, 35 (75 per cent) had been shot in the head ‘with the skull and brain completely destroyed’. But this surprising finding needs to be placed against its admission that: ‘At the Front in 1999, all seals examined by Daoust and Wong were shot from vessels or small speed boats, and most of them had been killed *by the time the observers arrived on site*’.¹⁹ This leaves open the possibility that such killing was not immediate, or that there might have been subsequent shots to the head after the seals had been landed on the vessels. *In either case, Daoust admits that 25 per cent had not been killed by a shot to the head: ‘six (13%) animals had been shot in the neck, and three (6%) animals had been shot in the ventral region of the neck with destruction of soft tissues, including major blood vessels, but no bone fracture, and the remaining three (6%) animals had been shot in the thorax or abdomen’.* Apparently, one of the latter ‘was found alive by itself on an ice floe and was immediately killed with a hakapik by a DFO officer’.²⁰

2.27 The claim in the abstract of the Report that the ‘large majority of seals taken during this hunt (at best, 98% in work reported here) are killed in an acceptably humane manner’ makes one

¹⁹ The Daoust Report, p. 6; my emphases.

²⁰ The Daoust Report, p. 7.

wonder what meaning is being given to the words ‘*acceptably* humane manner’. Acceptable to whom?--one might ask. A killing rate in which at least 25 per cent do not die instantaneously, but suffer anything from a few seconds to minutes of considerable agony is not ‘acceptable’ by conventional standards of slaughter. If such were the record of a veterinarian in professional practice, the individual would most likely be liable for prosecution under anti-cruelty legislation.

2.28 The Burdon Report says that any method for killing a seal that does not allow for the process of ‘stunning, checking and bleeding’ as detailed above ‘has an enormous potential to create suffering and is therefore unacceptable’. It continues:

As this process cannot be consistently followed in open water, we consider that shooting seals in open water can never be humane. Any method of taking a seal which requires the seal to be recovered by gaffing or hooking before the process can be followed, can never be humane.²¹

2.29 Again, it is worth listing the practical considerations that militate against the possibility of shooting as a method of ‘humane slaughter’. These include:

- below zero weather conditions;
- unstable vantage point for shooting, that is, usually from a moving vessel sometimes in uncertain waters;
- the quick movement of the seals when in water, and hence little time for preparation or precision with regard to aim;
- the need for a consistently high level of marksmanship in order to secure a head shot;
- the need to recover the dead or wounded animal--sometimes at a distance--by gaffing or hooking;
- the inevitable time delay between shooting an animal and its recovery, a delay made worse by the fact that scores, even hundreds, of seals have to be recovered, and
- the inevitability of some wounded animals being left to die in open water.

2.30 Again, the important point to be grasped is that the unpredictability of these factors must logically count *against* the killing of animals in these circumstances. Unsurprisingly, the Burdon Report refers to the ‘tremendous lack of consistency in the treatment of each seal’.²² The point about ‘consistency’ is not a trivial matter. The slaughter of large numbers of mammals requires uniformity and consistency in order to ensure the highest possible standards. Killing without uniformity and consistency means that animals are rendered liable to unnecessary suffering.

2.31 Here we go to the very heart of the problem: inconsistency, or arbitrariness, in the manner of death, and the degree of suffering caused, is an *inherent* feature of the Canadian seal hunt--inherent because it derives from the nature of the hunt itself, the methods of killing involved, and the uncertain circumstances in which the killing is pursued.

2.32 The Minister maintains that the Royal Commission found that ‘the methods used in the seal hunt compare favourably to those used to hunt other wild animals, and those used to slaughter domestic animals--like cattle and poultry--for human consumption.’²³ That view overlooks a number of important considerations. The first is that many wild animals in Canada are trapped

²¹ The Burdon Report, p. 1.

²² The Burdon Report, p. 1.

²³ Minister’s Statement, pp. 1-2.

for their fur in leghold traps that undoubtedly cause prolonged suffering--so much so that the use of such traps is illegal throughout the European Union (EU). Comparing the killing of seals with fur-bearing animals killed in traps is hardly a reliable indicator of humane treatment.

2.33 Secondly, the Daoust Report similarly refers to the slaughter of beef cattle in the United States, and notes how its putative 98 per cent rate of 'acceptably humane killing' for seals compares well with lesser percentages for cattle.²⁴ But one wonders why a *veterinary* Report should want to engage in such special pleading since few would want to defend the variable, and highly controversial, cattle slaughter practices in the US, as indicated by the research by Dr T. Grandin.²⁵ And the comparison with poultry is even more revealing since laws in Canada relating to poultry transportation and slaughter are poorly enforced at national level, and there are no laws regulating the treatment of birds at the farm level. And there are, astonishingly, no national welfare laws for poultry in the United States.²⁶ Comparisons, in short, are being made with the worst, or even the non-existent.

2.34 Thirdly, while conventional slaughter is often unsatisfactory and can render animals liable to suffering, it should be acknowledged that, despite the poor record of Canada (on poultry especially) and the United States (on cattle and poultry especially), many governments have worked progressively to improve slaughterhouse conditions during the last twenty years, based on increasing evidence of animal sentience. The most recent is the detailed and thorough Report of the Farm Animal Welfare Council (hereafter 'FAWC') of the British Government, which makes no less than 308 recommendations concerning slaughterhouse practices in relation to animal welfare.²⁷ This is not to imply, however, that conditions in Britain are ideal or anything approaching it; it is simply an example of how welfare standards in abattoirs can, if there is sufficient government support, be considerably improved in all countries.

2.35 While no-one should be complacent about conventional slaughter--and all should recognise that slaughter at speed invariably compromises even the most effective methods--it is important in formulating comparisons to compare best with best, or rather, like with like. According to Dr Ian Robinson, a British member of the 2001 international veterinary panel: 'The Canadian Government insists that the seal hunt is an animal production industry like any other. They say that it might not be pretty, but basically, it is just like any abattoir except on the ice. But we found obvious levels of suffering which would not be tolerated in any other animal industry in the world.'²⁸

²⁴ The Daoust Report, p. 10.

²⁵ T. Grandin, 'Welfare of cattle during slaughter and the prevention of nonambulatory (downer) cattle', *Journal of the American Veterinary Association*, 2001; 219, pp.1377-1382.

²⁶ See Karen Davis, 'Birds used in food Production' in Andrew Linzey (ed), *Animal World Encyclopaedia*, Kingsley Media, forthcoming 2005 (hereafter 'AWE').

²⁷ *Report on the Welfare of Farmed Animals at Slaughter or Killing, Part 1: Red Meat Animals*, London: FAWC, June 2003 (hereafter 'FAWC Report'), see especially, pp. 54-63. It should be noted that FAWC is not an animal welfare organisation *per se*, but a government advisory committee whose members are selected by the government of the day and comprise, *inter alia*, individuals from the meat and farming industries. For its opposition to religious slaughter on scientific and welfare grounds, and its recommendation that the exemption be repealed, see pp. 32-36. The Report is an impressive and comprehensive attempt to improve all aspects of the handling and slaughter of farm animals. See their website: <http://www.fawc.org.uk/>. It is much to be regretted that the British Government have not accepted and acted on all its recommendations.

²⁸ Dr Ian Robinson, cited at <http://www.ifaw.org/ifaw/general/default.aspx?oid=82078>.

FAWC Report, p. 2, para 8.

2.36 Thirdly, the ‘basic principles’ of conventional slaughter, as the FAWC Report insists, must involve ‘an effective process which induces immediate unconsciousness and insensibility or an induction to a period of unconsciousness without distress, and [the] guarantee of non-recovery from the process until death ensues’.²⁹ It is precisely these ‘basic principles’ that are violated by the seal hunt: neither ‘immediate unconsciousness’ nor ‘non-recovery’ can be ‘guaranteed’ or even, in most cases, regarded as likely. Both ‘clubbing’ and ‘shooting’ seals render the animals liable to high levels of suffering, and--other than in exceptional circumstances when a blow or shot renders the animals immediately unconscious--are inherently inhumane methods of killing.

2.37 We can say with confidence that clubbing and shooting render seals more liable to suffering than is the case with conventional slaughter. That is the only logical conclusion from the evidence. The Burdon Report, which examined the widely divergent degrees of damage inflicted on the craniums of dead seals, found that the ‘current methods and competency of clubbing is significantly inaccurate in location, resulting in severe and unacceptable suffering’, and again: there is ‘utmost concern regarding the severe suffering occurring in seals who have no lesions of the cranium, as well as those having fractures felt not sufficient to render the seal unconscious’.³⁰ In other words, clubbed seals are subject to procedures, including handling, dragging across the ice, bleeding out and skinning, while they are still conscious and capable of feeling pain.

III. SECOND CLAIM: SEAL PUPS ARE NOT KILLED

3.1 We now turn to the second claim that the hunting of ‘harp (whitecoat) and hooded (blueback) seal pups is strictly prohibited’. By itself, that might imply that it is--or always has been--contrary to Canadian Government policy to allow the killing of whitecoats. Closer examination suggests otherwise. Pressure for change emanated not from inside government circles but outside them. In fact, it was the decision in 1983 by the EU to ban the import of products made from ‘whitecoat’ harp and ‘blueback’ hooded seal pups that led to a rethink of the issue. In 1987, the Royal Commission recommended that the killing of these very young seal pups be prohibited on the grounds that ‘the hunt is widely viewed as abhorrent both in Canada and abroad’.³¹ In 1993, the MMRs were amended to prohibit the trade in whitecoat and blueback seal pups in order to prevent the killing of these seals.

3.2 At face value, these developments might suggest that seal pups are not now killed as they once were. But, in fact, harp seal pups can be legally killed as soon as they begin to shed their white coats, around 12 days after birth. Hooded seals (which constitute only a small fraction of the number hunted) can be killed when they shed their blueback pelt at about 14 months of age. Products from the slaughter of whitecoat harp and blueback hooded seal pups are covered by the EU ban, but not others.

3.3 The Canadian Government maintains that ‘Only weaned, self-reliant seals are hunted after they have been left by their mothers to fend for themselves . . . The vast majority of harp seals

²⁹ FAWC Report, p. 2, para 8

³⁰ The Burdon Report, p. 8.

³¹ A. H. Malouf, *Seals and Sealing in Canada*, Report of the Royal Commission (hereafter ‘The Royal Commission’), 3 Vols (Ottawa: Supply and Services Canada, 1987), Vol. 1., recommendation 2, p. 40.

are taken after more than 25 days of age'.³² In fact, according to the Canadian Government's own official seal landing reports, the majority of the seals killed over the past five years have been less than one month of age, and a large percentage of those have been under 25 days old (see para 3.6). Not only is the Canadian Government's statement inaccurate, it obscures the fact that the seals that are killed are, biologically, very young animals. While it is true to say that the killing of pre-weaned, that is nursing pups are not killed, it is untrue to say that seal pups are not killed. What is correct is that whitecoats and bluebacks are no longer killed. But, while all whitecoats and bluebacks are pups, all pups are not whitecoats and bluebacks. Moulting or moulted harp seal pups--ragged jackets and beaters, respectively--are, of course, pups. If we use the analogy of dogs, any young seal (in the first three months of life, for example) is still a 'pup', especially in a species that takes 4-6 years to reach sexual maturity, and has a life expectancy of 30 years.

3.4 In reality, in the case of the overwhelmingly most hunted seal, namely the harp, the advance is minimal--morally speaking. Two, ten, or fifteen more days of life is surely a welcome thing, but *morally speaking* it makes little or no difference whether seals are killed at 12 or 25 days old. Where seal pups are being sheltered by their mothers (and are more difficult to slaughter as a result), and where they are slaughtered in full view of them, it is possible that the mother seal endures an emotional trauma of some kind since only a few days before she had been carefully nursing and caring for her young. But the moral objection to killing and inflicting suffering is not wholly altered by these considerations. It is certainly pathetic to slaughter young life, and it is a relevant moral consideration if the mother seals also suffer, but the distance of a few days alone does not render one form of sealing licit and another illicit. At best, the moral gravity of sealing may be slightly ameliorated in the former case, but nothing more.

3.5 The Royal Commission accepted the widespread abhorrence at killing weaning seal pups and maintained that the 'resulting public protest cannot be effectively countered by any technical arguments about the facts of the issue'.³³ This suggests that it judged that the protests were entirely governed by emotional considerations--so much so that rational considerations could not prevail against them. While it is true that issues relating to animals do arouse significant emotional responses (as do most of the important moral issues of our day), it is a mistake to suppose that concern for animals is simply a matter of emotion, or, even worse, that moral judgments are simply emotional ones. There are solid rational grounds for extending moral solicitude to other species capable of suffering--indeed, it is morally inconsistent not to extend even the most basic considerations to similarly sentient species (see paras 8.10-8.11). This holds whatever age the sentient being may be.

3.6 In short: some reading the Minister's statement might erroneously conclude that seals are not killed at a very young age, whereas, in fact, developments in recent years have caused the goal posts to be slightly moved, but little else. The changes in fact are largely cosmetic--no longer do we see red splashes of blood on white fur, but whatever the colour of the fur--the moral issue remains the same. That seal pups continue to be killed is abundantly clear by an analysis of the total allowable catch (hereafter 'TAC') and the landed catch (hereafter 'LC') since 1971. In 1971, the TAC was 245,000 of which the LC 210,579 were pups, and 20,387 were one year or

³² 'Atlantic Canada Seal Hunt: Myths and Realities', Fisheries and Aquaculture Management, Department of Fisheries and Oceans Canada, at www.dfo-mpo.gc.ca/seal-phoque/myth_e.htm (accessed 5.13.2005) pp. 1-2 (hereafter 'Myths and Realities').

³³ The Royal Commission, p. 38.

more old, making a total of 230,966, of which 91 per cent of the seals killed were pups. In 2005, the LC was 317,672 of which 98.5 per cent were pups under two months of age. Apart from a drop in the numbers of seals killed especially acute during 1985-87 (due to the EU ban on seal imports), it is clear that--over a period of more than 30 years--the rate of killing has actually increased, and that the overwhelming percentage of seals killed are still under less than a year--no less than 97 per cent in 2004--itself an increase of 6 per cent (91 per cent) on 1971.³⁴

IV. THIRD CLAIM: THE HUNT IS TIGHTLY REGULATED

4.1 The third claim is that the hunt is 'closely monitored and tightly regulated'. Even if more seal pups are killed, the argument is that there are now regulations in place that prevent unnecessary suffering.

4.2 That a practice is tightly regulated does not, by itself, morally justify that activity. One could conceive, for example, that burglary might be regulated, according to certain codes (devised by burglars themselves), but that does not by itself make the practice justifiable. The impression is given that any cruelty that might take place is somehow an aberration or contrary to the rules, but what our analysis so far has made clear is that the methods of killing are themselves invariably inhumane.

4.3 But the possibility should be faced: can the activity of sealing, however inhumane, be ameliorated by regulation?

4.4 The Burdon Report argued that since the Canadian Government 'has indicated that sealing will continue indefinitely' that certain steps should be taken to ensure that a more 'reliable and consistent procedure' be adopted for killing which could 'significantly reduce the present level of suffering'.³⁵ The measures proposed include the process of stunning, checking and exsanguination as indicated above. The relevant MMRs are as follows:

28. (2) Every person who strikes a seal with a club or haka-pik shall strike the seal on the forehead until its skull has been crushed and shall manually check the skull, or administer a blinking reflex test, to confirm that the seal is dead before proceeding to strike another seal.

(3) If a firearm is used to *fish* [sic] for a seal, the person who shoots that seal or retrieves it shall administer a blinking reflex test as soon as possible after it is shot to confirm that it is dead.

(4) Every person who administers a blinking reflex test on a seal that elicits a blink shall immediately strike the seal with a club or haka-pik on the forehead until its skull has been crushed, and the blinking reflex test confirms that the seal is dead.

³⁴ The data is compiled from official kill reports from Canada's Department of Fisheries and Oceans. Source for 1971 quota is from *The Atlantic Seal Hunt: A Canadian Perspective*, Department of Fisheries and Oceans, pp. 1-24; for 1972-91 figures from ICES C.M. 1992/Assess 5. Table 10 (includes a number of preliminary figures); and figures for 2004 from Dawn Pearcey, Department of Fisheries and Oceans, Pers. Comm. See also note 1 for source of 2004 statistics.

³⁵ The Burdon Report, p. 1.

29. No person shall start to skin or bleed a seal until a blinking reflex test has been administered, and it confirms that the seal is dead.³⁶

4.5 The Burdon Report held that these or similar procedures *could* ameliorate the suffering caused. But, it is worth noting that, at the same time, the Report was emphatic that ‘the existing regulations are neither respected nor enforced’. What evidence is there that they are currently observed?

4.6 The MMRs (rightly) state that if a sealer clubs a seal, he must ensure that the seal is dead prior to moving on to the next. But if a sealer shoots a seal, he has only to kill the seal ‘as soon as possible’. This allows sealers to legally immobilise many seals to prevent them from escaping by shooting at them from boats, and only later going back to kill each one in turn. The point to be grasped is that, as they exist today, the MMRs provide a legal framework under which sealers can cause unnecessary suffering to seals.

4.7 The Canadian Government claim that ‘The hunt is closely monitored’. It is true that officers of the DFO monitor the commercial seal hunt, in an attempt to ensure that sealers adhere to the MMRs. But commercial sealing in Canada is conducted by thousands of individuals, on hundreds of small vessels, over hundreds of miles of open ocean. When hunting, sealers move far away from the boats in many different directions on skidoos, in small boats (skiffs), and on foot. In 2003, the Charlottetown *Guardian* printed DFO estimates of their expenditures on the monitoring of fisheries, and it showed that monitoring of the seal hunt was second to last on their list of priorities, receiving only 1.5 per cent of their funds for petrol hours.³⁷

4.8 Moreover, in 2005, the DFO seal hunt coordinator for the Gulf of St Lawrence stated that his Department assigns one enforcement officer for every seven vessels (one officer to monitor seventy to eighty sealers, all working in different areas). These officers gain access to the hunt by helicopter, and are easily identified by sealers when they approach. In the ‘Front’ (the area of northeast of Newfoundland where the bulk of the hunt is conducted), enforcement officers are unable to gain access to the hunt by helicopter because it occurs so far offshore, on very broken up ice. Thus, the only way for enforcement officers to monitor the hunt is by travelling to the area on coastguard patrol vessels. These vessels are large icebreakers, and monitoring the activities of thousands of individual sealers on hundreds of small boats from such a vessel would be practically impossible. According to the DFO, other observers do occasionally monitor the hunt from sealing vessels, but they do not have enforcement powers, and appear to be monitoring for catch numbers rather than humane considerations. Also, given that each sealing vessel holds fewer than 12 crew members, sealing boat captains are loath to sacrifice berths. All these considerations tell against the claim that there is adequate, let alone ‘close’, monitoring of the hunt.

4.9 Confirmation of the practical impossibility of regulating the hunt has been provided, unwittingly, by a group seeking to prove the opposite. Another veterinary report--this time the result of a Working Group composed of Dr Daoust, senior author of the previous Daoust Report, and eight other veterinarians (hereafter ‘Daoust2’) was published as recently as August 2005. It aims to ‘minimize or eliminate animal suffering within the context of the hunt’,³⁸ but it

³⁶ MMRs, Section 28 (C); emphasis.

³⁷ *The Guardian* (Charlottetown), 20 January, 2003, A4.

³⁸ Charles Craguel, Alice Crook, Pierre-Yves Daoust, J. Lawrence Dunn, Stéphane Lair, Alan Longair, Joost Philippa, Andrew Routh and Alison Tuttle, A Report of the Independent Veterinarians’ Working Group on the Canadian Harp Seal Hunt, *Improving Humane Practice in the Canadian Harp Seal Hunt* (prepared by BL Smith

acknowledges, *inter alia*, the following problems even within the existing system of regulation (many of which we have already noted):

- * ‘Many sealers were trained to use three blows’. Because of this, the Group believes that the emphasis ‘should be placed not on the number of blows, but on achieving the destruction of the whole skull. . . .’³⁹ But this admission is revealing since *repeated* blows cannot, by definition, be humane as recognised by the Burdon Report. By implication it follows that regulated hunting performed by ‘many’ sealers is not humane.
- * ‘The Group noted that many IFAW video clips show hunters who did not bleed animals after stunning and before hooking and skinning’.⁴⁰ This means that Daoust2 accepts that some hooking or skinning whilst alive is possible, even likely. More to the point, *since this happens under existing regulations*, it follows that they are obviously not effective.
- * The hunt ‘involves a large number of boats competing with each other to maximize their take of an open quota, over an extensive area, in a relatively short period of time’.⁴¹ It recommends that the DFO implement ‘measures to reduce competitiveness and haste in the hunt’. But what confidence can there be in a system, and in the very same agency, which has already failed to protect animals - especially when it is later acknowledged that

Groupwork, August 2005) (hereafter ‘Daoust2’), p. 2. There are some welcome recommendations in the Report, notably that ‘a seal should not be shot in the water, or in any circumstances when it is possible the carcass cannot be recovered’ (p. 2) which should logically exclude all shooting from boats. Also, the recommendation that ‘confirmation of irreversible loss of consciousness or death should be done by checking by palpation that the skull is crushed rather than checking the absence of corneal (blink) reflex’ (p. 2) is probably sound given the widespread ignorance of the importance of the other test. But there are a number of disquieting aspects to the Report. First, the Group met with sealers, industry representatives, government managers, and scientists for a day and then spent two days ‘in camera’ to formulate their recommendations (p. 2). We are told that four representatives of the sealing industry ‘made presentations on the industry, past, present and future, as well as hunting methods’, and that ‘information was provided about the social and economic importance of the seal hunt to coastal communities’ (p. 6). The Group apparently viewed ‘video clips’ from IFAW, but met no animal welfare professionals or scientists, or humane officials, or heard the detailed moral critique that can be made of sealing. This does not suggest an even-handed approach to the issue. Second, the Group concluded that ‘if carried by a trained and skilled individual, a three-step method of stunning, checking and bleeding seals *can result in rapid, irreversible loss of consciousness, and death*, and thus can be a humane process’ (p. 2; my emphases). The word ‘if’ is doing a lot of work in this sentence. It is precisely because the ‘ifs’ *cannot be relied upon* that the process cannot be claimed as ‘humane’. Moreover, the standard definition of humane killing has been revised here--it departs from the FAWC definition of the British Government which requires ‘immediate unconsciousness and insensibility, or an induction to a period of unconsciousness without distress and [the] guarantee of non-recovery from this process until death ensues’ (see para 2.36). There is an obvious difference between a ‘rapid’ and ‘instantaneous’ unconsciousness. It is difficult to avoid the conclusion that the Group has revised the definition for its own ends. Third, the Group claims that ‘perception of the seal hunt seems to be based largely on emotion’ (p. 5) which suggests that the Group does not know the difference between ‘emotional’ and ‘ethical’ considerations. Again (even worse): ‘Campaigns and rhetoric that play to emotion at the expense of understanding and communication of factual information will neither increase the use of humane methods nor reduce animal suffering’ (p. 6) which (again) conveniently overlooks the ethical issue, and presents one side of the argument in a pejorative way. All becomes clear, however, when we reach the end of the paragraph: ‘It is not the Group’s intent to enter into the discussion about whether or not there should be a hunt’ (p. 6) --in other words, it doesn’t intend to actually address the central issue about moral justifiability. Ethicists have learnt to be wary of reports that make prescriptions whilst not actually or adequately addressing the ‘moral issue’.

³⁹ Daoust2, p. 8.

⁴⁰ Daoust2, p. 10.

⁴¹ Daoust2, p. 11.

the ‘DFO appears to lack sufficient dedicated capacity to monitor and enforce regulation of the hunt, especially at the Front’?⁴²

* Daoust2 says: ‘DFO officers are often resident in the small communities that have social and economic links to the seal hunt. The Working Group believes that [the] DFO should consider bringing in officers from outside communities who are not faced with monitoring and potentially laying charges against friends and neighbours’. Unsurprisingly, Daoust2 admits that ‘there may be an element of conflict in [the] DFO being both an advocate for the seal hunt and its regulator’.⁴³ Quite so.

* The Group recommends increased training and ‘professionalism’ among sealers’ organisations. But it noted that the training video ‘did not provide the trainees with a good sense of why and how this [the corneal reflex test] was carried out’.⁴⁴ This admission is astonishing. It means that trainee sealers are not being provided with an adequate understanding of one of the two tests of consciousness. It later says so explicitly: the Group ‘does not believe that the corneal reflex, or more specially its absence, is well understood by those involved in the seal hunt’.⁴⁵ Once grasped, the implications in terms of animal suffering are alarming. It means that sealers have been killing seals without an adequate understanding of how to judge whether they are unconscious prior to hooking and skinning. This makes a mockery of sections 28, (2), (3), (4), and 29 in the MMRs as detailed above (see para 4.4).

* But there is one further point that is even more disturbing: it is the explicit acceptance by the Working Group that the recommended three-step process (stunning, checking and bleeding) cannot in practice be satisfactorily regulated and is, in any case, inevitably subject to delay. Daoust2 says that some members of the Group judged that bleeding out should be a requirement of the MMRs, ‘making it an offence not to bleed a seal before hooking and skinning’ (at present the requirement is only to check for unconsciousness). But ‘other members’ (presumably the majority view since there is no recommendation on bleeding before skinning) felt that ‘*worker safety and the difficulties presented by the natural environment in which the hunt takes place were considerations that could make such a regulation difficult to apply, specifically in relation to hooking a seal*’.⁴⁶ Daoust2 comments that ‘*it may be difficult for hunters to accept the need to wait a period of time after cutting the axillary [sic] arteries, before hooking the seal to bring it back to the boat, or continuing with the skinning process. [It should be noted that the initial cuts required for bleeding are the same as those that are used for skinning]*’.⁴⁷ But--and this goes to the heart of the debate about the ‘humaneness’ of the hunt--*if bleeding out (which all veterinarians agree is essential in order to ensure non-recovery from what is in most cases likely to be only temporary unconsciousness) cannot be guaranteed, or even made subject to enforceable regulation, then it must logically follow that at least a proportion of seals are being subject to gross cruelty by being skinned alive*. The Group says that ‘All members of the Working Group feel that sealers should make every effort to ensure

⁴² Daoust2, p. 14.

⁴³ Daoust2, p. 14.

⁴⁴ Daoust2, p. 15.

⁴⁵ Daoust2, p. 16.

⁴⁶ Daoust2, p. 10; my emphases.

⁴⁷ Daoust2, p. 10; my emphases.

that a seal is bled before hooking and skinning'.⁴⁸ But making 'every effort' and 'guaranteeing' are different things.

* It is alarming that a group of veterinarians should fail to grasp this--the most basic consideration of all, since however awful some slaughterhouse practices may be there is none in the world that allows killing by being skinned alive. It really will not do for Daoust² to say that sealing '*can be* a humane process'⁴⁹--self-evidently, if unconsciousness cannot be *guaranteed* before skinning, it cannot be.

4.10 The latest, and clinching, evidence is provided by the Humane Society of the United States (hereafter 'HSUS') in the form of videotapes of the 2005 seal hunt, which show dramatically that the current regulations are not observed. They reveal, *inter alia*, that seals are knifed opened without the blinking reflex or skull palpitation tests having been administered, repeated blows to the head and body of many seals (including one case in which a seal received more than 20 blows), animals left unattended in obvious states of suffering, one trying to drag itself over the ice with blood streaming from its nostrils, and some hooked seals dragged over the ice whilst almost certainly conscious. As anticipated, when sealers find a group of seals they hit out on all sides, trying to immobilise as many as possible before some escape. The video evidence demonstrates that the claim that the hunt is 'tightly regulated' is empirically false.⁵⁰

4.11 Dr Mary Richardson, a Canadian expert in humane slaughter, and past chair of the Animal Welfare Committee of the Ontario Veterinary Medical Association and the Animal Care Review Board with the Solicitor General of Ontario, reviewed the HSUS evidence and commented:

Among other things, the videos show seals that have been battered with a club or hakapik, and then left, or hooked and dragged, or skinned while still alive. The tapes show many of the wounded seals are still conscious and struggling for prolonged periods, as evidenced by their voluntary movements (crawling, crying out, laboured breathing, rolling, etc). In some scenes, seals with terrible head injuries are left in stockpiles of dead and dying animals, choking on their own blood and suffering tremendous pain--some for as long as 90 minutes. In others, sealers cut open seals that are clearly still conscious.

These are not humane ways to die as defined by the criminal code of Canada. When clubbing seals, sealers are legally required to kill each animal and then ensure that it is in fact dead, before moving on to kill the next one. But the vast majority of times, the sealers do not take time to do this, which results in horrendous pain and suffering for the wounded animals. . . . The cruelty documented by the HSUS this year is not the extreme--it is the routine of the commercial seal hunt.⁵¹

4.12 At least three things are required for improvement through regulation. First, there needs to be the laws or legally backed regulations. Second, there needs to be adequate enforcement and, third, there has to be compliance. As is clear from the HSUS and IFAW videotapes over the past

⁴⁸ Daoust², p. 10; my emphases.

⁴⁹ Daoust², p. 2; my emphasis. The confusion is evident from the wording of the Report: the 'summary' says that bleeding is 'an important element' (p. 3), whereas it is later described as 'essential' (p. 7).

⁵⁰ The 2005 Seal Hunt Footage, 23 mins, compiled and distributed by the HSUS. The video evidence is important because, without it, it is possible to entertain a sanitised version of the hunt in which scrupulous care is taken to avoid suffering. In fact, the 2005 footage shows that even while being filmed the sealers adopt a remarkably cavalier attitude both to the suffering of the seals and to the legal regulations.

⁵¹ Mary Richardson, 'The horror of the seal hunt', *National Post*, 9 June, 2005, A20.

years, many sealers do not comply with the regulations. Without compliance and enforcement, laws and regulations can have no impact at all.

4.13 In short: while in theory the worst aspects of the hunt could be ameliorated through strengthened regulations, logic and experience show that the enforcement of those regulations, let alone compliance, is a practical impossibility. Questions arising from this fact need to be weighed carefully. If more than 30 years of high profile campaigning, expressions of international concern, videotape evidence, veterinary reports, an EU ban, and the promulgation of Government-backed regulations have not been able to ameliorate the cruelty of sealing, what reasonable hope can there be for the observance of regulations in the future? In the words of the well-known axiom: 'the best indicator of future action is past behaviour'. Since the sealers depicted in the videotapes are, we may presume, mostly experienced sealers (those who, according to the rules, must instruct apprentices to hunt), what chance is there that they will teach practices fundamentally at variance with their own? How reasonable is it to suppose that such an entrenched, even culturally validated tradition, will be amenable to fundamental change? And, even more directly, how likely is it that such changes will take place when, in the overwhelming majority of cases, sealing is, and must inevitably remain, an essentially unobserved activity? These considerations suggest that the chances of regulations being more closely followed are as remote as the chances of humane killing by shooting and clubbing.

V. FOURTH CLAIM: HUNTING IS FOR SURVIVAL

5.1 The fourth claim is that Canadian coastal communities rely on the hunt 'for their survival'. This is certainly the nearest that the Government comes to providing a moral justification for the hunt. The question is: can the claim for moral necessity be substantiated?

5.2 Attitudes towards the exploitation of animals are usually tempered by concerns for native people and their cultures. It is sometimes assumed that the use of animals by aboriginal people can be justified for the purposes of subsistence and for cultural reasons. If 'subsistence' is defined as 'using wildlife locally for food, clothing, and shelter, and for making tools, rather than putting wildlife products into trade',⁵² then, it *may be* that the moral test as detailed above can be met--at least in utilitarian terms. But the difficulty is that defenders of 'subsistence' hunting are seldom satisfied with that definition, and invariably want to push it to include commercial trade. Indeed, as Lavigne notes, at the 1985 meeting of the Convention on International Trade in Endangered Species in Buenos Aires, 'subsistence' hunting was redefined by Canada as 'anything that turns an animal into "hard cash"'.⁵³

5.3 But while genuinely *subsistence* hunting may conceivably pass the test of necessity, it is impossible for *commercial* hunting to do so. And we must be clear that the annual seal hunt is a wholly commercial hunt. This can be demonstrated by the Canadian Government's own figures which detail the annual hunt as a 'commercial quota', as distinct from 'personal quotas' (killing

⁵² David M. Lavigne, Victor B. Scheffer and Stephen R. Kellert, 'The evolution of North American attitudes toward marine mammals' in J. R. Twiss Jr., and R. R. Reeves (eds), *Conservation and Management of Marine Mammals* (Washington and London: Smithsonian Institution Press, 1999), p. 37. See also, D. M. Lavigne, 'Canada's leghold leg-pull', Guest Editorial, *BBC Wildlife*, March, 1989, p. 133, and 'Rights and wrongs: should indigenous peoples have different 'rights' to hunt wildlife, including endangered species, and to trade in wildlife products?', Taking Issue, *BBC Wildlife*, November 1997, pp. 36-37, 40.

⁵³ Lavigne *et al*, in *Conservation and Management of Marine Mammals*, p. 37.

of seals by residents adjacent to sealing areas throughout Newfoundland and Quebec) including 'subsistence' use by aboriginal peoples and non-aboriginal coastal residents who reside north of 53° N latitude--the latter of which are able to hunt without a licence.⁵⁴ Thus, even if we are persuaded that some subsistence sealing can be justified (and not all ethicists would be so persuaded, especially if there is suffering involved), we can be sure that such use is entirely distinct from the commercial, Atlantic hunt.

5.4 The problem is compounded, however, because over the past decades, successive Canadian governments have strategically hidden non-aboriginal commercial wildlife slaughters behind a veil of native subsistence hunting. In order to combat the increasing unpopularity of fur, the industry and the Canadian Government were advised as early as 1985 to utilise 'contradictory emotional themes of interest to the same target publics, e.g. preservation of traditional indigenous cultures'.⁵⁵ In fact, less than two per cent of aboriginal people in Canada are involved in commercial trapping of animals for fur. Yet, Canadian governments and the fur industry primarily defend the fur trade as vital to aboriginal culture and economy. It is an effective, but entirely bogus, strategy and one that is used for the sealskin trade as well.

5.5 Canada's Inuit population continues to hunt small numbers of harp--most of their seal hunting (arguably for subsistence purposes) concentrates on another seal species, the small northern ringed seal, *Phoca hispida*. However, it is non-native fishermen from Canada's east coast who almost entirely conduct the commercial hunt. Demographical considerations make the reason obvious. There is little aboriginal participation in Canada's commercial seal hunt off the coasts of Newfoundland and Labrador, and in the Gulf of St Lawrence. Early European settlers killed off the indigenous Beothuck population in Newfoundland--one of the earliest recorded, and most tragic, examples of genocide. Consequently, there are few aboriginal people living in Newfoundland today. Although about one third of Labrador's population is aboriginal, there are very few seals hunted commercially in the area. In fact, the statistics indicate that aboriginal people could have taken less than one per cent of the total harp seal kill in 2005.⁵⁶

⁵⁴ 'Frequently asked questions about Canada's seal hunt', Fisheries and Aquaculture Management, Department of Fisheries and Oceans Canada, at www.dfo-mpo.gc.ca/seal-phoque/faq_e.htm (accessed 5.13.2005), p. 2 (hereafter 'FAQ').

⁵⁵ *Defence of the Fur Trade*, a discussion paper prepared by the Department of External Affairs, Canada (May 1985), p. 9. I am grateful to Dr David Lavigne for this reference. See also the discussion in Andrew Linzey, *Animal Gospel* (Louisville, Kentucky: Westminster John Knox Press, 1998), pp. 116-122.

⁵⁶ The figure is arrived at by the following calculation. The Canadian Government states in the Atlantic Seal Hunt 2003-2005 Management Plan, section 6.6.1 (Equitable Allocation): 'DFO continues to be supportive of Aboriginal efforts to hunt seals commercially. This plan provides an allocation for Labrador sealers to hunt harp seals commercially. There is also an allocation for harp seals for the Canadian Arctic, as sealing for this species has been limited in recent years'. According to the official DFO kill report in 2005, no harp seals were taken in the Arctic, while 7594 were killed in Labrador. Seal kill reports are not recorded by ethnicity of sealers. Thus, to determine how many seals were killed by aboriginal people in Canada's commercial seal hunt, we have had to make some demographic assumptions. Approximately one third of the population of Labrador is of aboriginal ethnicity. In the absence of data from the DFO, it is reasonable to assume that one third of commercial sealers operating in the Labrador area are aboriginal. Also that one third of the seals killed in Labrador would be taken by aboriginal sealers. If these assumptions are correct, of the 7,594 seals killed in 2005 in the Labrador quota, 2,531 would have been killed by aboriginal sealers. This would account for 0.8% of the total 2005 commercial kill of harp seals of 317,672. I am grateful to Rebecca Aldworth for this information.

5.6 Information supplied by the Canadian Government maintains that [non-aboriginal coastal] ‘sealers have noted that the income derived from sealing can represent 25-35 per cent of their total annual income’. But the facts do not bear out this claim. More than 90 per cent of sealers live in Newfoundland. They are actually fishermen, who participate in several fisheries throughout the year. The Newfoundland Government estimates that about 4,000 fishermen participate in the seal hunt. According to government data and media reports, they make about five per cent of their incomes from sealing, and the rest from commercial fisheries, such as crab, shrimp, and lobster. Given the landed value of the seal hunt in Newfoundland and the average income of Newfoundland fishermen, if they actually earned 35 per cent of their incomes from sealing, it follows there would be less than 400 of them.

5.7 In reality, sealing is not a primary occupation on which people rely for their ‘survival’, rather it is an economically marginal activity that could easily be replaced by the federal government. This point remains even if it is accepted that ‘employment opportunities are limited’⁵⁷ in coastal communities. But we must question that idea as well, given that Newfoundland’s fishery is wealthier than it has ever been in history--earning well over \$150 million more than it did prior to the infamous collapse of northern cod stocks in 1992. This economic growth is because of the development of the shellfish industry, which today accounts for 80 per cent of the value of Newfoundland’s fishery, whereas sealing accounts for only 2 per cent.⁵⁸ It is certainly possible that the hunt is economically useful to a small number of people who live in the coastal communities, but to say more than that is to go beyond the evidence.

VI. SEALS AS ECONOMIC COMMODITIES

6.1 It may be objected that, even if there is no strict necessity involved in hunting seals, it is, nevertheless, a profitable activity and one that the Canadian Government should properly defend as important to its own national self-interest.

6.2 The problem with this view, however, is that it effectively reduces the status of seals to economic commodities. Indeed, the ‘official’ government language used to describe the hunt consists of words such as: ‘harvest’ or ‘harvesting’, ‘tools’ (weapons of killing), ‘resource’, ‘dispatch’ (killing), ‘replacement yield’. They indicate a commodification of these marine mammals as if they were nothing more than lifeless or non-sentient resources here for us.

6.3 From the 1960s onwards, there have been various calls from fisheries organisations and government officials to ‘cull’ seals in order to protect fishstocks, especially cod.⁵⁹ That argument is now seldom, if ever, employed by the Canadian Government. The reason is that further study has indicated that seals also help codstocks by consuming several of their significant natural predators. Indeed, the Government now rejects that idea that the hunt is a ‘cull’ and explicitly states that it is ‘*not an attempt to assist in the recovery of groundfish stocks.*’ It continues:

⁵⁷ FAQ, p. 5.

⁵⁸ Landed fishery values 1998-2003 from Newfoundland’s Department of Fisheries and Aquaculture. Newfoundland’s inflation data from the Government of Newfoundland, see www.economics.gov.nf.ca/mnInflation.asp.

⁵⁹ In fact, Government officials were still making the same claim as late as 1996. See, for example: ‘Government scientists say seals eat vast amounts of cod and are hampering their recovery’, Deborah Mackenzie, ‘Seals to the slaughter’, *New Scientist*, 16 March, 1996, p. 36.

Seals eat cod, but seals also eat other fish that prey on cod. There are several factors contributing to the lack of recovery of Atlantic cod stocks such as fishing effort, the poor physical condition of the fish, poor growth, unfavourable ocean conditions and low stock productivity at current levels.

It is widely accepted in the scientific community that there are many uncertainties in the estimates of the amount of fish consumed by seals. Seals and cod exist in a complex ecosystem, which makes it difficult to find simple solutions to problems such as the recovery of cod stocks.⁶⁰

6.4 This admission is significant because it has left the hunt without any justification, other than the purely economic--and that is pretty marginal at best. The Government now claims that the hunt is 'a sustainable, commercial viable *fishery* based on sound conservation principles'.⁶¹ Leaving aside the tendentious claims about 'sustainability' and 'conservation', we should note the use of the word 'fishery' to describe the seal hunt. The comparison is revealing since fish have little or no legal protection and are treated wholly as a resource. Astonishingly, seals in Canada are legally classified as 'fish'. In fact, we know that fish are sensitive beings and there is--in at least some cases--empirical evidence that they are capable of experiencing pain and fear.⁶² But to place seals in the same category as other beings perceived wholly in economic terms and treated as fungible, disposable items is a serious category mistake.

6.5 Grasping this point takes us to the heart of the moral case against sealing. If seals were simply vegetables, that is beings without sentiency who could experience no pain, fear and suffering, and whose movements exhibited no complexity of awareness, then there would be no moral objection to using them and killing them. They might, like vegetables, have a kind of aesthetic value, but no one would think of mounting campaigns to protect them or worry about their rights. But seals do not belong to that category. On the contrary, seals are sentient and intelligent; they are highly developed social beings capable of experiencing intense pain and suffering. The mother seal, as is typical of mammals, is very protective of its young offspring and may well suffer at the death of an older pup even if the latter is on the verge of becoming independent. Studies show that many mammals react even when another unrelated animal is killed in their presence. By 'suffering' here, we do not just mean 'physical pain'. We mean by 'suffering' a range of experiences, such as anxiety, fear, trauma, foreboding, anticipation, terror, and stress. Moreover, mammals experience these things only to a greater or lesser degree than we do ourselves.

6.6 It is because seals, like other mammals, are sentient (that is, they can experience both pain and pleasure) that it is right to say that they have--as individuals--'intrinsic' or 'inherent' value. To use Kantian moral language they are 'ends in themselves' and not just 'means to ends'.

6.7 To categorise marine mammals as fish (which is taxonomically inexcusable) and therefore as commodities or resources represents an impoverished view of their status. The value of other

⁶⁰ FAQ, p. 6; my emphases.

⁶¹ Myths and Realities, p. 3; my emphases. The Burdon Report also makes a similar point, p. 12.

⁶² See, for example, the latest research by Lynne U. Sneddon, Victor A. Braithwaite and Michael J. Gentle, 'Do fish have nociceptors: evidence for the evolution of a vertebrate sensory system', *Biological Sciences*, Vol. 270, No. 1520, June 2003. And the previous work by Verheijen at the University of Utrecht discussed by John Webster, *Animal Welfare: A Cool Look at Eden* (Oxford: Blackwell, 1994), p. 224. For a review of the scientific literature on sentiency and its moral significance, see David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge: Cambridge University Press, 1996), especially chapters 4-7.

sentient beings in the world does not rest (as in the cases of stones or cabbages) entirely or largely in their relationship to us, and the uses that we may put them to. 'Instrumentalist' views that see the value of animals as consisting entirely in their relationship to us are logically opposed to views that recognise and celebrate the 'intrinsic' value of animals.

6.8 Now, it may be argued that 'instrumentalist' views of animals still predominate in the world day, and that the kind of attitude to marine mammals here espoused would have major implications for our use and treatment of animals in many areas of life. But what needs to be grasped is that attitudes to animals are changing, and changing fast. There is now a consensus among ethicists who have studied this subject that there is a need for fundamental changes in how we treat animals and our attitudes towards them.

6.9 What the Canadian Government does not seem to have grasped is that it needs to justify sealing in this new context of a growing ethical sensibility to animals. For example, it argues that the 'subsistence hunt is a valuable link to Canadian cultural heritage'.⁶³ But, as we have seen, the commercial hunt can be easily distinguished from any putative subsistence needs, and the argument that a now (otiose) form of hunting links us with a past culture is flawed as a moral justification. By the same logic, the British ports of Bristol and Liverpool should continue trading in slaves 'as a valuable link to British cultural heritage' (which, after all, greatly benefited from the trade). Appeals to past cultural heritage cannot absolve us from having to justify traditional practices in a contemporary moral context.⁶⁴

6.10 Furthermore, the appeals to 'sustainability' and 'conservation' really miss the mark in relation to considerations of animal protection. Since the 1960s, environmental organisations have, *inter alia*, expressed concern about the numbers killed and the survival of the species in the long-term. Such concerns have intensified since, as we have seen, the TAC is now at its highest for thirty years. Also, the Canadian Government's claim that the seal population stands at 5.2 million begs some questions.⁶⁵ But, however valid these concerns, they do not touch the issue of moral justification from the standpoint of animal protection. Governments of all shapes are increasingly, it seems, making the mistake of thinking that concerns for animals are entirely met by considerations of 'sustainability' and 'conservation', whereas in fact animal protection extends to concern for *each individual animal* and not just to the species as a collectivity or as a whole. This blindspot is part of a deeper failure of perception--to see that individuals within a species, and not just the species itself, deserve our moral solicitude. Even more, it betokens a failure to see that there *are* individuals and not just species. Each and every individual within a mammalian species is unique--as unique as any individual human being with its own needs, preferences, and social affiliations. Language about seals as a 'resource' is sub-ethical in this, second, sense: it utterly fails to see the value of each individual, and to recognise the claim of each individual to moral consideration.

⁶³ Myths and Realities, p. 4.

⁶⁴ In fact, the argument from 'tradition' is not, properly speaking, an ethical *argument* at all, just an appeal to the *status quo*. In England, we have become only too familiar with it as a defence of hunting with hounds, but its speciousness has been finally exposed and hunting is now (thankfully) banned.

⁶⁵ See FAQ, p. 1 which refers to a '1999 peer-reviewed study' which came to this figure, but no further information is given. The figure, unsurprisingly, is disputed. For the federal government's view see www.dfo-mpo.gc.ca/seal-phoque/report-rapport_e.htm. For the Report of the Eminent Panel on Seal Management (which included at least one person involved in the seal industry) www.dfo-mpo.gc.ca/seal-phoque/reports-rapports/expert/repism-rgegp_e.htm, and for contrary views, see the critique by Greenpeace at www.greenpeace.org/raw/content/international/press/reports/canadian-seal-hunt-no-managem.pdf and the website of the International Marine Mammal Association at www.imma.org.

VII. THE PROBLEM OF PARTISAN GOVERNMENTS

7.1 We need now to look at the role of the Canadian Government in relation to sealing. As we have seen, the Government has been pro-active in its support for the seal hunt. Although it claims that it no longer subsidises the hunt, it has clearly done so generously in the past.⁶⁶ And even though direct subsidies may be a thing of the past, the Government still supports seal hunting in a variety of ways, by--for example--providing ice-breakers to take the sealers to the seals, sending delegations around the world to promote the hunt, and by providing grants (or interest-free loans) to establish new processing plants--most recently to a few native people on the North Shore of the St Lawrence as part of its publicly declared intention to involve native people more prominently in the southern hunt.⁶⁷ The DFO in its own words still encourages the 'fullest possible commercial use of seals'.⁶⁸ It was not internal, but external, pressure that led the Government to establish a Royal Commission which recommended the discontinuance of killing whitecoat seal pups. Such limited action as there has been for seal protection has taken place without, perhaps almost in spite of, the Canadian Government.

7.2 This recognition should give us pause since it raises the much wider question of how governments should respond to issues of animal protection. There are worrying signs that other governments may follow the baleful example of Canada and view animals simply as economic resources, commodities, tools or objects of sport, and use their power to side with commercial or vested interests. Unless governments of the world understand their moral obligation to protect animals from cruelty, and set in place moderating measures to prevent (at least) the worst forms of exploitation, then the outlook for animal protection world-wide will be pretty bleak.

7.3 There is no evidence that the Canadian Government has any grasp of why its defence of the hunt should attract international criticism. The Minister says that

It is especially disturbing that some organizations are seeking to damage a legitimate Canadian activity and Canada's reputation abroad in public-relations campaigns in order to raise money for their organizations . . . these carefully orchestrated public-relations campaigns twist the facts of the seal hunt for the benefit of a few extremely powerful and well-funded organizations.⁶⁹

7.4 Attributing unworthy motives is always an unattractive, and suspect, form of argument. Doubtless, there are extreme or unbalanced advocates on either side, but it is a calumny on animal protection organisations to maintain that their criticism of the seal hunt is motivated by the desire to raise money for their own organisations. It is a statement that neglects the fact that most of the organisations that campaign to end the seal hunt are charities--non-profits that spend the money they raise carrying out their mandates. But the point is that these allegations avoid the main issue, which is the duty of the Canadian Government to protect wildlife in its own country from cruel exploitation. This obligation is not, of course, just the responsibility of one government but of all.

⁶⁶ According to the Canadian Government, 'All subsidies ceased in 2001', *Myths and Realities*, p. 4.

⁶⁷ See, for example: 'DFO continues to be supportive of Aboriginal efforts to hunt seals commercially', *Seals and Sealing*, p. 20, para 6.6.1.

⁶⁸ FAQ, p. 2.

⁶⁹ Minister's Statement, p. 2.

7.5 We need to remember that wildlife--free ranging animals--are not the property of any one country. Animal protection is an international concern involving, now more than ever, international expressions of solidarity. The days when any government can say: 'These animals are our national resource and we will do what we like with them' are over. There is an urgent need for all governments to move beyond narrow national and economic interests and embrace systems of international protection for animals.⁷⁰

7.6 In that regard, there are some small shafts of light. Perhaps the most significant of these was the agreement on animal welfare in the Amsterdam Treaty of the EU in 1997. The protocol deserves to be read in full:

The High Contracting Parties, desiring to ensure improved protection and respect for the welfare of animals as *sentient beings*, have agreed upon the following provision, which shall be annexed to the Treaty establishing the European Community, in formulating and implementing the Community's agricultural, 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.⁷¹

7.7 The protocol creates a clear legal obligation to pay full regard to the welfare requirements of animals and, for the first time, refers to them as 'sentient beings' rather than as agricultural commodities. That apparently small change in wording indicates a sea-change in attitude. While the Treaty still provides no legal basis for the introduction of legislation specifically intended to improve the welfare of animals, it leaves member states free to introduce national legislation on issues of animal welfare as they judge right. The qualifying line in relation to 'religious rites, cultural traditions and regional heritage' regrettably allows for possible derogations, although the 'requirement is merely to "respect" legislative or administrative provisions in these areas'.⁷² Despite this limitation, the Amsterdam protocol is the first international agreement between governments on animal welfare which clearly accepts that animals are 'sentient beings' and should be protected. It needs to become the first of many.

VIII. TRADE EMBARGOES ON SEAL PRODUCTS

8.1 The Amsterdam protocol, then, requires all European countries to ensure animal protection. By the same token, it is also logical for EU member states to be able to restrict the importation of goods on the grounds of morally-based concerns for animal welfare. Indeed, article 30 of EU regulations enables countries to take action on the grounds of 'public morality', and that

⁷⁰ I make the case in my 'Other Eyes and Other Worlds', Introduction to 'AWE', which is a guide to international animal protection. What became clear in editing the Encyclopaedia was that countries, which are guilty of disrespecting human rights mostly disrespect animal rights as well. Contrary to prejudice, the countries which care most about animals also care most about human beings.

⁷¹ My emphases. The full text of the treaty can be found at chapter 8 at http://www.europarl.eu.int/topics/treaty/section2_en.htm#chap8.

⁷² The view of Eurogroup for Animal Welfare found at <http://www.eurocbc.org/page673.html>; see also their own website, <http://www.eurogroupanimalwelfare.org/>.

provision has already been invoked by the Westminster and Scotland parliaments as a justification for passing legislation against fur farming.⁷³

8.2 In January 2004, the Belgian Government also banned the import of seal products along with cat and dog fur. Belgium's announcement also included an order to begin labelling all fur, so that authorities can know what is on sale in Belgian shops and what is entering the country. The Government no longer grants licences to importers seeking to bring in cat or dog fur, or seal skins. Both the bans and the labelling order went into effect immediately; the prohibitions are temporary, but the Belgian legislature is expected to replace the stop-gap measure with an even broader ban that would stop both the imports and exports of cat and dog fur and skins.⁷⁴ The Belgian decision is ground-breaking because it is the first time that a EU member state has unilaterally banned seal products and has defended its decision on the grounds of public morality.

8.3 Likewise under GATT (General Agreement on Tariffs and Trade), there is an exception to its free trade policy, which states that embargoes could be put into place in order to 'protect public morals'. And it is on that basis that the existing embargo against the importation of harp seal products enshrined in the US Marine Mammal Act has been justified.

8.4 Both WTO and GATT are, of course, hugely controversial and may not stand the test of time. But as long as such agreements exist, they have the capacity to determine all international trading agreements in relation to animals and animal products. Their likely affect on animal protection is potentially massive and world-wide. GATT could represent a serious setback for animal protection, and there are many in the animal protection community who fear that the role of the WTO could be utterly destructive of the limited, but significant, gains in international animal welfare.⁷⁵ But it is worth remembering that few hold that free trade should be absolute. Even one of the pioneers of free trade philosophy, Henry George, maintained that the abolition

⁷³ See Andrew Linzey, *The Ethical Case Against Fur Farming, a statement by an international group of academics, including ethicists, philosophers and theologians* (London: Respect for Animals, 2002, ISBN 0-9547208-0-6) (hereafter 'The Ethical Case'), which argues that European countries should exercise their powers to prohibit fur farming on the grounds of public morality.

⁷⁴ As in the news release of the HSUS, see

http://www.hsus.org/about_us/humane_society_international_hsi/hsi_europe/belgium_joins_the_ranks_of_eu_countries_to_ban_dog_and_cat_fur.html. In addition, there has been a long history of (unsuccessful) British attempts to restrict or ban the import of seal products. In 1980, a Trade Order was promulgated to require the labelling of all sealskin imports into the UK, but it sadly failed to make progress, see *The Trade Descriptions (Sealskin Goods) (Information) Order 1980, No. 1150*. In 2003, the Minister for Trade and Investment was pressed to take action, but maintained that 'The view of the WTO, which has to make a decision unanimously, is that it is not prepared to allow animal welfare issues to be a criterion for stopping trade in particular kinds of products', *Hansard* 4 November, 2003, Column 222WH. As we show, there are grounds for disputing that view, since some animal welfare issues properly come under the heading of moral exceptions. The claim that 'the EU is attempting to impose its ethical views on other countries' (ibid) is also untenable. See also the question to the Secretary of State for Foreign and Commonwealth Affairs about making known British opposition to the seal hunt, *Hansard*, 24 January, 2005, Column 151W. Since Belgium has taken the lead, it is now only appropriate for other EU member states, including the UK, to follow, especially since the principle about morality and animal welfare issues has already been conceded. As we have seen, five EU member states (Belgium, France, Italy, Greece, and Denmark) have already outlawed the trade in dog and cat fur.

⁷⁵ See Steven Best, 'The World Trade Organisation' in the 'AWE'. Best properly warns of how unfettered trade could destroy all the limited gains already made in animal protection.

of restrictions should exempt ‘those imposed in the interests of public health or morals’.⁷⁶ But, an obvious difficulty arises because, as Steve Charnovitz points out, ‘Virtually anything can be characterized as a moral issue’.⁷⁷

8.5 The question is whether a convincing case can be made on the basis of article XX(a) in the GATT which allows exemptions on the ground of ‘protecting public morality’. Can a ban on seal products be justified on this basis?

8.6 The first possible ground is that articulated by Economist Richard N. Cooper, namely, that ‘the international community cannot and should not be able to force a country to purchase products the production of which offends the sensibilities of its citizenry.’⁷⁸ The notion of ‘sensibilities’ may appear, at first, too all-encompassing. But, in fact, it is generally recognised that Muslim countries, for example, have the right to limit or prohibit the importation of alcohol into their countries, which offends not just Qu’ranic injunctions, but also Muslim sensitivities more generally. Similarly, there are long standing objections, both cultural and moral, to animal cruelty in many countries which, by the same token, should also be respected.

8.7 The second ground is that there are alternative measures ‘reasonably available’--a factor that has become prominent in previous adjudications of disputes. Currently, exported seal products include oil, skin, fur, and meat, but there are clearly ‘reasonable alternatives’ to each of these. It would be difficult to claim that seals are a unique source of these products unavailable elsewhere in the world.

8.8 The third ground is that countries could claim that they are not engaging in ‘unjustifiable discrimination’ because they would be treating foreign products the same as domestic ones. The point has coherence in relation to animal cruelty laws. If a country exports products that contravene the host country’s own legislation with regard to animal cruelty laws in general, and humane slaughter legislation in particular, then there is a *prima facie* case against allowing such imports. We have already seen how there are good grounds for supposing that slaughter of seals in Canada would not meet European standards of humane killing. A further question may be raised whether there is any ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’.⁷⁹ But it is clear--for example in the case of the action by the Belgian Government--that since *all* seal products, from whatever source, are susceptible to the same prohibition that claim could not reasonably be sustained.

8.9 The above are just some of the possible legal grounds under article XX(a) of GATT for excluding the importation of seal products. But there is a wider set of moral considerations here that should inform both adjudications about existing trade agreements and also influence future developments in this area. It is sometimes argued that we should not allow issues as seemingly

⁷⁶ Henry George, *Protection or Free Trade* [1886] (Schalkenbach Foundation, 1991), p. 286; cited and discussed in Steve Charnovitz, ‘The Moral Exception in Trade Policy’, *Virginia Journal of International Law*, Summer 1998, 38/689, pp. 21-22, also available at www.worldtradelaw.net/articles/charnovitzmoral.pdf (hereafter ‘Charnovitch’). I am indebted to Charnovitch for his insightful and important paper on which I have drawn freely. See also, Steve Charnovitz, ‘GATT and the Environment: Examining the Issues’, *International Environmental Affairs*, 4 (3) 1991: 203-33, and at www.ciesin.org/docs/008-061/008-061.html. There is a useful discussion for and against embargoes at <http://darwin.bio.uci.edu/~sustain/issueguides/Embargoes>. On the continuing debate about the responsibilities of multinationals, see, for example, ‘Can Corporations Assume Responsibility for the Environment?’ by John B. Cobb, Jr., at <http://www.religion-online.org/showarticle.asp?title=261>.

⁷⁷ Charnovitch, p. 21.

⁷⁸ Richard N. Cooper, *Environment and Resource Policies for the World Economy* (New York, 1994), p. 30, cited in Charnovitch, p. 21.

⁷⁹ Charnovitch, p. 22.

minor as animal welfare to influence major trade agreements between the nations of the world. In fact, as Charnovitz points out, the adjudication panel of the WTO has never taken that view, and animal cruelty clearly, and rightly, falls 'within the range of policies covered by article XX(a)'.⁸⁰

8.10 From an ethical perspective--far from being a minor or trivial matter--there is a range of considerations that relate to animals that buttress an even stronger legal claim that may be made on their behalf. Such considerations deserve to be stated in full:

* *Animals cannot give or withhold their consent.* The point is obvious but it has considerable moral significance. It is commonly accepted that 'informed consent' is required in advance by any person who wishes to over-ride the legitimate interests of another. The absence of this factor requires, at the very least, that we should exercise special care and thoughtfulness. The very (obvious) fact that animals cannot agree to the purposes to which they are put increases our responsibility and singles them out (along with others) as a special case.

* *Animals cannot represent or vocalise their own interests.* Again, the point is obvious but it has serious moral implications. Individuals who cannot adequately represent themselves have to depend upon others to do so. The plight of animals, like that of children, or the elderly who suffer from dementia--precisely because they cannot articulate their needs or represent their interests--should invoke an increased sense of obligation and mark them out as a special case.

* *Animals are morally innocent.* Because animals are not moral agents with free will, they cannot--strictly speaking--be regarded as morally responsible. That granted, it follows that they can never (unlike, arguably, adult humans) deserve suffering, or be improved morally by it. Animals can never merit suffering; proper recognition of this consideration makes any infliction of suffering upon them particularly problematic.

* *Animals are vulnerable and defenceless.* They are wholly, or almost wholly, within our power and entirely subject to our will. Except in rare circumstances, animals pose us no threat, constitute no risk to our life, and possess no means of offence or defence. Moral solicitude should properly relate to, and be commensurate with, the relative vulnerability of the subjects concerned.⁸¹

8.11 The key point to note is that all these considerations make the infliction of suffering and death on animals not *easier*--but *harder* to justify. But, perhaps, the most relevant of these considerations is the recognition that animals cannot represent or vocalise their own interests. Individuals who cannot adequately represent themselves have to depend upon benign moral representation. This consideration marks animals out, along with other vulnerable human subjects, notably infants and young children, as a special case. There are, therefore, strong grounds for extending to these beings special consideration when it comes to legal decisions that may affect or harm their own interests.

8.12 The capacity of the strong and the powerful to overlook the interests of the weak has been variously documented throughout human history, and nowhere is this clearer than in these two cases: children and animals. Unless active steps are taken to ensure that their interests are not overlooked, we can be almost certain that they will be. There is a moral challenge here to all those who espouse free trade philosophy. Unless fundamental limits are observed, then any

⁸⁰ Charnovitch, p. 24.

⁸¹ These considerations are also cited and discussed in the previous international statement, 'The Ethical Case', p. 4.

libertarian trade system can easily turn into a means whereby the weak and the voiceless are further disenfranchised.

8.13 Charnovitch concludes his review by stating that: ‘Efforts will surely be made to limit the scope of XX(a) and like provisions to inwardly-directed concerns. It will be argued that morality must stop at the border. In an increasingly interdependent global community, however, the linkages between morality and economic policy will become harder to overlook.’ And he recalls the words of Lucia Ames Mead that ‘[w]orld righteousness and world economic welfare must be shown to be compatible’.⁸²

IX. CONCLUDING ASSESSMENT

9.1 Some conclusions can be reached with confidence.

9.2 *Firstly, the clubbing and shooting of seals is not humane.* The most reliable veterinary evidence points unmistakably in that direction. Basic principles of humane slaughter are violated by the hunt: neither ‘immediate unconsciousness’ nor ‘non-recovery’ can be ‘guaranteed’ or even, in most cases, regarded as likely. Both ‘clubbing’ and ‘shooting’ seals render the animals liable to high levels of suffering, and--other than in exceptional circumstances when a blow or shot renders the animals immediately unconscious--are inherently inhumane methods of killing. Because of the physical environment in which it operates, and the way in which it must be conducted in order to be commercially viable, Canada’s seal hunt is--and must always be--inhumane. And, if there is any doubt, the video footage makes abundantly clear that the suffering of the seals is considerable.

9.3 *Secondly, regulations are not enforced and neither are they enforceable.* Grasping the commercial nature of the hunt is central to understanding why animal welfare is inevitably compromised. Commercial sealing is carried out by fishermen in hundreds of small boats, far offshore, amidst treacherous ice floes and hostile weather conditions. High fuel costs, dangerous work environments, and the proximity of opening dates for other commercial fisheries make it expensive and impracticable for sealers to operate at the seal hunt for extended periods of time. Moreover, sealing vessels compete against each other for quotas, killing as many animals as quickly as possible. That is why over the past ten years, the bulk of the commercial killing has occurred over just a few days each year.

9.4 Each year, apparent violations of Canada’s Criminal Code and the MMRs are documented with minimal effort by animal protection groups, independent journalists, veterinarians, scientists, and parliamentarians. These violations include seals exhibiting responses to pain

⁸² Lucia Ames Mead, *Law or War* [1928] (New York: Garland Publishing Inc., 1971), p. 86, concluding line of Charnovitch, p. 28. Charnovitch also rightly refers to Kant’s statement that ‘[t]he peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere’, see Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* in Hans Reiss (ed), *Kant’s Political Writings* (Cambridge: Cambridge University Press, 1979), paras 107-8, p. 93, and in Charnovitch, pp. 48-49. But Kant’s point, if valid, can also be extended to include animals. Animals also form part of the ‘universal community’--if not through choice--certainly by *our* choice because we have adopted them into our moral universe. Animals have thus acquired moral significance because of the ways humans relate to them and treat them. We might say, then, that ‘the peoples of the earth have thus entered in varying degrees into a universal community--of which animals form part--and it has developed to such a point where a violation of rights--to either humans or animals - in one part of the world is felt everywhere’. Put more simply, the abuse of animals anywhere, like the abuse of humans, ought to concern us all everywhere.

stabbed with hooks and dragged across ice floes, wounded seals left to suffer for prolonged periods of time, and conscious seals cut open and skinned. Video evidence of nearly 700 of these offences has been submitted to the DFO (the department charged with enforcing the MMRs) to no avail. Not a single charge was laid in response, leading to the inevitable conclusion that the DFO lacks the will to enforce even their own regulations. That is one of the reasons why hopes that new or strengthened regulations will eliminate suffering are illusory. As Daoust² unwittingly shows, enforcing, and ensuring compliance with, even the most basic regulation, namely the three-step process (stunning, checking and bleeding) is practically impossible.

9.5 *Thirdly, there is no adequate moral justification for the seal hunt.* Ethicists are divided about where we should draw the line in our treatment of animals, but there is a strong consensus that the infliction of suffering upon animals requires strong justification (indeed there are some ethicists who would hold that the deliberate infliction of suffering on innocent and vulnerable beings can never be justified). In ethical terms, to show that something is necessary requires more than a simple appeal to what is fashionable, or even desirable. Human wants do not by themselves constitute moral necessity. It has to be shown that the good procured is essential and that no alternative means are available. To point to economic advantage is insufficient as a moral justification, and neither can any claim for subsistence reasonably apply to the commercial Atlantic hunt.

9.6 We may debate those situations where animals pose some kind of threat or danger to the human species. But we should be clear that seals do not constitute--either directly or indirectly--any threat, ecological or otherwise. Neither do they constitute any health risk, nor is the reduction of their numbers required by notions of biodiversity. We have already noted that no reasonable claim against seals can be made in the interests of preserving fishstocks. Seals pose no general or particular adversity to the human species. They are not in any sense aggressors. To regard them, as some sealers do, as a nuisance species: 'seal slugs'--as they have been called--is without rational foundation. The hunt is thereby exposed as devoid of moral justification.

9.7 *Fourthly, to regard seals merely as economic commodities is an impoverished view of their status.* Sealing is perceived by fishermen, and the Canadian Government, as just another part of the fishery. This is reflected in the government department that manages it (Fisheries and Oceans), the individuals who conduct it (commercial fishermen), and the language used to describe it ('catching seals', 'fishing for seals'). Taken as a whole, it appears that fishermen who hunt seals really believe that they are 'fishing', and that the seals are deserving of as much, or as little, consideration as they would extend to any other ocean target. This historic understanding of seals as fish (that is, as beings perceived as non-sentient) may be the root cause of much inhumane behaviour. Moreover, as already noted, most sealers are fishermen from Canada's east coast. Many of them--because of misinformation disseminated over many years--have come to believe that seals caused the collapse of Northern Cod and are still impeding its recovery. Therefore, the very people killing the seals frequently view them as competitors for the fish, and the reason why they personally suffer economic hardships. Such perspectives provide an environment in which there is an emotional incentive to mistreat the seals.

9.8 To regard hundreds of thousands of seals solely as resources to be harvested indicates a crudely instrumentalist understanding of animal life. Enlightened ethical thinking regards animals as sentient beings with their own inherent or intrinsic value. Such a view is at least implied in the EU Amsterdam Protocol of 1997. The Canadian Government has simply failed to

provide a convincing rationale for their advocacy of sealing in the light of changed ethical thinking.

9.9 *Fifthly, the Canadian Government has become unreasonably partisan in its support for sealing.* Government claims have been shown to be tendentious, misleading, or inaccurate. All governments of course want to support the economic well-being of the countries they serve, but each and every government should have a proper regard for animal welfare, and exercise a moderating hand in relation to economic pressures that threaten to reduce the status of animals to mere commodities. It is clear that the Canadian Government has not begun to exercise such a moderating hand. It has therefore set an unwelcome precedent for other governments that could threaten the future prospects for animal protection world-wide. Moreover, governments should respect, if not always reflect, the views of their citizens, the majority of whom in Canada are opposed to the commercial seal hunt.⁸³

9.10 *Sixthly, the Canadian Government should act immediately to prohibit the commercial seal hunt.* It is the responsibility of the Canadian Government to protect its own wildlife from cruelty. The fact that governments can apparently act without accountability (even it seems to their own electorate), in matters relating to animal cruelty must be of concern to all right-thinking people everywhere. It cannot be sufficient to shrug off such culpability as though it was simply part and parcel of the round of politics with which we have become altogether too familiar. All governments are morally accountable for their support of cruelty.

9.11 *Seventhly, WTO adjudications must continue to allow concerns for animal welfare to constitute a moral exception to free trade.* Free trade philosophy is still in a process of development. Despite some reversals, GATT and WTO accept in principle that there can be a moral exception to free trade, and there is no rational ground for excluding concern for animals within that category. Indeed, we have shown that there are strong rational grounds for extending special moral solicitude to the innocent and the vulnerable, especially children and animals who are unable to represent themselves and who, necessarily, rely upon benign representation by others. The international community of animal advocates and all right thinking citizens must speak up and insist that international trade regulations do not compromise the cause of animal protection.

9.12 *Eighthly, the moral case for trade bans against Canadian seal products is compelling.* Animal protection is, and should be, a matter of international concern. We must look to governments to protect animals in their own countries, but when they fail to undertake this responsibility, then international pressure can and should be reasonably applied. Already the US bans the import of seal products, and the Government of Belgium has recently done so--along with dog and cat fur. These actions should be welcomed and supported by the international community.

9.13 Although undoubtedly made more complex by the development of GATT and WTO, there is still ample scope for individual governments to take action on the grounds of public morality. We know from experience that trade embargoes work. When the EU banned the import of seal products in 1983, it had an immediate effect on the number of seals killed, as the figures show: down from 166,739 in 1982, 57,889 in 1983, 31,544 in 1984 to a record low of 19,035 in 1985.

⁸³ See the polling evidence by Angus Reid, 1997. The Canadian Government says that 'results of the [2000] survey indicate that, after being presented with arguments for and against the hunt, 53% of Canadians support the seal hunt', *Seals and Sealing*, p. 20, para 6.5.4. But the 'arguments for' invariably include the claim that sealing in 'humane'--which is precisely what cannot be assumed.

In the absence of action by the Canadian Government, trade bans are still the most effective means of preventing cruelty to seals.

9.14 Ninethly, governments should initiate trade bans on seal products as a matter of urgency based on the moral imperative to prevent unnecessary and prolonged suffering. We cannot avoid the evidence that seals are being skinned alive. Whilst not true in all cases, reason and evidence indicate that a proportion, even a high proportion, will end up being subject to gross cruelty. The Canadian Government says that the methods of killing seals are comparable with slaughter methods elsewhere. We know that is not so. There is no country in the world that accepts a definition of humane slaughter that includes being skinned alive. The magnitude of the suffering involved--almost a million animals during the past three years--is so great that international action is now essential.

Signatories

The paper was written by Professor Andrew Linzey. Included are the names of individuals who wish to be associated with it. Institutional affiliations are for the purpose of identification only. All individuals sign in their personal capacity. © Andrew Linzey, 2005.

FREE EXERCISE DOES NOT PROTECT ANIMAL SACRIFICE: THE MISCONCEPTION OF *CHURCH OF LUKUMI BABALU AYE V. CITY OF HIALEAH* AND CONSTITUTIONAL SOLUTIONS FOR STOPPING ANIMAL SACRIFICE

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I. INTRODUCTION

In Springhill, a box containing a decapitated pig and two decapitated pigeons is discovered in a residential neighborhood. In Norfolk, cow tongues hang from trees, and a disemboweled lamb is found on a public street. In Philadelphia, park workers increasingly find themselves cleaning up the carcasses of decapitated animals left in the public parks.¹ Every morning in Miami, city workers clear the county courthouse steps of animal carcasses left the night before.² Nearby, decapitated chickens frequently line the banks of the Miami River.³ All these animals have been sacrificed, their carcasses left as offerings to Santería deities, called Orishas.

Many practitioners of the Santería religion will claim they have a constitutional right to practice animal sacrifice. And many local governments are also convinced that this is the state of the law. In fact, law enforcement officials and animal control workers often feel their hands are tied when reports of Santería sacrifices are directed their way. They are all mistaken.

In 1993, the U.S. Supreme Court upheld a First Amendment religious free exercise challenge brought by a Florida Santería church in *Church of Lukumi Babalu Aye v. City of Hialeah*. However, *Lukumi* may be the most misunderstood legal precedent in recent history. The decision is often cited for the proposition that religious practitioners have a constitutional right to engage in animal sacrifice. This is far from the truth. *Lukumi* was decided in a unique context, and its holding was not based on the merits of animal sacrifice. This article will demonstrate that *Lukumi* does not force government to acquiesce to animal sacrifice, or the “litter” it creates.

Part II of this article begins with an overview of the religion of Santería, and the ritual of animal sacrifice within the religion. It then discusses the history of the conflict between the

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¹ See *infra* note 53.

² See *infra* note 54 and accompanying text.

³ See *infra* note 52.

Santería Church of Lukumi Babalu Aye and the City of Hialeah, Florida, which was eventually brought before the Supreme Court in *Lukumi*.

Part III of the article begins with discussing the Free Exercise Clause of the United States Constitution, and gives a concise historical overview of Supreme Court's changing treatment of free exercise challenges. Next, this section engages in an in-depth analysis of the *Lukumi* opinion, and why the Supreme Court had to uphold the church's challenge as a matter free exercise jurisprudence. The section concludes with a summary of what the Supreme Court *actually* held regarding the right to engage in animal sacrifice.

Part IV of the article outlines some constitutionally permissible ways the law can be used to prevent and deter the practice of animal sacrifice. The two legal solutions advanced are municipal licensing and zoning laws, and state and local animal cruelty statutes. This section proposes how legislation in each legal area can have the effect of hindering animal sacrifice.

II. HISTORY OF THE ISSUE

A. *The Religion of Santería*

1. *the evolution and background of the religion*

The religion of Santería, also known as Regla de Ocha,⁴ began its evolution in Cuban slave society during the Spanish colonial period.⁵ Spain purchased slaves from a variety of countries, melding together slave populations from diverse areas of Africa.⁶ After 1800, the Yoruba-speaking groups from southwest Nigeria, Dahomey, Togo and Benin came to dominate Cuba's slave population.⁷ Their religious tradition of Regla de Ocha was a major contribution to Cuban slave culture.⁸ Eventually, Regla de Ocha came to be the island's most widespread Afro-Cuban religion.⁹

Regla de Ocha translates into "the rule or religion of the Orisha."¹⁰ The central and highest deity in the religion is Olodumare (also known as Olorun and Olofi in Cuba).¹¹ According to practitioners, he exists in many energy forms throughout the universe, and is also deemed to be creator of heaven and earth.¹² Olodumare communicates with man through use of

⁴ OLMOS & PARAVISINI-GERBERT, CREOLE RELIGIONS OF THE CARIABBEAN 24 (2003). Regla de Ocha preserves the language of Yoruba in the names of deities and rituals, and the designation of ranks of priesthood. *See generally* MIGUEL A. DE LA TORRE, SANTERIA: THE BELIEFS AND RITUALS OF A GROWING RELIGION IN AMERICA (2004).

⁵ OLMOS & PARAVISINI-GERBERT, *supra* note 4, at 24.

⁶ *Id.*

⁷ *Id.* These groups collectively are called the Lukumi. *Id.*

⁸ *Id.*

⁹ *Id.* at 25.

¹⁰ *Id.* at 24. The language is Yoruba, the traditional language of the Lukumí. *Id.*

¹¹ OBA ECUN, ITA: MYTHOLOGY OF THE YORUBA RELIGION 18 (1989); OLMOS & PARAVISINI-GERBERT, *supra* note 4, at 24.

¹² ECUN, *supra* note 11, at 18-20. Olodumare appears to possess many characteristics similar to the traditional Judeo-Christian concepts of a supreme deity. For example, Olodumare has existed since the beginning of time, controls the destiny of mankind, and sees everything a person really is, including his innermost thoughts and

divine intermediaries, known as Orishas.¹³ These Orishas are seen as spiritual forces, some of whom existed prior to the earth's creation, others who were human at one time and became Orishas though supreme qualities they possessed during their human lives.¹⁴ Hundreds of Orishas were acknowledged in African worship, but far fewer survived in Regla de Ocha as it was established in Cuba.¹⁵

Further, Cuban Regla de Ocha underwent another unique evolution. In Colonial Cuba, Catholicism was the official religion.¹⁶ Upon being exposed to Catholicism, a process of "syncretization" of Regla de Ocha and Roman Catholicism began.¹⁷ The slaves continued to worship the Orishas, but expressly identified them as Saints.¹⁸ This syncretism of the Orishas with Catholic Saints may have been an attempt by the slaves to secure the perceived powers of Catholicism. On the other hand, it may simply have been an endeavor to mask the continuance of their native religious practices in a colony that would only permit the Catholic religion.¹⁹ As the Orishas gradually came to be identified with Catholic counter-parts, the Saints or *Santos*, the religion gradually took on the name *Santería*, the "worship or way of the Saints."²⁰

However, in *Santería*, the concept of the Orisha as a natural force remains distinctly African. Likewise, the natural force, or power, associated with each of the traditional Orishas remains intact.²¹ It is based on these identifying powers that *Santería* has established a correlating Catholic Saint for each Orisha.²² For example, Changó is the Orisha of fire and war, and is usually associated with Santa Barbará, the patroness of Spanish artillery.²³ Saint Lazarus, the leper from the Christian biblical parable, is associated with the Orisha Babalú Ayé. Babalú Ayé, like his Catholic counter-part, suffers part of his existence with sores all over his body. The Tradition of Regla de Ocha says he is later deemed the Orisha of epidemics and health.²⁴ *Santeros* and *Santeras* will often keep statues of the Catholic Saints in their house-temples.²⁵

feelings. Olodumare does not punish a person for breaking man's natural laws (this is the job of the Orishas); instead he doles out any just rewards (or punishments) at the end of a man's life. *Id.*

¹³ Olmos & Paravisini-Gerbert, *supra* note 4, at 30.

¹⁴ *Id.*

¹⁵ De La Torre states that original number of Orishas in African Regla de Ocha is unknown, and is estimated to be between four hundred and seventeen hundred. Only a handful are recognized by Afro-Cuban American practitioners, and his work delineates the eighteen most worshipped Orishas. DE LA TORRE, *supra* note 4 at 45.

¹⁶ Olmos & Paravisini-Gerbert, *supra* note 4, at 26.

¹⁷ *Id.* at 26. De La Torre, a former practitioner of Regla de Ocha, points out that many, if not all, religions are a product of "syncretization," and that using such a term to describe Regla de Ocha marginalizes the importance of the practitioners' belief system. He states *Santería* is best viewed more as a distinct religion rather than a distorted version of Catholicism. See DE LA TORRE, *supra* note 4, at 6-12. This author means no disrespect by using the term here, and incorporates it only because it is so frequently used by others when referring to the transformation of "Regla de Ocha" to "*Santería*".

¹⁸ DE LA TORRE, *supra* note 4 at 2-3.

¹⁹ See OLMOS & PARAVISINI-GERBERT, *supra* note 4, at 36 (suggesting that by adopting the Catholic Saints, Cuban slaves may have wished to incorporate the perceived powers of Catholicism into their religion, or gain social status in society); but see DE LA TORRE, *supra* note 4, at 2-3 & 12 (stating that any incorporation of Catholic Saints or rituals was merely an act by practitioners to mask and protect their ability to worship).

²⁰ OLMOS & PARAVISINI-GERBERT, *supra* note 4, at 32-33.

²¹ "Neither gods nor deities in the Western Sense, Orishas are personified natural forces that interact with human beings." *Id.* at 33.

²² *Id.* at 34.

²³ ECUN, *supra* note 11, at 37-38; and DE LA TORRE, *supra* note 4, at 54.

²⁴ ECUN, *supra* note 11, at 46; and DE LA TORRE, *supra* note 4, at 54.

²⁵ DE LA TORRE, *supra* note 4, at 8-11 & 106-07. De La Torre calls these *casas de santos* (Spanish) or *Ile'* (Yoruba). These are generally rooms within their residence that *Santeros* have devoted to the worship of *Santería*.

Depending on the stage of their faith in Santería, they may even invoke the power sought in the name of the Saint, rather than the corresponding Orisha.²⁶

It is difficult to estimate the number of Santería practitioners in the United States. Santería is a decentralized religion, with many independently operating house-temples.²⁷ It lacks a centralized membership roll or leadership hierarchy.²⁸ Most sources seem to estimate the number of practitioners to be between half a million to five million within the United States.²⁹ Most practitioners are of Hispanic heritage, mainly Cuban and Puerto Rican.³⁰ However the religion has also developed its share of African American believers.³¹ A former practitioner also indicates that “Euro-American” Santeros and Santeras are becoming increasingly common.³² In sum, it seems that the religion is appealing to a diverse cross-section of the United States population, and its practitioners are growing in number.

2. animal sacrifice in Santería

Santería is a secretive religion,³³ and it is difficult for a researcher to establish all the facts surrounding Santería’s practice of animal sacrifice. There is no dispute that sacrifice occurs, or that sacrifices are conducted in order to receive the assistance of the Orisha to whom the sacrifice is made. However, factual certainty regarding most aspects of Santería animal sacrifice is difficult, due to the clandestine nature of the rituals. This author relies on the book of a former practitioner, the evidentiary findings of the courts in the *Lukumi* case, and various newspaper articles, in an attempt to form a complete picture of how often Santería sacrifices occur, the method employed to sacrifice the animal, how the sacrificial animals are obtained, and how the animal carcasses are disposed of afterward.

In *Lukumi*, the Supreme Court found practitioners of Santería performed animal sacrifices rarely, outlining a handful of religious events which called for such rituals.³⁴ However, one

If it is the home of a Santero priest, persons will come to consult the priest and will wait outside the room for their “appointment” just as one would wait at a doctor’s office. These persons are often devout Catholics or Protestants, and simply see consulting the Santero as complimentary to their faith and regular worship. *Id.*

²⁶ *Id.* at 106-07. The level of “masking” is usually dependant on the stage or evolution of the Santero’s belief. Beginning worshippers are often more comfortable invoking the Catholic Saint while performing worship rituals. As one’s spiritual development (and curiosity) in Santería grows, he will be instructed by other Santeros about the ways of the Orishas. *See generally id.*

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ *Id.* at xiv; *but see The American Religious Identification Survey*, CUNY Graduate Center (estimating the number of U.S. practitioners at 22,000) at http://www.gc.cuny.edu/studies/key_findings.htm (last visited Apr. 19, 2005). However, due to the study’s high response refusal rate, this may be significantly lower than actual numbers, especially given the typical practitioner’s secrecy regarding their faith. *See infra* note 33.

³⁰ Eugene Bernard Filipowicz, *Santería As Revitalization Among African Americans* (1998) (unpublished Masters thesis, Florida State University) (on file with Florida State University Robert Manning Strozier Library).

³¹ *Id.*

³² DE LA TORRE, *supra* note 4, at 4.

³³ De La Torre credits this to the religion’s historic persecution in Cuba, and the fact that most original practitioners were Cuban refugees in the United States, thus the practices were of a marginalized and distrustful people. This led to a tradition of secretive practicing within the United States. *Id.* at 174-80.

³⁴ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525 (1993). Specifically, Justice Kennedy, writer of the opinion, concluded that sacrifices were performed during birth, marriage and death rites, to cure the

former practitioner, Miguel De La Torre, indicates that sacrifices can be conducted more frequently. He states that sacrifices may be made on occasions of thanksgiving, to combat an illness, to ward off attack by enemies, during initiation into the religion, and upon other life events.³⁵ Additionally, each Orisha is lord of certain days, and an ebbó, or offering, performed on those days is especially powerful.³⁶ Further, Santeros possess sacred stones, called otanes, each believed to contain the spirit of an Orisha.³⁷ These stones ideally need a blood offering at least once a year to satisfy the Orishas they contain.³⁸ Thus, it seems the practice of animal sacrifice might occur frequently in a practitioner's worship, depending on her life events and her need for assistance from the Orishas.

The method of conducting a sacrifice is also difficult to discern. De La Torre states that before each sacrifice a divination ceremony is performed, in order to make certain that the sacrificial animal is acceptable to the Orisha.³⁹ Once it is deemed acceptable, the ebbó can then be made to this Orisha.⁴⁰ Orishas need such offerings in order to have sufficient ashé, or spiritual force, to accomplish what is asked by the practitioner.⁴¹

In the district court, Ernesto Pichardo, the head priest of the Santería church bringing suit, testified that the sacrifices were conducted very carefully and deliberately.⁴² He testified that only priests conducted sacrifices.⁴³ These priests had apprenticed in the art of sacrifice under other trained priests.⁴⁴ In a typical sacrifice, the animal was led into the room and was placed on a table, with its head overhanging the edge of the table.⁴⁵ The priest would use a knife and puncture the neck and carotid arteries in one move, thus the animal would feel little pain and be rendered unconscious by anemia swiftly.⁴⁶ The animal's blood was then drained into a clay pot placed under the head, and the animal was decapitated and removed from the area.⁴⁷

The district court found that the method of sacrifice described by Pichardo was not humane. The court found the Santería practice of severing the arteries lacked reliability, and

sick, for initiation of new members and priests, and during an annual celebration. In reaching this conclusion, he relied on the district court's opinion, and the Encyclopedia of Religion. *Id.*

³⁵ DE LA TORRE, *supra* note 4, at 123.

³⁶ *Id.* Ebbós do not just take the form of sacrificial animal parts or blood. Food offerings and herbal baths may also be what is required, as determined by divination. *Id.* at 121-22.

³⁷ *Id.* at 135.

³⁸ *Id.*

³⁹ *Id.* at 126. For example, Babalu' Aye' prefers doves, hens, gelded goats, snakes, wild pigs, rooster and quails. *Id.* at 124.

⁴⁰ *Id.* at 121-22.

⁴¹ De La Torre says ashe' can be created in a variety of ways, such as burning a candle. However, the greatest amount of ashe' is achieved with animal sacrifice because "blood contains the life and soul of a creature." *Id.*

⁴² Church of Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1472 (S.D. FL, 1989).

⁴³ *Id.* De La Torre says that only the highest Santero priest, a Bablawo, can sacrifice four legged animals. Ordained Santeros and Santeras are permitted to sacrifice birds. DE LA TORRE, *supra* note 4, at 126. However, he also seems to indicate that an ordained Santero can choose to "specialize in animal sacrifice" thus eliminating the need for the skills of a Babalawo. *Id.* at 106.

⁴⁴ *Lukumi*, 723 F. Supp. at 1472.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1473.

great pain could be caused to the animal if the blood vessels were missed.⁴⁸ In sum, the court found the sacrifices were likely to cause animal suffering.

The district court was also concerned with animal suffering prior to the ritual. The court found that the animals were not necessarily obtained from reputed dealers, and often suffered mistreatment while being housed awaiting sale.⁴⁹ De La Torre is silent on this subject. At least one recent news article seems to confirm some of the district court's findings. In 2004, San Francisco animal control authorities seized one hundred animals from a Santería priest's residence. The priest apparently was a supplier of animals to other practitioners. Among the animals seized were a variety of birds, some goats, rabbits, and a pot belly pig. A fire department safety inspector, who was the first to respond, told the reporter that the animals were being kept in extremely unsanitary conditions, surrounded by excrement. He further stated many were without water or proper food, and some appeared dead or dying.⁵⁰ One hopes this is an extreme case, but it can probably be concluded that some sacrificial animals do suffer mistreatment while being housed prior to sacrifice.

The district court had further concerns regarding how the animal carcasses were disposed of afterwards, citing fear for public health.⁵¹ With respect to disposal, even De La Torre acknowledges that the public disposal of animal carcasses has become a problem in areas with large populations of practitioners.⁵² News accounts also confirm this concern, and indicate the problem may not be only in areas associated with a large population of practitioners.⁵³ De La Torre explains the phenomenon of public disposal, saying the ebbó may be left in a place that is significant to the Orisha. For example, the Orisha Ochosi has power over court rooms. This explains why in Miami the Dade County Courthouse opens each morning to steps strewn with numerous sacrificed animals, burning candles, and food left as ebbós to Ochosi the night

⁴⁸ *Id.* at 1472-73. The court relied on the expert testimony of Dr. Michael Fox, Vice President of the Humane Society of the United States. Dr. Fox testified that under the method described the animal was not likely to be unconscious instantaneously, and would experience pain, because arteries were located in places that the blade would not reach under this method. *Id.*

⁴⁹ *Id.* at 1474. The court found that typically animals were kept in stores (*botanicas*) selling Santería religious articles. They were often confined with animals other than their own species, often without food or water, both conditions causing distress. The court also found that the *botanicas* were usually not licensed to sell or house animals, and often transported them illegally into the state. *Id.* at 1473-74.

⁵⁰ Malaika Fraily, *Animals Meant for Sacrifice Seized from Priest's Home*, THE ARGUS, May 26, 2004, available at <http://www.religionnewsblog.com/7462> (last visited Feb. 1, 2006).

⁵¹ *Lukumi*, 723 F. Supp. at 1473-75. With regard to disposal, Pichardo was unable to say what became of any portion of the uneaten carcass, and speculated it was simply disposed of in the residence's trash. Other testimony indicated numerous disposals in public areas had been taking place. *Id.*

⁵² De La Torre acknowledges that the number of decapitated chicken and dove carcasses in the Miami river, left as an ebbó to Oshun, the goddess of love and the river, is becoming a problem. See DE LA TORRE, *supra* note 4, at 210.

⁵³ Duane Borne, *Decapitated Pig, Birds Found in Spring Hill*, ST. PETERSBURG TIMES, May 21, 2004, at A5 (reporting a decapitated pig and two pigeons found, along with coins and coconuts, in an abandoned box in a residential neighborhood. One of the pigeons had a red identification band on its leg); Stephen Vegh, *Authorities Credit Animal Sacrifices to Santeria Religion*, THE VIRGINIAN PILOT, Nov. 8, 2001, at A1 (reporting a disemboweled lamb, cow tongues, and a variety of decapitated chickens found in public streets and parks within a short period in Norfolk); Julian Walker, *The Sacrificial Lambs*, NORTHEAST TIMES, Aug. 21st 2002, available at <http://www.northeasttimes.com/2002/0821/animals.html> (reporting an alarming rise in the number of decapitated animals found in dumpsters and public parks in Philadelphia).

before.⁵⁴ So, at least for some ebbós, it appears practitioners are required to engage in “public” disposal of the animal carcasses to complete the ritual’s requirements.

B. Conflict Between the Church of Lukumi Babalu Aye and Hialeah, FL

In June of 1987, the Santería Church of the Lukumi Babalu Aye relocated to 173 West 5th Street in Hialeah.⁵⁵ The members of the Church sought to establish a religious and cultural center, complete with a school and museum, at this location.⁵⁶ They wished to practice all the rituals of Santería, including ritual animal sacrifice.⁵⁷ They hoped to bring the practice of Santería out into the open, and they began to organize and prepare the building for occupancy.⁵⁸

The City Council of Hialeah reacted quickly. Upon meeting on June 9, 1987, the council adopted Resolution 87-66, which noted that the residents of the city were concerned “that certain religious groups may propose to engage in practices inconsistent with public morals, peace and safety.”⁵⁹ The city then “reiterated its commitment” to prevent such practices.⁶⁰ Further, the city adopted Ordinance 87-40, which incorporated into city code, except as to penalties, Florida Statutes Chapter 828.⁶¹ This chapter contained Florida state laws regulating animal control and animal cruelty.⁶² Within this chapter is Florida’s animal cruelty statute, § 828.12. This statute states it is a misdemeanor to “unnecessarily” kill any animal.⁶³ Because Chapter 828 prohibits local governments from passing laws that conflict with state laws, the city sought the advice of the Florida Attorney General regarding their ability to pass additional ordinances prohibiting animal sacrifice.⁶⁴ An opinion was issued which assured the city that the state misdemeanor anti-cruelty statute “prohibits the sacrificial killing of animals other than for the primary purpose of food consumption.”⁶⁵ Thus, according to the opinion, municipal ordinances prohibiting Santería animal sacrifice were permissible under state law.

Armed with this information, the city passed Resolution 87-90, a hortatory enactment adopted on August 11th.⁶⁶ This resolution declared it was city “policy” to oppose ritual sacrifice of animals within Hialeah. Later, in September, the city adopted three substantive ordinances.⁶⁷

⁵⁴ These animals are not eaten as other sacrificial animals are, because they are used in rituals, such as the cleansing ritual, where the negative energy of the practitioner is transferred back to the animal. If the animal were consumed the negative energy could not be dispersed. Thus, the animal must be left in an area near where the targeted Orisha resides, in order to decompose and return back to the earth. *See DE LA TORRE, supra* note 4, at 126.

⁵⁵ *Lukumi*, 723 F. Supp. at 1476.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ City of Hialeah, Fla. Resolution No. 87-66 (June 9, 1987), *reprinted in Lukumi*, 508 U.S. at 548.

⁶⁰ *Id.*

⁶¹ City of Hialeah, Fla. Ordinance No. 87-40 (June 9, 1987), *reprinted in Lukumi*, 508 U.S. at 548-49. The maximum municipal penalty could not exceed five hundred dollars, and the maximum jail sentence could not exceed sixty days. *Id.*

⁶² *Id.*

⁶³ FLA. STAT. § 828.12 (1) (2004).

⁶⁴ *Lukumi*, 508 U.S. at 526-27 (1993). Advice was sought because Fla. Stat. § 828.27 only permits municipalities to enact animal control or cruelty ordinances that are not in conflict with chapter 828 of the state statutes. FLA. STAT. § 828.27 (7) (2004).

⁶⁵ 146 Fla. Op. Att’y Gen. 5 (1987).

⁶⁶ City of Hialeah, Fla. Resolution No. 87-90 (Aug. 11, 1987), *reprinted in Lukumi*, 508 U.S. at 549-50.

⁶⁷ *Id.*

Ordinance 87-52 prohibited possession or use of animals for ritual slaughter outside of properly zoned and licensed establishments.⁶⁸ Ordinance 87-71 declared in “unlawful . . . to sacrifice any animal within the corporate limits of the City of Hialeah” if it were not done for the primary purpose of food.⁶⁹ The final of the three, Ordinance 87-72, declared it unlawful to slaughter any animal in the city on any premise not zoned for slaughter and “meeting all health, safety and sanitation codes prescribed by the City.”⁷⁰ This provision exempted small farm operations that were exempted by state law.⁷¹ With these enactments, the city had blocked the Santeros from conducting animal sacrifices at the church.⁷²

The church responded by filing a claim in federal district court under 42 U.S.C. § 1983.⁷³ The church, led by head priest Ernesto Pichardo, challenged all four ordinances by asserting they were in violation of the First Amendment right to free exercise of religion.⁷⁴ The district court held that the ordinances were not in violation of the Constitution’s Free Exercise Clause of the First Amendment.⁷⁵ The court found the city had had asserted compelling interests to justify the ordinances: preventing animal cruelty and protecting the public health.⁷⁶ Interestingly, the district court concluded the ordinances’ effect of prohibiting animal sacrifice was not aimed specifically at the practices of the Church of Lukumi Babalu Aye or Santería.⁷⁷

All the evidence established was that the council members’ intent was to stop the practice of animal sacrifice in the City. Although this concern was prompted by the Church’s public announcement that it intended to come out into the open and practice its religious rituals, including animal sacrifice, the council’s intent was to stop animal sacrifice *whatever individual, religion, or cult it was practiced by*.⁷⁸

In an unpublished opinion, the Eleventh Circuit Court of Appeals affirmed the district court’s decision.⁷⁹ However, on June 11, 1993, a unanimous Supreme Court reversed the decision.⁸⁰ The Church of Lukumi Babalu Aye had prevailed in their constitutional free exercise claim, defeating Hialeah’s ordinances.

⁶⁸ City of Hialeah, Fla. Ordinance No. 87-52 (Sept. 22, 1987), *reprinted in Lukumi*, 508 U.S. at 550-52.

⁶⁹ City of Hialeah, Fla. Ordinance No. 87-71 (Sept. 22, 1987), *reprinted in Lukumi*, 508 U.S. at 552-54.

⁷⁰ City of Hialeah, Fla. Ordinance No. 87-72 (Sept. 22, 1987), *reprinted in Lukumi*, 508 U.S. at 555-57.

⁷¹ *Id.*

⁷² *Lukumi*, 723 F. Supp. at 1476-77.

⁷³ *Id.* at 1469.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1486.

⁷⁶ *Id.* It should be noted here, to avoid confusion, this decision was handed down prior to the U.S. Supreme Court’s 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Prior to *Smith*, strict scrutiny was the standard of review applied, at least expressly, in cases where a free exercise violation had been alleged. The district court also found a third compelling interest asserted by the city: protecting the welfare of children by not exposing them to animal sacrifice. This interest was not re-asserted by the city in the Supreme Court.

⁷⁷ *Lukumi*, 723 F. Supp. at 1476-77.

⁷⁸ *Id.* (emphasis supplied).

⁷⁹ *Church of Lukumi Babalu Aye v. City of Hialeah*, 936 F.2d 586 (11th Cir. 1991).

⁸⁰ *Lukumi*, 508 U.S. 520.

III. FREE EXERCISE AND ANIMAL SACRIFICE IN THE U.S. SUPREME COURT

The Free Exercise Clause of the First Amendment⁸¹ of the U.S. Constitution is usually asserted in one of three situations. It may be invoked when a government regulation burdens a religious practice or makes religious observance difficult.⁸² Additionally, it may be used to challenge a regulation that compels an individual to engage in conduct which their religion forbids.⁸³ Finally, a violation may be claimed when a law prevents an individual from engaging in conduct which his religion requires.⁸⁴ The latter of the three situations was at issue in *Lukumi*.

A. History of Free Exercise Jurisprudence

1. free exercise jurisprudence before Smith

The Supreme Court has historically distinguished between state regulation of religious belief, and state regulation of religious conduct.⁸⁵ The former was strictly forbidden, but the latter was necessarily more permissible. In *Cantwell v. Connecticut*, the Court stated: “Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”⁸⁶ Thus, if religious *conduct* was being regulated for the purpose of promoting public health, safety, welfare, or another public interest, the law was generally found constitutionally permissible.

Under the belief/action dichotomy, free exercise challenges to regulations compelling, burdening, or forbidding conduct were almost always unsuccessful. For example, challenges to regulations requiring adherence to military uniform requirements,⁸⁷ observance of Sunday

⁸¹ U.S. CONST. amend. I.

⁸² See, e.g., *Braunfield v. Brown*, 366 U.S. 599 (1961) (challenging Sunday closing laws on the grounds that petitioners, Orthodox Jews, also must observe Saturday closing for Sabbath and their stores were thus placed at a disadvantage); *Sherbert v. Verner*, 374 U.S. 398 (1963) (challenging denial of unemployment benefits on the basis that Petitioner was offered a job, which she refused because it required her to work on her religious Sabbath).

⁸³ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (challenging compulsory education to age sixteen on the grounds that Petitioner’s Amish religion forbid public high school education); *Bowen v. Roy*, 476 U.S. 693 (1986) (challenging use of social security numbers in federal assistance programs on the grounds that Petitioner’s Native American religious beliefs forbid giving out the number, as it harmed their child’s spirit).

⁸⁴ *Reynolds v. United States*, 98 U.S. 145 (1878) (challenging criminal ban on polygamy on the grounds that, as a Mormon, Petitioner’s religion required him to have multiple wives); and *Prince v. Massachusetts*, 321 U.S. 158 (1944) (challenging child labor laws preventing children selling and distributing periodicals on grounds that Petitioners’ belief system, as Jehovah’s Witnesses, required all members to circulate the religious information).

⁸⁵ See *Reynolds*, 98 U.S. at 164. (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”).

⁸⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). *Cantwell* was also the first time the Court officially extended the First Amendment Free Exercise Clause to the states via the Fourteenth Amendment.

⁸⁷ *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding military regulations which forbid the wearing of yarmulkes while in Air Force uniform were not a violation of free exercise; military had a sufficient interest in subordination of individuals in order to facilitate the overall group mission).

closing laws,⁸⁸ payment of social security taxes and other federal taxes,⁸⁹ and use of social security numbers⁹⁰ all failed. In each case the U.S. Supreme Court found the challenged law did not violate the Free Exercise Clause.

In fact, successful free exercise challenges were few and far between. One successful challenge occurred in *Wisconsin v. Yoder*, when the Court upheld an Amish father's challenge to Wisconsin's compulsory education requirement for minors.⁹¹ Other successful challenges occurred in cases where the government had denied unemployment benefits because the individual had declined jobs requiring work on their day of worship.⁹² These were largely the only successful challenges in the Supreme Court prior to *Lukumi*.

After the early 1960s, the Court purported to apply strict scrutiny to evaluate any valid assertion of a free exercise violation.⁹³ This is the most rigorous level of constitutional scrutiny. When the Court applies this level of constitutional review, the government is required to defend the challenged regulation by asserting a compelling public interest to justify it. However, as summarized above, the Court rarely struck down any regulations of conduct in the name of free exercise. Instead, the Court would swiftly determine the state's interest satisfied the "compelling public interest" burden.⁹⁴

Further, the Court occasionally refused to apply strict scrutiny at all. For example, in *Bowen v. Roy*, Native American parents challenged a state law requiring the use of social security numbers to obtain welfare benefits.⁹⁵ The parents said their Native American religion forbid using such numbers, as using the number would endanger their child's spirit. In upholding the constitutionality of the law, the Court stated: "The test applicable in cases like *Wisconsin v. Yoder* is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs . . . the Government is entitled to wide latitude."⁹⁶ The Court further went on to say that "absent proof of intent to discriminate against particular religious beliefs or against religion in general" the government could meet its burden of demonstrating a regulation was valid if the regulation were a

⁸⁸ *Braunfield*, 366 U.S. at 599 (holding state's asserted interest in a uniform day of rest a sufficient secular goal, no exemption was required for Orthodox Jews who were placed at an economic disadvantage when they had to close both Saturday (their Sabbath) and Sunday).

⁸⁹ See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (holding Amish free exercise challenge to payment of Social Security taxes failed, the payment was essential to accomplish the important government interest of maintaining a nation social security system).

⁹⁰ *Bowen*, 476 U.S. at 693 (holding that the state's interest in using social security numbers to administer government benefits was valid and permissible, and requiring Native American parents to obtain and use a social security number for their daughter was not a violation of free exercise).

⁹¹ 406 U.S. at 205.

⁹² *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Frazee v. Illinois Department of Income Security*, 489 U.S. 829 (1989).

⁹³ *Sherbert*, 374 U.S. at 398 (establishing that the correct standard for the Court to apply in evaluating a valid free exercise challenge was strict scrutiny).

⁹⁴ See e.g. *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, Petitioner sought exemption from military duty in Vietnam, on the basis his religious belief required he conscientiously object to "this war." He challenged the Military Selective Service Act of 1967, which only allowed religious conscientious objection to "all wars" as violating the Free Exercise Clause and the Establishment Clause. The Court determined within a few sentences of the opinion that there were substantial governmental interests relating to military conscription, which justified not permitting religious objection to specific wars. *Id.* at 463.

⁹⁵ 476 U.S. at 693.

⁹⁶ 476 U.S. at 707 (citations omitted).

“reasonable means of promoting a legitimate public interest.”⁹⁷ In *Bowen*, the Court seemed to dwell on the type of regulation--a requirement in order to obtain government benefits.⁹⁸ Despite this limiting context, the Court’s language indicates the seeds of the *Smith* test were already being planted in free exercise jurisprudence. The use of strict scrutiny review in most free exercise challenges was soon to be a thing of the past.

2. *Employment Division v. Smith: a new constitutional test for Free Exercise challenges*

In 1990, the Court expressly changed the constitutional test applicable to free exercise challenges. In *Employment Division v. Smith*, the Court held that members of the Native American Church, fired and denied unemployment benefits for their religious peyote use, were not exempt from Oregon’s criminal statute prohibiting the possession of controlled substances.⁹⁹ In deciding *Smith*, the Court applied a new constitutional test to the challenged law. This new analysis first determined whether the law regulated conduct in a neutral and generally applicable way. If so, the state needed only justify the law with a legitimate public interest. Though a six-three split on the holding, only five of the nine justices agreed to officially change the free exercise standard of constitutional review.¹⁰⁰

The Court’s new test significantly weakened an individual’s ability to assert a violation of the Free Exercise Clause. Now neutral and generally applicable laws could freely burden religious conduct as long as they served a legitimate public interest.¹⁰¹ Nearly any interest that in some way served the public good would satisfy this “legitimate public interest” requirement. The meaning of *Smith* was clear: there need not be legal accommodation for conduct simply because it was religious.

The Court defended the departure from strict scrutiny review. According to the Court, if the Free Exercise Clause required a government to defend regulations burdening religious conduct with a compelling interest, each citizen was given a private right to ignore generally applicable laws.¹⁰² Effectively, each individual was then a law unto themselves.¹⁰³ Such a system could not uphold social order.

The Court did not escape from the *Smith* decision unscathed by criticism. In fact, the political process, which the Court had entrusted to protect minority religions in *Smith*,¹⁰⁴ reacted swiftly. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) which functioned to override the *Smith* decision. The act mandated that a government could not substantially burden a person’s religious conduct without a “compelling government interest.”¹⁰⁵

⁹⁷ *Id.* at 708.

⁹⁸ *Id.*

⁹⁹ 494 U.S. at 872.

¹⁰⁰ Specifically, Justice O’Connor, who concurred in the holding, vehemently criticized the new test for not giving enough protection to minority religions, which she felt were more likely to be significantly burdened and have no recourse in the political process. *Id.* at 902-03 (O’Connor, J., concurring). The dissenters, Justices Blackmun, Brennan, and Marshall, also agreed that elimination of the previous strict scrutiny test was unwarranted, and stated the decision to adopt a new test rested on misconstruing past precedent. *Id.* at 908 (Blackmun, J., dissenting).

¹⁰¹ *Id.* at 885.

¹⁰² *Id.* at 885-86.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 890.

¹⁰⁵ 42 U.S.C. § 2000bb (1993).

However, the Supreme Court later declared RFRA unconstitutional as applied to state and local governments (but apparently still good law with regard to the federal government).¹⁰⁶ The Court stated the scope of the act was beyond the powers of Congress as enumerated in the Constitution.¹⁰⁷

Undaunted, Congress enacted the Religious Land Use and Institutionalized Person Act (RLUIPA) in 2000.¹⁰⁸ Using congressional powers granted via the U.S. Constitution's Commerce Clause,¹⁰⁹ Congress sought to demand a "compelling state interest" when a law regulating land use or institutionalized persons burdened religious conduct. The future of this act is uncertain, as it has not yet come before the Supreme Court. However, a federal district court in California has held the act to be unconstitutional, and higher courts may follow suit.¹¹⁰ Therefore, in spite of opposition, the *Smith* test remains applicable to most free exercise challenges.

Despite *Smith*'s retreat from heightened free exercise protection, the *Smith* decision did fire one warning shot at state and local legislatures. The Court indicated regulations of conduct would be unconstitutional if the motive of the legislature was to target the conduct *because* it was inspired by religion:

It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.¹¹¹

These words established the outer limit of permissible regulations interfering with religious conduct. If the conduct was regulated only because it was motivated by religious belief, the regulation would be in violation of constitutional free exercise rights.

At the time, the Justices may never have foreseen such a unique legal challenge arising before the Court. However, these words foreshadowed the free exercise conflict the Court would entertain only three years later in *Lukumi*.

B. Church of Lukumi Babalu Aye v. City of Hialeah: *Protecting Animal Sacrifice?*

Lukumi came before the Supreme Court six years after the conflict had arisen between the church of Babalu Aye and the city of Hialeah, and almost four years after the Florida District Court decision had been entered. In the interim, with the Court's *Smith* decision in 1990, free exercise law had undergone major changes. In fact, the dearth of successful free exercise challenges prior to *Smith*, coupled with *Smith*'s reformation of the free exercise constitutional test, seemed to indicate that the church had an almost insurmountable battle. Without strict scrutiny, the

¹⁰⁶ *City of Bourne v. Flores*, 521 U.S. 527 (1997).

¹⁰⁷ *Id.* at 536.

¹⁰⁸ 42 U.S.C. § 2000cc (2004).

¹⁰⁹ U.S. CONST. art. I, § 8, cl. 3

¹¹⁰ *Elisnore Christian Ctr. v. City of Lake Elisnore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003).

¹¹¹ *Smith*, 494 U.S. at 877-78.

interests the city had asserted, protection of public health and prevention of animal cruelty, seemed more than sufficient to defeat the challenge to Hialeah's four ordinances. The Petitioners needed a heightened level of constitutional review. To invoke this, they needed to argue that the ordinances targeted conduct *because* it was inspired by religious belief. This is precisely what they asserted, and it worked.

1. the context of the Lukumi analysis

The Supreme Court began its opinion by establishing that Santería was a religion within the meaning of the First Amendment.¹¹² The Court further stated that the practice of animal sacrifice in Santería, though disagreeable to some, need not be commonly acceptable to warrant First Amendment protection.¹¹³ With these words, the Court had established that the church had a viable free exercise claim.

Next, the Court reiterated that the proper method of review was applying the test articulated in *Smith*. If the ordinances were neutral and of general application, their incidental effect of burdening a religious practice would not prove them unconstitutional, so long as they served a legitimate public interest.¹¹⁴ However, if the ordinances were not found neutral and generally applicable, strict scrutiny review would be invoked. The ordinances would then need to be justified by a compelling government interest, and be narrowly tailored to serve that interest.¹¹⁵ Having laid out the framework of the inquiry, the Court then proceeded to engage in its application.

2. the neutrality of the ordinances

The Court analyzed the ordinances' neutrality in progressive stages. Beginning with the text of the ordinances, the Court noted a law would lack facial neutrality if it referred specifically to "a religious practice without a secular meaning discernable from the context."¹¹⁶ The Court found though the words "animal sacrifice" and "ritual" seemed to have some religious connotations, there were also plausible secular meanings for the words. The Court concluded the wording of the ordinances was not sufficient to demonstrate an impermissible objective.¹¹⁷ The ordinances did not lack facial neutrality.

However, this did not end the neutrality inquiry. The Court asserted that a facially neutral law could still harbor an impermissible object.¹¹⁸ The Court turned to Resolution 87-66,¹¹⁹ in which the city had expressed its commitment to prevent religious action "inconsistent with public morals, peace or safety." The Court concluded that this resolution supplied evidence

¹¹² *Lukumi*, 508 U.S. at 531.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 532-33.

¹¹⁶ *Id.* at 533-34.

¹¹⁷ *Id.* at 534.

¹¹⁸ *Id.*

¹¹⁹ *See supra* note 59.

that the object of the ordinances was to suppress a “central element of the Santería worship service.”¹²⁰

The Court also looked to the effect of each of the ordinances in their collective operation. The Court found that Ordinance 87-71,¹²¹ specifically prohibiting sacrifice of animals, exempted almost all types of animal killing except for animal sacrifice.¹²² The Court further felt the language “not for the primary purpose of food consumption” went even further, appearing to operate as an exception for kosher slaughter.¹²³ From this the Court determined the true object of the ordinance was simply to stop Santería animal sacrifices.

Regarding Ordinance 87-52,¹²⁴ prohibiting possession and use of animals to be killed in rituals, the Court found that it harbored numerous suspicious exemptions, indicating a legislative “gerrymander.”¹²⁵ The Court found it failed to cover animal killings not for food purposes, killings not done during a ritual, or killings done during a ritual but in a properly zoned establishment.¹²⁶ In operation, the Court concluded, the burden of the ordinance fell almost exclusively on Santería.¹²⁷

Finally, ordinance 87-40,¹²⁸ incorporating state animal control and cruelty laws, also failed the neutrality inquiry. Here, the Court dwelled on the attorney general’s opinion construing Florida’s animal cruelty statute. The Court stated that to deem a killing “unnecessary” when it was done for religious reasons, yet allow most other animal killings to fall outside the prohibition, again specifically operated to target Santería.¹²⁹

The Court admitted Ordinance 87-72,¹³⁰ which confined animal slaughter to properly zoned slaughter houses, might survive the neutrality inquiry were it not for its relationship to the previous three impermissible ordinances.¹³¹ Ordinance 87-72 was thus found guilty by association. The Court concluded that because the ordinances, in sum, had the effect of targeting Santería animal sacrifice, all the ordinances seemed to solely target a specific religious conduct.

Further, the Court indicated they could “find guidance in our equal protection cases” in determining the ordinances’ neutrality.¹³² By this, the Court meant they could determine the true object of the ordinances from circumstantial evidence, for example the historical background leading to the enactments. This stage of the inquiry reflected dismally on the city council. The legislative record showed the city harbored great hostility towards the church and its practitioners.¹³³ This final step in the analysis forced the Court to conclude that the only object of the ordinances was to prevent Santeros from engaging in animal sacrifice.

¹²⁰ *Lukumi*, 508 U.S. at 534.

¹²¹ *See supra* note 69.

¹²² *Lukumi*, 508 U.S. at 535-36.

¹²³ *Id.* at 536.

¹²⁴ *See supra* note 68.

¹²⁵ *Lukumi*, 508 U.S. at 537.

¹²⁶ *Id.* at 536-37.

¹²⁷ *Id.* at 537.

¹²⁸ *See supra* note 61.

¹²⁹ *Lukumi*, 508 U.S. at 537-38.

¹³⁰ *See supra* note 70.

¹³¹ *Lukumi*, 508 U.S. at 539-40.

¹³² *Id.* at 540.

¹³³ *Id.* at 540-42. Specifically, the Court found that many city council members had made comments at the meetings directed towards Santería and the church members. For example, one councilman said that people in Cuba were put in jail for practicing the religion, and that the religion was against everything the country stood for. Apparently, at

The Court found the ordinances were not neutral laws, but laws directly targeting a religious practice. After examining the language of the ordinances, their effect in operation, and the historical record of the legislation, the Court found the ordinances worked in tandem to target one object: Santería animal sacrifice. The city's ordinances did not satisfy *Smith's* requirement of neutrality.

3. *the general applicability of the ordinances*

Having found the ordinances were not neutral, the Court was more perfunctory with the second prong of the *Smith* test. In fact, the Court prefaced this stage of the inquiry by stating: "In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."¹³⁴ From there, the Court focused mainly on the under inclusiveness of the ordinances.

The Court lashed out again at Ordinance 87-40¹³⁵ and the Florida Attorney General's construction of the term "unnecessary." The Court enumerated how many secular killings were deemed "necessary" and permissible under state law: "For example, fishing . . . is legal. Extermination of mice and rats within a home is . . . permitted. [E]uthanasia of 'stray . . . or unwanted animals'; . . . infliction of pain or suffering 'in the interest of medical science'; . . . and the use of a live animal to 'pursue or take wildlife or to participate in any hunting,' . . . and to 'hunt wild hogs. . . .'"¹³⁶ To the city's response that such killings were "important" or "obviously justified" the Court retorted: "These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals."¹³⁷

The Court also found the ordinances under inclusive in protecting public health.¹³⁸ With regard to the assertion that the public health was threatened by improper disposal of animal carcasses: "The city does not . . . prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after that activity."¹³⁹ The Court even strained to find Ordinance 87-72¹⁴⁰ under inclusive, by finding that the state's small farm exemption for persons slaughtering small numbers of hogs and cattle suspect.¹⁴¹ Upon finding the ordinances did not reach far enough to achieve the city's asserted justifications, the Court found the laws were not generally applicable.¹⁴² In sum, the Court concluded the ordinances would impose a prohibition upon

the public meetings, such comments were greeted by the public with cheers, while Ernesto Pichardo's brief attempts to speak were met with taunts. *Id.*

¹³⁴ *Id.* at 543.

¹³⁵ *See supra* note 61.

¹³⁶ *Lukumi*, 508 U.S. at 543-44.

¹³⁷ *Id.* at 544.

¹³⁸ *Id.*

¹³⁹ *Id.* at 544-45.

¹⁴⁰ *See supra* note 61.

¹⁴¹ *Lukumi*, 508 U.S. at 545 (citing FLA. STAT. § 828.24 (3) (1991)). But note that this exemption was later repealed, when § 828.24 was substantially rewritten and amended. Act effective July 1, 2001, ch.01-279, § 39, at 120, Law of Fla. (amending § 828.24 FLA. STAT. (2000)).

¹⁴² *Id.* at 545-46. "We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances 'have every appearance of a prohibition that society is prepared to impose upon [Santería worshippers] but not upon itself.'" *Id.* (citations omitted).

conduct because it was religious, but not prohibit the same conduct done by a secular society at large. This would lead to the “precise evil . . . the requirement of general applicability is designed to prevent.”¹⁴³

4. strict scrutiny and the need for a compelling government interest

Because the ordinances were not neutral or generally applicable, the Court found the ordinances “must undergo the most rigorous of scrutiny.”¹⁴⁴ This meant that the ordinances needed to serve a compelling government interest, and be closely tailored to accomplishing this interest.

However, other than asserting the justifications for the ordinances must be “of the highest order,” the Court seemed to decline a determination of whether the interests the city asserted in their defense were compelling. Employing somewhat circular reasoning, the Court concluded because the government had failed to enact other measures to prevent “substantial harm . . . of the same sort” the interests could not be compelling.¹⁴⁵ Thus, because the Court found the ordinances so under inclusive, it found “there can be no serious claim that those interests justify the ordinances.”¹⁴⁶ The Court seemed to intimate that the interests asserted by the city were not the true justifications for the ordinances.

However, before establishing that the city’s asserted interests could not be compelling, the Court first addressed the tailoring of the ordinances to the city’s purported interests. The Court found that the ordinances were not narrowly tailored to accomplish the city’s asserted interests.¹⁴⁷ For example, the Court decided laws regulating disposal of animal carcasses could satisfy Hialeah’s public health concern, and still permit animal sacrifice.¹⁴⁸ The Court concluded that narrower ordinances could suffice in protecting the city’s interests in public health protection and animal cruelty prevention, while burdening religion to a far lesser degree.¹⁴⁹

With this brief inquiry, the Court found the ordinances did not withstand strict scrutiny. The Court apparently did not find the ordinances were designed to serve the compelling public interests asserted by the city. And even if they were, the Court concluded the laws could be more narrowly tailored to serve these interests. The ordinances failed constitutional review, and all were held unconstitutional under the Free Exercise Clause.

C. The Law of Lukumi: What the Supreme Court Said, and Didn’t Say

As a matter of free exercise law, the Supreme Court probably decided *Lukumi* properly. The Court apparently felt it was confronted with the type of situation expressly forbidden in *Smith*, a government banning conduct simply because it was inspired by religious belief: “It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is an easy

¹⁴³ *Id.* at 546.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 546-47.

¹⁴⁶ *Id.* at 547.

¹⁴⁷ *Id.* at 543.

¹⁴⁸ *Id.* at 538-39.

¹⁴⁹ *Id.* at 546.

one to decide.”¹⁵⁰ Unlike the district court, the Supreme Court refused to distinguish animal sacrifice from other animal killings.¹⁵¹ Without this distinction, the conduct at issue appeared permissible in many secular circumstances, and only barred when motivated by religion.

The historical record behind the enactments was incredibly damaging.¹⁵² Had Hialeah been more cautious in its public debate and hortatory enactments, it may have been more difficult for the Court to conclude that the city had acted to target Santería. Ultimately, the record simply revealed an intense discrimination against a religious practice.

The *Lukumi* decision reiterates a fundamental First Amendment principle: legislators cannot persecute religious conduct through methods overt or disguised. In its final paragraph, the Court admonished: “The Free Exercise Clause commits government itself to religious tolerance . . . all officials must pause to remember their own high duty to the Constitution and the rights it secures.”¹⁵³

However, *Lukumi* stops far short of declaring a constitutional right to sacrifice animals. The challenged ordinances failed because they were found to be not neutral and not generally applicable. The Court found the historical record of the legislation, coupled with ordinance’s numerous exemptions, revealed the aim of the ordinances was to persecute a religious practice. If the ordinances had instead been neutral in their aims, and largely applicable to both secular and religious conduct, strict scrutiny would never have been invoked. The ordinances would then have withstood the free exercise challenge, the Court no doubt finding that protection of public health and prevention of animal cruelty were legitimate public interests to justify the laws.

In fact, it is worth noting that the Court didn’t find preventing animal cruelty was not a *compelling* public interest. Justice Blackmun, who declined to adopt the majority’s new rule in *Smith*, expressly qualified the *Lukumi* holding on this point: “This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that *sincerely* pursued the goal of protecting animals from cruel treatment.”¹⁵⁴ Thus, even Justice Blackmun, an accommodationist, was uncertain about whether the interest of protecting animals from cruelty could be superseded by free exercise rights. Clearly, the *Lukumi* holding was one turning on the invidious discrimination of a legislature, not on the merits of preventing animal sacrifice.¹⁵⁵

¹⁵⁰ *Id.* at 580 (Blackmun, J., concurring).

¹⁵¹ *See Lukumi*, 723 F. Supp. at 1472.

¹⁵² *See DE LA TORRE*, *supra* note 4 at 174-80.

¹⁵³ *Lukumi*, 508 U.S. at 547.

¹⁵⁴ *Id.* at 580 (Blackmun, J., concurring).

¹⁵⁵ For another evaluation, reaching a similar conclusion, see Professor Francione’s critique of the Supreme Court decision which was published shortly after the decision was handed down. Gary L. Francione, *Supreme Court Did Not OK Animal Sacrifices*, THE HOUSTON CHRONICLE, June 24, 1993 (pointing out that the decision rested on the law’s failure to be neutral, and that neutral statutes preventing inhumane treatment should still be permissible).

IV. SOLUTIONS: HOW THE LAW CAN CONSTITUTIONALLY PREVENT ANIMAL SACRIFICE

The *Lukumi* decision does indicate that a direct ban on animal sacrifice will probably never be found constitutional.¹⁵⁶ Though the Court in *Lukumi* did not find the term *animal sacrifice* to include only religious conduct, it seemed to find the language, and thus the law's object, suspect. This resulted in a further, deeper inquiry into the Hialeah ordinances' true objects and historical background. No doubt this in-depth inquiry would be repeated by any court when reviewing a challenged law prohibiting animal sacrifice. It would be overly optimistic to expect that any law banning animal sacrifice *per se* could withstand this inquiry without indicating that its target was not, at least substantially, religious conduct. This would probably lead the court to conclude the law violated *Smith*'s requirements of neutrality and general applicability. Strict scrutiny would then be invoked, and would operate to defeat the law.

However, there are constitutionally permissible ways the law may operate to prevent animal sacrifice. Both *Smith* and *Lukumi* indicate that if a law is neutral in its object, and applicable to both secular and religious conduct, it will pass constitutional muster. To be neutral, *Lukumi* indicates a law must be facially neutral and not harbor numerous exemptions that operate in effect to target a religious practice. Further, the historical background of the legislation should not indicate the motivation for the law was prohibiting religious conduct. *Lukumi* also indicates that a law is generally applicable if it targets conduct that has both secular and religious motivation. If a law genuinely has these qualities of neutrality and general applicability, its incidental effect of burdening animal sacrifice will not amount to a violation of religious free exercise rights.

Two areas of the law can work to prevent animal sacrifice in constitutionally permissible ways, albeit indirectly. Below is a discussion of how both municipal zoning and licensing laws, and animal cruelty laws, can be used as a potential barrier to animal sacrifice. Neither area represents a perfect solution, in the sense neither is to likely stop sacrifice completely. However, in both areas legislation can be passed and enforced which is neutral, generally applicable, and a burden to animal sacrifice.

A. Zoning Laws

1. zoning laws regulating slaughter zones

In the *Lukumi* decision, the Supreme Court treated Ordinance 87-72 more favorably than any other of Hialeah's ordinances. The ordinance simply prohibited any animal killing within the city that was not conducted in a properly zoned slaughter house meeting applicable health, safety and operational codes. The Court was only able to criticize the law for harboring the state's

¹⁵⁶ These solutions are advanced in the context of the current legal status of animals. Of course, if laws were passed prohibiting animal killing or granting some legal rights to animals, the assertion that a direct ban on animal sacrifice would fail may not be true. If such laws preceded a law banning animal sacrifice, then animal killing would likely be prohibited in many secular areas. The current Court would almost assuredly not accommodate a religious exception. However, such sweeping changes in the state of animal law are probably, unfortunately, far off and not helpful to this analysis which seeks immediate solutions.

small farm exemption. The ordinance largely failed only because it had been passed in tandem with the other impermissible ordinances.

If this ordinance had been examined independent of the others, the Court likely would have found it to be neutral and of general applicability. This type of regulation is facially neutral in its object of protecting the public health. It would also be neutral in its effect, and this would be especially true if no exemptions were present. Further, it is generally applicable because it regulates both religious and secular slaughter. Such a regulation would likely survive the *Smith* test.

A municipal law relegating animal slaughter to authorized slaughter zones would have the incidental effect of preventing many animal sacrifices. Most animal sacrifices take place in Santeros' *Ilés*, or house-temples. These house-temples are usually in residential zones, within city limits. The law would prevent the sacrifices that take place in these locations.

The solution is not perfect, however. First, the Religious Land Use and Institutionalized Person Act¹⁵⁷ may extend to such zoning laws, and is still the applicable law in many jurisdictions unless and until it is found unconstitutional. RLUIPA states that governments cannot implement land use regulations which substantially burden religious free exercise unless the regulation serves a compelling public interest, and is narrowly tailored to achieve this interest.¹⁵⁸ Essentially, RLUIPA mandates strict constitutional scrutiny of land use laws affecting religious free exercise rights. RLUIPA's primarily goal seems to be preventing local governments from denying permits for church construction or operation.¹⁵⁹ However, if RLUIPA was determined to apply to slaughter zoning laws affecting Santería house-temples, a government advancing municipal zoning laws might be required to demonstrate how burdening religious animal sacrifice served a compelling public interest. A court reviewing the challenged law may find the law was justified by the compelling interest of protecting public health. However, the court may also find a narrower law, such as one regulating the method of sacrifice and disposal, would serve this interest without placing such a substantial burden on religious practices. This issue would be one of first impression under RLUIPA.

Additionally, such a law would not prevent Santeros from conducting sacrifices in rural areas outside the scope of the zoning regulation. However, for practitioners who do not live in rural areas, the need to travel a distance could be a deterrent. Such a burden would probably render frequent sacrifices less feasible for most practitioners.

2. zoning and licensing laws regulating animal possession

Similarly, a law regulating possession of certain animals within city limits may indirectly prevent sacrifice. Ordinance 87-52 did attempt such a prohibition, but went further. In addition to prohibiting possession, the ordinance prohibited killing during a ritual, but allowed killing if the animal was not going to be consumed, or was ritualistically slaughtered for food purposes within properly zoned areas. The Court found this pattern of prohibitions and exemptions to be a sign

¹⁵⁷ 42 U.S.C. § 2000cc (2004).

¹⁵⁸ 42 U.S.C. § 2000cc (a) (1) (2004).

¹⁵⁹ Roman P. Storzer & Anthony P. Picarello, Jr., *The Religious Land Use and Institutionalized Person Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 945-968 (2001).

of a legislative gerrymander. From this, the Court concluded the ordinance was directed only, in effect, at Santería sacrifice.

A prohibition solely against possession would not be likely to raise such concerns. Such a law would simply prohibit possession of certain animals, such as chickens, goats and other livestock, outside of properly zoned areas and/or licensed establishments. As long as there were few or no exemptions, the ordinance would in effect operate neutrally to protect the public health. The law would apply to animals housed both for secular and religious uses, therefore prohibiting both secular and religious conduct. Because such a law would then be neutral and generally applicable, it would not be subjected to strict scrutiny and would likely survive constitutional review.

Many Santería practitioners obtain animals from specialized shops called botanicas, which sell religious supplies for Santería.¹⁶⁰ These botanicas are usually located in commercially zoned areas.¹⁶¹ These botanicas also do not generally have a license to house the animals they keep.¹⁶² Such a law would prevent botanicas lacking proper zoning and/or licensing from possessing sacrificial animals. This would stop a large portion of sacrificial animal supply to practitioners.

This is also not a perfect solution. If a botanica established itself in a proper zone and/or obtained a license to house animals, such actions would be then be legally permissible. Further, the law would not prevent Santeros from obtaining animals from other licensed and/or properly zoned dealers. However, by requiring proper zoning and licensing, the conditions under which animals are held could be better regulated. The law would work to prevent cruel conditions like those reported in the San Francisco account, above.¹⁶³ At the very least, such a law imposes a burden on the practice of animal sacrifice, and takes steps towards the safeguarding of animal welfare.

B. Animal Cruelty Statutes

State and local animal cruelty statutes may function to prohibit animal sacrifice in some circumstances. In *Lukumi*, the Supreme Court found that Ordinance 87-52, incorporating Florida's animal cruelty statute, lacked general applicability because it construed animal sacrifice to be an "unnecessary" killing while permitting many secular killings. Thus, an animal cruelty law probably cannot flatly prohibit all animal sacrifices unless it also prohibits a great number of secular animal killings. However, the state can mandate that religious sacrifices are conducted in a humane manner. Sacrificial conduct that rises to the level of animal cruelty can then be prosecuted under animal cruelty statutes.

Shortly after the *Lukumi* decision was handed down by the Supreme Court, another Santero was prosecuted under Florida's animal cruelty statute.¹⁶⁴ Rigoberto Zamora, a professed Santero, was charged with four counts of animal cruelty stemming from a Santería sacrifice he

¹⁶⁰ DE LA TORRE, *supra* note 4 at 133; *Lukumi*, 723 F. Supp. at 1474.

¹⁶¹ De La Torre, *supra* note 4 at 133 (describing the botanica and merchandise it carries to cater to practitioners).

¹⁶² The district court found botanicas are likely to be the suppliers of the animals used in the sacrifices, and that the botanicas were unlikely to be licensed to house or sell animals. *Lukumi*, 723 F. Supp. at 1474.

¹⁶³ Fraily, *supra* note 50.

¹⁶⁴ Manny Garcia, *Santeria Priest Claims Constitutional Right in Animal Killings*, THE MIAMI HERALD, Aug. 9, 1995.

performed for reporters in celebration of the *Lukumi* decision.¹⁶⁵ He motioned to dismiss the charges, stating that the state animal cruelty statute, as applied to him, violated his right to free exercise of religion.¹⁶⁶ The prosecution asserted that the First Amendment did not prevent animal cruelty prosecutions under Fla. Stat. § 828.12, where the sacrifice was conducted in a cruel and inhumane manner.¹⁶⁷ The county court agreed, and denied Zamora's motion to dismiss.¹⁶⁸ Zamora plead no lo contendere to all counts, reserving his right to appeal the denial. However, the 11th Judicial Circuit per curiam affirmed the denial of the motion.¹⁶⁹

Animal cruelty laws provide a viable solution for preventing animal sacrifice. Every state has enacted animal cruelty legislation that provides for criminal penalties.¹⁷⁰ Thus, even though a state cannot flatly prohibit animal sacrifices, the state can mandate that the practice occur in a humane manner. Practitioners of animal sacrifice who do not adhere to the state requirements can be criminally prosecuted. Such prosecutions should have a deterrent effect on the practice.

As with the former solutions, this solution is also not perfect. Though the prosecution of an offender may deter future conduct, it cannot prevent the initial harm from occurring. The solution also has other practical short comings. For a prosecution to take place, the offense must first be reported. Additionally, the facts demonstrating the inhumane method of the sacrifice have to be proven in court beyond a reasonable doubt, the standard of proof required in criminal prosecutions. Since Santería's practitioners usually conduct sacrifices away from the eyes of anyone but fellow practitioners, both of these requirements can be difficult to satisfy. However, the attitude of fellow practitioners towards Zamora's conduct¹⁷¹ indicates some self-policing and reporting can be possible within the Santería community.

V. CONCLUSION

The solutions discussed above are not exhaustive of the constitutionally permissible ways the law can burden or prevent animal sacrifice. Any law that satisfies the *Smith* test can withstand constitutional scrutiny when challenged under the Free Exercise Clause. Local and state

¹⁶⁵ Rigoberto Zamora sacrificed five roosters, three goats, two hens, two pigeons, two guinea hens, and a lamb to celebrate the *Lukumi* decision. According to the reporters, the sacrifices did not all proceed smoothly. For example, Zamora had to trade out knives in the middle of a goat sacrifice when his first knife was too dull to finish the cut. Aminda Marques Gonzalez, *Protesters, Church Rap Unusual Public Santería Sacrifices*, THE MIAMI HERALD, June 27, 1993 at A1. It should also be noted that Zamora's actions were condemned by some fellow practitioners and by Ernesto Pichardo, the head priest of the Church of Lukumi Babalu Aye. Pichardo stated that Zamora's conduct was "taken totally out of the religious experience" and that he and church elders planned to investigate the Santero's training and background. *Id.*

¹⁶⁶ Initial Brief of Appellant at 4, *State v. Zamora*, No. 96-375AC (Fla. 11th Cir. Ct. 1997).

¹⁶⁷ State of Florida's Response to Defendant's Motion to Dismiss at 1-2, *State v. Zamora*, No. M95-28476 (Fla. Dade Cty. Ct. Feb. 14, 1996). The State prosecuted Zamora for misdemeanor animal cruelty, the four counts stemming from his inept sacrifice of the sheep and the three goats. Apparently, none of the animals had their carotid arteries severed in the manner required by the state statute governing humane ritual slaughter. *Id.*; FLA. STAT. §828.23 (6) (b) (2004).

¹⁶⁸ Order, *State v. Zamora*, No. M95-28476 (Fla. Dade Cty. Ct. Feb. 14, 1996).

¹⁶⁹ *State v. Zamora*, No. 96-375AC (Fla. 11th Cir. Ct. Oct. 10, 1997).

¹⁷⁰ M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L.J. 3, 4 (2002).

¹⁷¹ See Gonzalez, *supra* note 165.

governments are free to enact and enforce laws that have the effect of burdening or preventing animal sacrifice if the laws are neutral and of general applicability.

The Court's decision in *Lukumi* has been criticized for not protecting animals by recognizing that governments have a substantial interest in preventing animal sacrifice.¹⁷² However, because animals have very little legal protection in the United States and in Western Society in general,¹⁷³ it is unfair to expect the Supreme Court to draw an arbitrary line at animal sacrifice. After all, if animals can be bought, sold, and used with impunity to satisfy most human needs, how can using them to engage in religious conduct suddenly be deemed impermissible? This quandary was undoubtedly an undercurrent in the *Lukumi* decision.

Those who disagree with animal sacrifice on an ethical level should reflect on why that practice is more disagreeable than other practices involving the use of animals. Some have asserted that the varying treatment of animals across cultures has erected yet one more barrier between the U.S. majoritarian culture and the cultures of marginalized races and ethnicities.¹⁷⁴ If so, it follows the majority culture establishes the norm for treatment of animals. Punishment for deviation from that norm is often then directed at minority races and ethnicities. Such a pattern is arguably one more symptom of institutionalized racism. Such a proposition may seem radical, but it does challenge society to rationalize why the current morays regarding animal treatment lie where they do.

Therefore, *Lukumi* forces one final question. Though laws can constitutionally prevent and burden animal sacrifice, should such laws be enacted and enforced? The government, via the legal system, is often called upon to enforce the popular morality of society. However, the Constitution's place is to guarantee all members of society some fundamental protections of belief, speech, and action that otherwise might be annihilated in the process of enacting and enforcing legislation to satisfy democratic demand.

The Supreme Court was unable to distinguish animal sacrifices from the many legally permissible secular animal killings. Because of this, the Court could not find any justification in prohibiting one and not the others. This justification should be found; if possible, the citizens of Hialeah and other municipalities seeking to prevent animal sacrifice should explain why their reprehension towards animal sacrifice largely does not extend to the many secular killings of animals for other uses. Until this is done it seems arguably unfair, and perhaps dangerous, to employ the legal system to establish a distinction that has not yet been defended by any clear and satisfactory argument.

¹⁷² See, e.g., Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 ANIMAL L. 79, 95-98 (1995).

¹⁷³ See Chandola, *supra* note 170, at 3-12.

¹⁷⁴ Glen Elder, et al. *Le Practique Savage: Race, Place, and the Human-Animal Divide*, in ANIMAL GEOGRAPHIES (Jennifer Wolch & Jodi Emel, eds. 1997) available at <http://www.uvm.edu/~geograph/beast.html> (last visited April 18, 2005).

BEHIND A GLASS, DARKLY

JENNIFER LOGAN TILDEN*

*“To insult someone we call him ‘bestial.’
For deliberate cruelty and nature, ‘human’ might be the greater insult.”¹*
- Isaac Asimov

I. INTRODUCTION

As wild populations of big cats continue to decline precipitously, concerns about the ethical and environmental considerations of keeping cats for entertainment have increased exponentially. The plight of the big cat has been brought forcibly into the international media spotlight following high profile incidents like the tiger attack on Roy Horn at Las Vegas’ Mirage Casino. However, for every big cat whose instinct makes the national news, many suffer in silence, sacrificed to entertain the masses. Often, this cruelty to animals is rationalized under the wide net of “education,” since many people still believe there is valuable information to be gained from viewing animals trapped behind bars.

A. Ringling Brothers and Barnum & Bailey Circus

In July 2004, a two-year-old male lion named Clyde died in the Mojave Desert. The animal was contained for six hours in a Ringling Brothers and Barnum & Bailey Circus boxcar traveling from Arizona to California. High temperatures in the cars were recorded at a whopping 109°F², but the animals in the cars were not provided with water or adequate ventilation. A trainer who complained that Clyde was looking ill was ignored by the conductor and Ringling Brothers employees.³ Clyde died in Arizona, which requires a one-year renewable exhibiting license for big cats.⁴ This license may only be held by exhibitors also holding two years’ Wildlife Holding License.

Clyde was not the Greatest Show on Earth’s first animal victim. According to Circuses.com, elephants are routinely tortured with bull hooks by handlers. California Humane

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¹ ISAAC ASIMOV, ISAAC ASIMOV’S BOOK OF SCIENCE AND NATURE QUOTATIONS 67 (1988).

² People for the Ethical Treatment of Animals (PETA), Hold Ringling Accountable for Clyde’s Tragic Death, www.circuses.com/ringling-clyde.asp (all cites last visited Apr. 1, 2005).

³ *Id.*

⁴ Big Cat Rescue, State Laws for Keeping Exotic Pets, www.bigcatrescue.org/statelawsexoticcats.htm#AZ.

Society workers charged Mark Gebel, a Ringling elephant trainer, with cruelty after he used his bull hook to inflict a large wound to the shoulder of an elephant.⁵ A baby elephant had to be euthanized after toppling off a display pedestal and breaking its legs; another drowned in a pond before its frantic mother could reach it. Sabre, an Arabian horse, was caught on tape by a People for the Ethical Treatment of Animals (PETA) investigator dying during a live performance;⁶ two other horses died after being struck by a train outside Dayton, Ohio.

In 2001, an endangered Bengal named Jasmine was euthanized due to a kidney condition; Barnum and Bailey did not make this information public.⁷ Another endangered Bengal was also put down off the books the same year for facial and ear tumors. And, most appallingly, in 1999 a Ringling handler fatally shot a caged tiger named Arnie after the animal snapped during a grueling photo shoot. Arnie was also an endangered Bengal; there are estimated to be only 3,000 of these majestic animals remaining in the wild.

A suit brought against Ringling Brothers in 2001 by the ASPCA and the Animal Welfare Institute, alleging abuse of captive endangered Asian elephants, was dismissed from the district court for the District of Columbia for lack of standing under the Endangered Species Act. The court found the petitioners failed to prove sufficient injury in fact, and dismissed the suit without prejudice, but also without any aid to the animals who were the subjects of the action.⁸

B. The Lion Habitat of the MGM Grand

The MGM Grand casino in Las Vegas, Nev., spent nine million dollars in 2003 to install a so-called “Natural Lion Habitat,” allowing tourists to observe lions in a Plexiglas enclosure.⁹ The enclosure covers 5,000 square feet, and is immediately adjacent to the noisy casino floor and a lion-themed gift shop. The habitat contains concrete rocks, fake trees, and lion “toys,” including large beach-style balls. The Grand’s Lion Habitat comprises the only free animal display on the strip (the Mirage, which houses Siegfried and Roy’s famous white tigers, charges \$12 for admission, Mandalay Bay’s Shark Reef display costs \$15.95 per person).¹⁰

Visitors may have their pictures taken with four-month-old lion cubs at the habitat, encouraging the dangerous notion of big cats as cuddly pets. Additionally, this glorification of cubs may lead to unhealthy breeding practices: many venues breed large numbers of cubs as crowd pleasers, but they are later sold to dealers, small zoos, and canned hunts when they outgrow their popularity. Tourists may walk through an enclosure through the paddock to the Lion Habitat Gift Shop. The lions appear in six hour shifts six days a week. When not on display, the MGM lions live on an 8.5-acre ranch, known as “The Cat House,” located 12 miles from the Strip.¹¹ In the wild, the territory of an average pride is 40 to 50 square *miles*.¹²

⁵ Kinship Circle, *The Big Con: Ringling Brothers Barnum & Bailey Circus*, available at www.kinshipcircle.org/fact_sheets/RinglingBrosTheBigCon.pdf.

⁶ *Id.*

⁷ PETA, *Factsheet: Ringling Brothers and Barnum & Bailey*, available at www.circuses.com/pdfs/RinglingFactsheet.pdf.

⁸ *Performing Animal Welfare Society v. Ringling Bros. and Barnum & Bailey Circus*, 2001 U.S. Dist. LEXIS 12203 (D.C. Cir. 2001).

⁹ *Gambling Magazine*, MGM Denies Exploitation of Lions, www.Gamblingmagazine.com/articles/14/14-782.htm.

¹⁰ Price quotes from www.vegas.com.

¹¹ MGM Grand, Lion Habitat, www.mgmgrand.com/pages/entertainment.asp?link=habitat.

¹² Rolling Hills Zoo, African Lions, www.rollinghillszoo.com/theanimals/1/lionafican/.

The Grand maintains that lions are kept to allow people to see lions and increase awareness of big cat issues, and donates a portion of proceeds to big-cat charities. Nevada law requires a state permit for the holding or transport of bobcats and mountain lions, but does not require a permit for other felines. Nevada commercial licenses for exotic animal display average \$100.¹³ Exhibitors must also carry a federal USDA Class C “exhibitors” license. The MGM Grand qualifies as an exhibitor under the Animal Welfare Act, since the primary purpose of the Lion Habitat is exhibition, not breeding or sale.¹⁴

C. *The New Jersey Tiger Lady*

Until November of 2003, the bucolic suburb of Jackson Township, N.J. had the highest concentration of tigers per square mile in the world.¹⁵ Fifteen of these majestic cats are on display at Six Flags Great Adventure Theme Park, but an additional 24 were kept by a private citizen. Residents of metropolitan New York and Philadelphia remember the saga of the Tiger Lady of Jackson Township; Joan Byron-Marasek who ran the Tigers Only Preservation Society from her home on Route 537, housing 24 animals. Tigers Only was open for approximately 21 years, nestled in the Pine Barrens region between Philadelphia and New York City. One of her tigers, Marco, savaged her husband in 2002, leaving him in the hospital for a week.

In 1999, a 431-pound full-grown male tiger was shot by Department of Environmental Protection officials wandering near the preserve. The tiger was destroyed by police before it entered a densely populated subdivision in Clarksville, N.J., nearly crossing busy Interstate 195. Police were forced to shoot the animal after attempts to tranquilize the beast failed.¹⁶ The cat was never proven to belong to Byron-Marasek.¹⁷ Opponents of the preserve note, however, that there aren’t many other places in North Jersey a tiger could escape from. In light of the escape, the state of New Jersey failed to renew Byron-Marasek’s permit to keep the animals in 1999. She appealed this ruling, but her appeals were finally exhausted in 2002.¹⁸ During the course of litigation, Marasek went through seven different lawyers.¹⁹

Marasek denies accusations of abuse and maltreatment, and claims one of her tigers lived to be 23; average lifespan in captivity is 20 years, wild tigers tend to live only up to 15.²⁰ Many of Byron-Marasek’s tigers seem to meet a miserable fate. During various state inspections, the property was rumored to be infested with rats. There was evidence tigers were attempting to dig their way out from under the fences surrounding the property, and escape into the surrounding forest.²¹ Diamond the tiger lost a leg in a fight with Marco (the same tiger who attacked her husband) and had to be put down. One Christmas Eve, Marco killed another male during a fight.

¹³ Big Cat Rescue, *State Laws for Keeping Exotic Pets*, www.bigcatrescue.org/statelawsexoticcats.htm#NV.

¹⁴ ANIMAL WELFARE ACT, 7 USCS §2132(h).

¹⁵ Susan Orlean, *The Lady and the Tigers*, THE NEW YORKER, 24 Feb. 2002.

¹⁶ *Id.*

¹⁷ PETA, When Animals Attack: Big Cats, www.circuses.com/attacks-cats99.asp.

¹⁸ Red Nova, *N.J. Workers Rounding Up 24 Bengal Tigers*, 11 Nov. 2003 at www.rednova.com/news/display/?id=33015.

¹⁹ Kathy Baratta, *Sanctuary Owner Lays Out Plan to Move Jackson Tigers*, TRITOWN NEWS, 18 July 2002, at A1.

²⁰ Vanishing Species, *Tigers*, <http://www.vanishingspecies.net/animals/details.php/000008/Tiger/Panthera/Tigris>.

²¹ *Id.*

And two of Byron-Marasek's tigers died of poisoning after consuming road kill deer, which Marasek believes may have been contaminated by antifreeze.²²

In 2004, the 21 tigers living at the Preserve were removed from the property and sent to live in the Wild Animal Orphanage in San Antonio, Tex., at an estimated cost of \$300,000.²³ Upon arrival, however, three of the tigers had to be euthanized; one had an inoperable brain tumor, one with a kidney infection, and one male (thought to be the one who attacked Jan Byron-Marasek) for aggressiveness. Another male was mutilating his own foot, necessitating amputation of the leg.²⁴ A neurological defect keeps one of the animals from holding his head up.²⁵ Four of the tigers suffered from coccidiosis, a parasite that lives in the intestines of animals subjected to filthy conditions.²⁶

Asked for a comment, Chris Cutter of International Fund for Animal Welfare (who helped move the animals to Texas), said "Keeping a tiger in your back yard is like keeping a kitten in a suitcase."²⁷ New Jersey does not issue permits for potentially dangerous species unless you are an exhibitor, educator, or dealer. Marasek claimed her tigers were held for educational purposes--one of her males, Jaipur, was touted as the Guinness Book's largest Siberian tiger in captivity.²⁸ Marasek's animal theatrical permit was revoked on 3 May 1999 after the preserve failed numerous inspections and Marasek failed to provide adequate information about the animals' touring schedules.²⁹

D. Roy Horn, the Secret Garden and Others

Perhaps the most famous big cat incident to date was the onstage mauling of Vegas showman Roy Horn by one of Siegfried and Roy's famous white tigers on October 3, 2003. The tiger--named Montecore--bit Horn on the arm during a performance, causing Horn to strike the animal repeatedly on the muzzle with a microphone. Montecore then grabbed Horn and dragged him offstage "like a rag doll."³⁰ Stagehands were finally able to deflect the tiger by spraying it with a fire extinguisher.

As a result of the attack, Horn suffered critical blood loss from injuries to the arm, neck, and head. Cerebral hemorrhaging necessitated a decompressive hemicraniectomy--the removal of a portion of his skull, which was transplanted into his abdomen to avoid rejection upon replacement.³¹ Days after the attack, Horn also suffered a stroke as a result of the attack (the duo claim the stroke was caused by Horn's blood pressure medication).³² Critics have charged that

²² Orlean, *supra* note 15.

²³ Joseph Sapia, *N.J. Born Tigers Stretch Out at Their New Texas Spread*, ASBURY PARK PRESS, 5 Aug. 2004, at A1.

²⁴ *Id.*

²⁵ Red Nova, *supra*, note 18.

²⁶ Kathy Baratta, *Jackson Tigers Reported to Be Doing Well in Texas; Move from Jackson Went Without Problems, Facility's Director Says*, TRI-TOWN NEWS, 20 Nov. 2003, at A1.

²⁷ *Id.*

²⁸ Orlean, *supra* note 15, at 5.

²⁹ NJ Dept. of Env'tl. Protection News Release, NJDEP DIV. of Fish and Wildlife Seeks Court Order to Remove Tigers (April, 21, 2001), www.state.nj.us/dep/newsrel/releases/01_0031.htm.

³⁰ CNN, *Roy of Siegfried and Roy Critical After Mauling*, <http://www.cnn.com/2003/SHOWBIZ/10/04/roy.attacked/>.

³¹ Brendan I Koerner, *Why Put Roy's Skull in His Stomach?*, <http://www.slate.msn.com/id/2090128>.

³² Illusionist Roy Horn Walks Again, CBS NEWS, Mar. 10, 2004, www.cbsnews.com/stories/2004/03/10/entertainment/main605081.shtml.

Siegfried and Roy have downplayed the extent of his injuries to placate concerns about the safety of animal acts. As of February 2005, the Siegfried and Roy show at the Mirage is still cancelled indefinitely.

According to the Big Cat Rescue, since 1990 there have been 151 incidents involving big cat attacks. Thirteen people have been killed in these attacks, including two children; and many more have been mauled. As a result of these attacks, 54 big cats have been destroyed.³³ As recently as 29 January 2005, an endangered tiger in Sioux Falls, S.D., was at risk of being euthanized to be decapitated and tested for rabies after the animal bit a man who reached through the chain link fence surrounding its Great Plains Zoo enclosure. The only available test for rabies is lethal, and no vaccination against the disease is approved for non-domesticated animals.³⁴

The proper maintenance of tigers is of particular concern to biologists and environmentalists. Big Cat Rescue estimates that there are only 1,576 wild tigers remaining in India, on 27 reserves in 11 states.³⁵ They count another 1,098 others in captivity, of which 330 are in the United States. The Humane Society of the United States places the number far higher, estimating between five and seven thousand in captivity in America (roughly the same number thought to remain in the wild), with only 10 percent of those in American captivity in zoos and sanctuaries.³⁶ Siegfried and Roy have a total of 63 lions and tigers in their personal collection, mostly genetically recessive and over-bred white lions and tigers.

II. LICENSING REQUIREMENTS: A COMPARATIVE LOOK

Much information may be gathered on the care and keeping of wild animals by examining the requirements for their welfare in other nations. While not the most stringent in their licensing requirements for the display of wild animals, the American system is far from the worst, even among industrialized nations. The differing systems utilized by Ireland, India, Great Britain, New Zealand, Canada and United States, serve to shed light on both the strengths and weaknesses of the American Animal Welfare Act.

A. The Republic of Ireland

The Republic of Ireland currently has no licensing requirements whatsoever regarding the ownership and display of exotic animals.³⁷ As the Irish Society for the Prevention of Cruelty to Animals (ISPCA) notes on their website, “[y]ou are required by law to hold a license to own a dog, but not a tiger!” The ISPCA has proposed a two-tier licensing scheme for the keeping of exotic animals, allowing one type of permit for non-dangerous species like macaws and sugar gliders and another for dangerous animals like lions and tigers.

³³ Big Cat Rescue, Big Cat News, www.bigcatrescue.org/big_cat_news.htm.

³⁴ *Id.*

³⁵ Big Cat Rescue, Tigers, www.bigcatrescue.org/tiger.htm.

³⁶ Humane Socy. of the U.S., Siegfried and Roy Incident Underscores the Dangers of Exotic Pets, www.hsus.org/wildlife/wildlife_news/siegfried_roy_incident_underscores_the_dangers_of_exotic_pets.html.

³⁷ Irish Socy. for the Prevention of Cruelty to Animals, Exotic Animals: The Public Safety Issue, <http://www.ispca.ie/content/wild.html>.

The ISPCA speculates that, on average, big cats being transported around Ireland in menageries and mini-zoos have approximately 2.5 square meters of space, or less. An undercover report revealed that cats were only allowed out of these cages for exercise less than 10 percent of their lives.³⁸ There is no inspection system for animals in zoos or circuses in Ireland, and, at the present time, there is no pending legislation on the subject.³⁹

B. India

All zoos in India are established under a central authority known as the Central Zoo Authority (CZA), which administers a law known as the Recognition of Zoo Rules (1992). The purpose of zoos is clearly defined within the statute: “the primary objective of operating any zoo shall be the conservation of wildlife and no zoo shall take up any activity that is inconsistent with the objective.”⁴⁰ All facilities showing live animals must be closed at least one day out of the week.⁴¹ Animals which are sick or injured may not be displayed. The law outlines required staff, on-site veterinary requirements, proportion of display to visitor amenities, and landscaping. Each zoo must have a graveyard on site; larger zoos must also have a crematory.⁴²

The Recognition of Zoo Rules requires annual submission of records on all animals held within the zoo, including birth, death, and transfer records. These files must be submitted to the CZA by 30 April of each year. Death records must include the results of post-mortem analysis. Within two months of the end of each fiscal year, each zoo must furnish their annual business report to the CZA, and make this document available to the public at a reasonable cost.⁴³ Zoos must also put forward to the CZA a long-term master plan, laying out strategy for the next six years.⁴⁴

Zoos in India are divided into four classes depending upon size and the types of animals on display; licensing requirements vary according to class. These classes are determined primarily by area (measured in hectares), and are labeled large, medium, small, and mini. Class size also may reflect the number of endangered species exhibited, and average visitor attendance per year.⁴⁵

Indian animal welfare law is based on five precepts, known as the five freedoms:

1. Freedom from thirst, hunger, and malnutrition
2. Freedom from thermal and physical discomfort
3. Freedom from pain, injury and disease
4. Freedom to express normal behaviour
5. Freedom from fear and distress.⁴⁶

³⁸ *Id.*

³⁹ *European Council Directive 1999/22/EC on the Keeping of Animals in Zoos*, available at <http://www.consultationni.gov.uk/zoo.pdf>.

⁴⁰ RECOGNITION OF ZOO RULES, 10(1) (1992) (India).

⁴¹ *Id.* at 10(7).

⁴² *Id.* at 10(35).

⁴³ *Id.* at 10(42-44).

⁴⁴ *Id.* at 10(51).

⁴⁵ *Id.* at 9.

⁴⁶ THE INDIAN ZOO INQUIRY: A REVIEW OF CONDITIONS IN THE ZOOS OF INDIA 14 (Compassionate Crusaders Trust & Zoocheck eds., 2004), available at <http://www.zoocheck.com/programs/zoocheck/Indianreport1.pdf>.

Indian law notes that it is not acceptable to house carnivores in the “concrete grottos” common in older zoos. The use of concrete or “gunite,” a molded concrete, should be avoided whenever possible to avoid animal boredom and sores arising from constant exposure to unyielding surfaces.⁴⁷ When designing enclosures for animals, the following questions should be addressed:

First, how much space does the animal actually need to facilitate engagement in natural movement patterns and behaviours?

Second, how much space does an animal need to feel secure; so that it's (sic) fight or flight response isn't triggered or to escape from assault or the threat of assault by cagemates?

Third, what are the consequences to the animal of not providing an appropriate amount of space?⁴⁸

The legislation notes that zoos should move towards acting in a conservation, not entertainment, capacity, and act as rescue centers for orphaned animals.⁴⁹ Environmental enrichment must be provided to all captive animals, including toys and furniture like trees, root balls, pipes, climbing apparatus, puzzle feeders, and sprinklers.⁵⁰ Vertical space should be appropriately utilized, especially for animals with natural climbing instinct, like leopards.

The Indian high court in Delhi has recently banned the certain animals, including lions and tigers, from use in circuses. The government is now in the process of creating animal rescues where lions and tigers currently in circuses may live out their lives.⁵¹ Unfortunately, the state Forest Minister Jogesh Burman suggested at one point the banned animals be given to zoos or released into the wild, a potential disaster when quasi-tame, dependent animals are returned to the forests and ecosystem.⁵²

C. Great Britain

The treatment of animals in zoos and circuses in England is covered under the Zoo Licensing Act of 1981.⁵³ This regulation is administered by an independent body known as the Zoo Forum. The Zoo Licensing Act was amended in 2002 to further the British commitment to biodiversity and conservation, and to come into compliance with the 1992 European Council Directive on zoo animals.⁵⁴ Prior to the grant of a license, public notice must be given within the proposed community through newspaper or other media, identifying the types of animals to be kept, numbers of staff, and the projected effect on motor vehicle and tourist traffic in the area.⁵⁵ Licenses under the Zoo Act are originally granted for four years, but can then be renewed for six

⁴⁷ *Id.* at 18.

⁴⁸ *Id.*

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 22.

⁵¹ Zoocheck, India Leads the Way in Banning Circus Cruelty, available at http://www.bigcatrescue.org/big_cat_news_files/bigcatattacks.htm.

⁵² Subhendu Maiti, *Circuses Slam Ban on Animal Shows*, THE STATESMAN (INDIA), 28 Dec. 2000, available at Archives, <http://www.thestatesman.net/>.

⁵³ Zoo Licensing Act 1981 (England and Wales).

⁵⁴ Zoo Licensing Act 1981 (Amendment) (England and Wales) Regulations 2002.

⁵⁵ *Id.* at s. 2(2).

years if the facility meets the standards outlined within the law.⁵⁶ The Act requires records of birth, death (including cause of death), animals acquired, animals sold, and the health of the animals within the collection.⁵⁷

Zoos in Great Britain are subject to regular inspection by local authorities.⁵⁸ At least two inspections are mandatory, with 28 day's notice provided.⁵⁹ Special investigations may also be carried out if a facility becomes suspect, or for zoos which have been closed. In the event of failure to meet Act requirements, licenses may be revoked and fines assessed against a facility. Within a month of the review, the inspector must send a copy of his or her report to the owner/operator and allow them to comment on the contents thereof.⁶⁰

Under the Zoo Act, animals may only be handled by trained professionals and authorized staff. Staff is prohibited from smoking near the animals or their food. British standards regarding space requirements for animals on display are excellent. Requirements include both space and "furniture" within cages, attempting to meet the psychological needs of the animals.⁶¹ The layouts of cages are controlled so that predator and prey will not be within eyesight of one another to avoid undue stress on the animals.

D. New Zealand

New Zealand has ratified some of the most comprehensive animal welfare legislation in the world. The registration process to become a licensed animal facility is more thorough than anywhere else in the world, and requires both a 5-10 year animal collection plan and a contingency plan outlining the fate of the animals should the facility fail.⁶² Registration and inspection are both annual in New Zealand, coupled with periodic inspection.

Prior to the grant of a license, the local municipality where the proposed facility would be located must grant permission for the license.⁶³ At the cost of the applicant, a licensed vet must review each license application for viability. If he or she feels it is necessary, the vet may consult other experts also at the applicant's expense, and may choose to veto the facility's ability to keep one or more species.⁶⁴

The standards for animal accommodation are strictly outlined under New Zealand law. Legislation requires a high level of hygiene in all enclosures, and conditions are outlined for each species in regards to the following categories:

1. behavioural requirements of individuals (i.e. swimming, climbing, grooming, territoriality);
2. behavioural requirements of social groups (i.e. size/sex ratios, seasonal changes, hierarchies, compatibilities, need to escape conflict);

⁵⁶ *Id.* at s. 5(1-2).

⁵⁷ *Id.* at s. 1A(f).

⁵⁸ *Id.* at s. 10(1).

⁵⁹ *Id.* at s. 10(2).

⁶⁰ *Id.* at s. 10(7).

⁶¹ *Id.* at s. 1A(c)(i).

⁶² Lesli Bisgould, *Wildlife in Captivity: An Examination of Legal Requirements in Canada and Around the World*, ZOOCHECK CANADA, Feb. 2000.

⁶³ *Id.*

⁶⁴ *Id.*

3. physical requirements (i.e. exercise, shelter, individual cover, territories, ventilation);
4. psychological requirements (i.e. intellect, adaptability, timidity, aggressiveness);
5. reproductive requirements (reproductive control must be incorporated);
6. zoographic requirements (i.e. expected life span, rate of population increase).⁶⁵

E. Canada, Exclusive of Nova Scotia

Each province in Canada is free to set its own space requirements for the keeping of exotic animals. Most require a license to keep exotic animals. British Columbia, Saskatchewan and Manitoba each set requirements by species or group. Saskatchewan forbids the tethering of any captive animal, and, like New Zealand, requires that the local municipality agree to a facility before a license may be granted. Each facility within the province must provide a full accounting of all animals within its possession, along with a description of all sales, deaths, purchases, and transfers yearly.⁶⁶ Manitoba requires periodic inspections by representatives of the Crown.⁶⁷ Newfoundland outlines specifics required for enclosures including surface space, volume, height, den requirements, exercise equipment, and non-drinking water requirements.⁶⁸

F. Nova Scotia

Nova Scotia has begun to develop extensive plans for the keeping of animals in captivity, including provisions for the mental well-being of the creatures.

Two months prior to arriving in Nova Scotia, all traveling animal acts must submit an application to the Director of Wildlife at the Nova Scotia Department of Natural Resources. Included within this plan must be lists of all tricks an animal must perform if it is employed within entertainment, health certificates, lists of construction materials, sizes of animal containment facilities, and documentation that trainers understand the level of animal care required within the province.

Many animals are excluded from use in circuses and traveling menageries in Nova Scotia. Nonperforming animals within a menagerie are not permitted for import, and must be relocated prior to the grant of a permit. Hybrid animals, such as mules, ligers, tigons, and wholphins, are not allowed within circuses. Reptiles (exclusive of large snakes), bears, pinnipeds (seals and similar), amphibians, fish, cetacea (whales and dolphins), and nonhuman primates are all banned from circuses. Additionally, there are strong recommendations that bull elephants not be used within circus performances because of their tendency towards aggression. All performing and traveling animals must be seen by a vet within six months of entering the province.⁶⁹

⁶⁵ Bisgould, *supra* note 62, at “Accommodation”.

⁶⁶ *Id.* at “Licensing Requirements 2”.

⁶⁷ *Id.*

⁶⁸ *Id.* at “Accommodation 2”.

⁶⁹ Standards for Exhibiting Circus Animals in Nova Scotia, cl. 1.

During transport of animals, Nova Scotia requires stops every two hours to check the health and well-being of animals in the convoy. Convoys must stop at least 12 out of every 24 hours so the animals may rest, and fresh air must be provided for the animals as weather permits. It is suggested that the transportation cages for big cats be fashioned from plastic-coated steel. The cage must be of sufficient size that the lion or tiger be able to stand, turn, lie down, and stretch without touching the walls.⁷⁰ Since male lions reach an overall length of 11 feet⁷¹ and Siberian tigers may be more than 10 feet long,⁷² these cages must be sizeable.

When not on the road, big cats must be provided with the following living space (exclusive of additional exercise areas):

Minimum (Nova Scotian) Display Dimensions for Big Cats	
Minimum floor space for one animal	20 m ² or 215 ft ²
Floor space for each additional animal	10 m ² or 105 ft ²
Minimum height	3.0 m or 10 ft.
Minimum width	3.6 m or 12 ft.

Tigers may be housed together if the particular animals interact well, but must be fed separately.⁷³ Since lions naturally live within prides, interaction among lions is deemed essential, and lions should be housed together and allowed regular intraspecies interaction. Lions must only be separated in cases of violence against certain individuals, such as male dominance action or lionesses in heat.⁷⁴

Cats must be able to feel dirt under their paws, and must have access to direct sunlight during daylight hours.⁷⁵ Platforms must be available within the display to allow tigers and other climbers to exercise their natural instincts.⁷⁶ Cat cages must be secured with double doors to prevent escape. The public must be kept behind safety barriers at least two meters from the cage.⁷⁷ To meet natural instinct and health needs, all big cats must be provided with bones weekly (for maintaining teeth and gums) and must have access to wood within their cages to sharpen their claws.⁷⁸

Specific standards are laid out for performing animals. Big cats can be trained to sit on perches, shake hands, jump through hoops (but not flaming hoops), and run on planks.⁷⁹ If the animal resists these tricks, it may not be forced to perform them. “Unwillingness to perform” is met if the animal:

⁷⁰ *Id.* at cl. 5.

⁷¹ Big Cat Rescue, Lion, www.bigcatrescue.org/lion.htm.

⁷² Big Cat Rescue, Tiger, www.bigcatrescue.org/tiger.htm.

⁷³ Standards, *supra* note 69, at Clause 17.

⁷⁴ *Id.*

⁷⁵ *Id.* at cl. 6.

⁷⁶ *Id.* at cl. 19.

⁷⁷ *Id.* at cl. 16.

⁷⁸ *Id.* at cl. 21.1.A

⁷⁹ *Id.* at cl. 10.

- (i) “Initially refuses, or baulks at performing the behaviour
- (ii) Attempts to please the trainer by performing an alternate behaviour
- (iii) Performs a displacement activity (such as grooming manoeuvre)
- (iv) Attempts to escape the proximity of the trainer.”⁸⁰

In the interest of dignity, no animal may be dressed in any costume that “belittles the animal.”⁸¹

G. The United States

Under the current animal welfare regime in the United States, animals used for entertainment are protected under the Animal Welfare Act,⁸² which is administered by the USDA. Facilities such as Ringling Brothers, The Secret Garden, and Byron-Marasek are required to carry licenses under the AWA. All of these facilities carry (or carried) Class “C” exhibitor licenses, which allow them to display animals and buy/sell only the number necessary to maintain a population in their facility:

(h) The term "exhibitor" means any person (public or private) exhibiting any animals . . . and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.⁸³

Unfortunately, animals outside of research facilities have very few direct regulations applied to their living conditions. Circus animals, which are frequently within the channels of commerce as the circus moves from state to state, must maintain records of the animals they display⁸⁴ and humane standards in transport, including ventilation, water, and shelters from temperature extremes (which should have saved Clyde the lion).⁸⁵ Periodic inspections of licensed facilities are also provided for, at least once a year.⁸⁶ Violations of the Act may lead to suspension or revocation of the license and a civil penalty of not more than \$2,500/per diem.⁸⁷ Criminal penalties may include up to a year in prison, a fine of \$2,500, or both.⁸⁸

Unfortunately, nearly all American animal welfare laws are engineering standards, not performance (outcome) regulations, reduced to numbers of feet and amount of food, but failing to take into account the general health and welfare of the animal.⁸⁹ Roy’s lions may have enough food at their disposal and be living in a “large enough” cage, but nothing takes into account their mental well-being or whether they actually eat the food measured and required. Inspectors

⁸⁰ *Id.*

⁸¹ *Id.* at cl. 11.

⁸² ANIMAL WELFARE ACT, 7 U.S.C.S. §§ 2131 *et seq.*

⁸³ 7 U.S.C.S. § 2132(h).

⁸⁴ 7 U.S.C.S. § 2140.

⁸⁵ 7 U.S.C.S. § 2143.

⁸⁶ 7 U.S.C.S. § 2146(a).

⁸⁷ 7 U.S.C.S. § 2149(a-b).

⁸⁸ *Id.* at (d).

⁸⁹ DAVID FAVRE, ANIMALS: WELFARE, INTERESTS, AND RIGHTS 382 (2003).

applaud engineering standards because they are easy to monitor and easy to enforce--“it is simple and defensible.”⁹⁰ Noncompliance may easily be determined with a tape measure, a scale, and a clipboard.

However, such noncompliance is rarely prosecuted. Following the 2003 attack on Roy Horn, it was revealed that in 1999 Siegfried and Roy’s habitat had been cited for noncompliance relating to medications on site and the lack of proper barriers between animals and tourists.⁹¹ In 1998, the Ringling Brothers and Barnum & Bailey Circus reached an out-of-court settlement regarding violations of the Animal Welfare Act arising from the death of a two-and-a-half-year-old baby elephant named Kenny following a performance in Florida.⁹² Despite these cases, both the Jungle Habitat at the Mirage and Ringling Brothers remain open.

III. EXPERT OPINIONS

Tigerlink.org suggests the following accommodations for the display of captive tigers, as suggested by R. Montali of the American Association of Zoo Veterinarians. The list includes a clean water source, a raised shelf, natural and artificial lighting, an unscaleable moat, high fencing, nontoxic natural planting, and epoxy coatings over any concrete used. To provide for the cat’s mental well-being, Montali suggests:

- Environment Enrichment, including:
 - **Toys:** Hard plastic balls (e.g., "boomer balls"), traffic cones.
 - **Olfactory stimulation:** Variety of smells placed at varying locations in enclosure from time to time. May include food, other animals, perfume, catnip, spices, etc.
 - **Heat rocks and cold rocks**
 - **Whole food/carcasses:** Meat "on the bone" provides tigers with an opportunity to display natural foraging and manipulative behavior and occupies their time.
 - **Meat trail/hiding food/adding bones:** carcass is dragged through exhibit and hidden.
 - **Scratching logs.**⁹³

Big Cat Rescue suggests that for large felids like lions, tigers, jaguars, and leopards/snow leopards, enclosures should have 1,200 square feet of space for the first animal, with an increase of 25% for each additional animal in the display.⁹⁴ By the Big Cat Rescue standards, the 5,000 square foot habitat at the MGM Grand is sufficient space for the eight cats within it, which would require only 3,300 square feet. Dens and water features must be provided to allow for

⁹⁰ *Id.*

⁹¹ PETA, About Siegfried and Roy, www.circuses.com/siegfriedroy-about.asp.

⁹² *Performing Animal Welfare Society v. Ringling Bros. and Barnum & Bailey Circus*, 2001 U.S. Dist. LEXIS 12203 (DC 2001).

⁹³ Tiger Missing Link Foundation, Management and Conservation of Captive Tigers: Tiger Holding and Facility Exhibit, www.tigerlink.org/husbandry/husman3.htm.

⁹⁴ Big Cat Rescue, Exotic Cat Standards, www.bigcatrescue.org/exoticcatstandards.htm.

typical feline behaviors, and enclosure walls must be 12 feet high. Since cats get bored easily, toys like boomer balls, drums, barrels, cones, rawhide, and bones should be furnished.⁹⁵

The American Zoological Association Tiger Species Survival Plan (SSP) has designated several zoos with good tiger exhibits. These include the Cincinnati Zoo, the National Zoo in Washington, D.C., the San Diego Zoo, and the Minnesota Zoo.⁹⁶ Common features of the award-winning displays include:

- 1) Relatively large outdoor space;
- 2) Water pools, moats or running streams;
- 3) Natural vegetation to avoid the grotto look; and
- 4) Reduce or avoid bars between tigers and the viewing public.⁹⁷

IV. CONCLUSION

Without question, the best course of action to follow for the animals would be a ban on the use of endangered and threatened wild animals in entertainment, such as that now in place in India. With the modern trends in computer-generated imaging and animatronics, there is no longer a need to use real animals in film. The popularity of non-animal circuses has been definitively proven by acts such as Cirque de Soleil, which commands an astonishing average of \$70 per ticket. Animals exploited for entertainment in cities like Las Vegas could easily be replaced by the more traditional showgirls, human magicians, and comedy acts. So far, only six American municipalities have banned animal acts completely: two in Florida, two in Massachusetts, and one each in Maryland and Illinois.⁹⁸

However desirable this outcome may be, the complete ban of the use of animals for human entertainment is highly unlikely within any of our lifetimes. Instead, a concerted effort must be made to strengthen laws protecting show animals, and to provide adequate means and monies for enforcement of these laws. Trainers and owners with multiple AWA complaints should be investigated, and their licenses suspended or revoked. Repeat offenders like Ringling Brothers and Barnum & Bailey should be forced to relinquish the animals in their care, or at least subject to random inspections by the USDA, ASPCA, and other animal welfare organizations. The MGM Grand at the very least should immediately cease all photo opportunities with their lion cubs, or possibly create a shuttle to the Cat House to see the lions in larger spaces.

The best licensing and accommodation plan might be drawn by combining the strict initial licensing requirements in force in New Zealand with the stringent traveling and display requirements in force in Nova Scotia. By combining the best thinking from these two jurisdictions, it may be possible to plan for the animals' care during their performance career, in the event of financial insolvency of the facility, and in transit. The strict transportation requirements laid out by Nova Scotia certainly would have prevented the death of Clyde the Ringling lion, who would have been watered every two hours. The locking system required on permanent housing in Nova Scotia would probably have prevented Byron-Marasek's escaped

⁹⁵ *Id.*

⁹⁶ The American Zoo and Aquarium Association, Exhibit Award Recipients, www.aza.org/HonorsAwards/ExhibitHistory/.

⁹⁷ Tiger Missing Link Foundation, *supra* note 93, at "Editor's Note".

⁹⁸ Canadian Federation of Humane Societies, Animal Use, www.cfhs.ca/Programs/AnimalUse/circus3.htm.

tigers, and the requirement to separate aggressive males would have saved the tigers mauled by Marco, the aggressive male.

Under Nova Scotia's accommodation requirements for the housing of big cats, the MGM Grand's Lion Habitat would be illegal, since the entire facility is created from concrete and plastic, instead of the required natural substrate. The photo opportunities with cubs provided by the Grand would be banned under section 16.1A.2, which provides that members of the public must be kept at least 6.5 feet from the cat cage.⁹⁹

In order to enforce these statutes, it is vital that Congress provide the requisite monies needed to give the AWA and other animal cruelty statutes "bite." As with any animal abuse statute, the problem remains of what to do with the big cats removed from dangerous situations. These animals eat an average of 40 pounds of meat per kill in the wild, or 10 pounds of meat and vitamins per day in a zoo-like setting.¹⁰⁰ These provisions cost money, money many rescuers just don't have.

Additionally, many of the organizations who frequently intervene in animal abuse cases, including local humane shelters, are completely unequipped to handle animals like lions and tigers. Detroit shelters report similar problems, including jaguars, lions and leopards often used to guard drugs and contraband. Big cats have become so frequent, the Michigan Humane Society installed facilities to hold two big cats at a time.¹⁰¹

The Captive Wildlife Safety Act, passed by Congress this year, serves to address some of these big-cat-as-pet issues. The Act provides for penalties for those caught buying, selling, or importing animals¹⁰² like lions, tigers, jaguars, and any hybrids thereof.¹⁰³ The Act also provides for fee-shifting, placing the financial burden of care for the seized animal on the convicted owner.¹⁰⁴ The Act also specifically allots funds from the Secretary of the Treasury to be paid as rewards to persons furnishing information leading to the arrest and conviction of a big cat owner or illegal dealer.¹⁰⁵

In his testimony before the House of Representatives Subcommittee on Fisheries Conservation, Wildlife, and Oceans in support of passage of this Act, Eric Miller, a board member of the American Zoo and Aquarium Association and Director of Animal Health and Conservation at St. Louis Zoological Park, told the subcommittee:

In a raid of a California home in April of 2003, the California State Department of Fish and Game found 30 dead adult lions and tigers and 58 cubs found dead in a freezer. Allegedly the adults were left to starve to death because they were no longer marketable to buyers and the cubs were killed due to overproduction. . . . With unregulated breeding, these animals have no breeding or genetic record behind them. This is problematic when the pet owners abandon their animals at accredited zoos which are unable to introduce them into their legal breeding programs due to a lack of genetic background information. . . . This type of breeding decreases the genetic viability of the species and increases the risk of

⁹⁹ Standards, *supra* note 69 at cl. 16(A)(1).

¹⁰⁰ Save the Tiger Fund, Eating, <http://www.savethetigerfund.org/AllAboutTigers/Basics/eating.htm>.

¹⁰¹ *Id.*

¹⁰² 16 U.S.C.S. § 3373.

¹⁰³ 16 U.S.C.S. § 3371(g).

¹⁰⁴ 16 U.S.C.S. § 3374(c).

¹⁰⁵ 16 U.S.C.S. § 3375(d).

tainted bloodlines getting into American zoological collections and possibly wild populations.¹⁰⁶

What is required above all else is the reeducation of educators, who still believe that observing animals in zoos and exhibits is a proper teaching tool. If the public were reeducated to understand the pain and suffering that is inexorably entwined with these exhibits, market pressures could lead to the phase out of animal acts and nonconservation-based facilities. But as long as society teaches children it is okay to view animals in these situations, society will fail to reach a point where the interests of the animals outweigh the financial considerations of their captors.

“Dieu aime les oiseaux et inventa les arbres.

L’homme aime les oiseaux et inventa les cages.”

(God loved the birds and invented trees. Man loved the birds and invented cages.)¹⁰⁷

~Jacques Deval

¹⁰⁶ Testimony of Eric Miller, D.V.M., before the Committee on Resources on H.R. 1006, 12 June 2003.

¹⁰⁷ Jacques Deval, *Afin de vivre bel et bien*, available at <http://www.nightwing.easynet.be/citations/citations-9.html>.

LEGAL PROTECTION ONLY FOR
THOSE WHO ARE MOST LIKE “US”?
WHAT ANIMAL ACTIVISTS CAN LEARN FROM THE
EARLY WOMEN’S MOVEMENT ABOUT SOCIETY’S
RESISTANCE TO ACKNOWLEDGING RIGHTS

CAMDEN J. MCDARIS*

I. INTRODUCTION

All social movements share essential similarities: they consist of “out-groups” that society views as illegitimate;¹ persuasion is the sole means available to transform perceptions of reality and to achieve legitimacy, since social movements cannot rely on established legal channels to reward or punish behavior;² and advocates must often spend great amounts of time and rhetoric to justify their beliefs and to quell their opponents’ attempts to ignite controversy and invoke suspicion about the movement’s goals.³

“The fight for legitimacy is a fight for public perceptions, and patriotic, religious, and social myths and symbols are important weapons in this struggle.”⁴ It is often hard to believe that many concepts that modern society accepts as fundamental civil rights were once considered to be radical, utopic and potentially devastating to the contemporary world order.⁵ Recognizing that women of all races, religions, ethnicities and socio-economic status are equal to men is an example of one such truth that cannot be denied (without a great deal of ridicule) in the United States. When one proclaims that society must recognize the basic rights of animals, however, the tables are turned.

* Copyright, Camden Janemary McDaris, 2005. J.D. Benjamin N. Cardozo School of Law 2006; recipient of the Jacob Burns Medal for Outstanding Contribution to a Law Journal; founder and president, Cardozo Student Animal Legal Defense Fund; student member, Association of the Bar of the City of New York’s Committee on Legal Issues Pertaining to Animals. This note is dedicated to the memory of Ms. McDaris’s cousin, Marisa K. Harvey. Ms. McDaris would like to thank her parents for their continual support and encouragement, and David Wolfson, Stephanie Russell, Marisa Miller and Eva Hanks for their help and guidance throughout the process of writing this note. [The *Journal* proudly presents Ms. Camden’s article which was awarded the prestigious Jacob Burns Medal.--Eds.]

¹ ROBERT E. DENTON, JR., CRAIG ALLEN SMITH & CHARLES J. STEWART, PERSUASION AND SOCIAL MOVEMENTS 6 (4th ed. 2001).

² *Id.* at 6-7.

³ *Id.* at 328.

⁴ *Id.* at 321.

⁵ TOM REGAN, EMPTY CAGES, FACING THE CHALLENGES OF ANIMAL RIGHTS 192-193 (2004); MATTHEW SCULLY, DOMINION, THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 351 (2002).

Consider the following paraphrase of a concurring opinion from the United States Supreme Court:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres . . . of man and [animal]. Man is, or should be, [animal]'s protector and defender. . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a[n] [animal] had no legal existence separate from [its owner]. . . . This is the law of the Creator.⁶

If one substitutes all references to “animal” with “woman” and the word “owner” with “husband,” one will have the accurate quote from Justice Bradley’s concurring opinion in *Bradwell v. Illinois*⁷, an 1872 case whereby an Illinois woman was denied a license to practice law solely on the basis of gender. Peter Singer illustrates the parallels in “moral justification” regarding the treatment of women and that of animals:

Until very recently it was the common view that a woman should obey her father, until she is married, and then her husband (and in some countries, this is still the prevailing view). . . . [T]he fact that a view is widespread does not make it right. It may be a defensible prejudice that survives primarily because it suits the interests of the dominant group.⁸

This note analyzes the challenges that the animal rights movement faces in reforming society’s relationship to animals--particularly in regard to farmed animals--by tracking a similar evolution of the concepts of “dominion” and “civilization” within the early feminist movement. Specific focus is on nineteenth-century white middle-class women, who viewed themselves as models of civilized, liberated womanhood, while asserting maternalistic dominion over their “primitive” and underprivileged sisters.⁹ Acknowledging the way in which nineteenth-century America--which, for socio-political and legal purposes, was composed almost exclusively of Protestant white men--was willing to gradually “grant” one class of women a voice in society, based on well-established perceptions of “true womanhood,”¹⁰ is important in considering the

⁶ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

⁷ In all fairness to the Court, it is worth noting that the thrust of Justice Bradley’s concurrence (basing his reasoning on “natural” and “divine” law) was unique to his opinion. Justice Miller, who delivered the opinion of the Court, confined the holding to a narrow interpretation of the Constitution’s “privileges and immunities” clause, as established during that same term in *The Slaughter-House Cases*, 83 U.S. 36 (1873), whereby “the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed by citizenship of the United States in the party seeking such license.” *Bradwell*, 83 U.S. at 139. The majority opinion of the Supreme Court of Illinois evinced a similar blind-eye to justice without resorting to blatantly paternalistic language either. The lower court justified entering judgment against Myra Bradwell on the grounds that courts are not springboards for change absent legislative sanctioning and that the legislation already in place ought to be given an “originalist” interpretation: “Whatever [] may be our individual opinions as to the admission of women to the bar, we do not deem ourselves at liberty to exercise our power in a mode never contemplated by the legislature[.]” *Bradwell v. Illinois*, 55 Ill. 535, 539 (1876).

⁸ Peter Singer, *Ethics beyond Species and beyond Instincts: A Response to Richard Posner*, in *ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS* 78, 78-79 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁹ See generally LOUISE MICHELE NEWMAN, *WHITE WOMEN’S RIGHTS, THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES* (1999); MARY E. ODEM, *DELINQUENT DAUGHTERS, PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920* (1995).

¹⁰ Louise Michele Newman defines this as being “pious, virtuous, genteel, refined, soft-spoken [and] well-dressed.” NEWMAN, *supra* note 9, at 8.

way in which modern society seems poised to acknowledge some degree of rights for companion animals, while ignoring the legally-sanctioned misery to which billions of farmed animals are subjected annually.¹¹

Part II examines the emergence of the “civilized” woman as “civilizer” and how this new identity gave the privileged few a voice in national socio-political arenas. Part III details the history of animal domestication and America’s current views toward companion animals. Part IV contrasts public sympathy for companion animals with society’s near-complete oblivion to the lives of factory-farmed animals, and highlights the convergence of human and animal dominion in the way that “civilized” corporate farmers have now relegated most of the “dirty work” of their businesses to immigrant laborers.¹² Part V spells out the legal realities for all animals in America today, and Part VI proposes strategies that will enable animal activists to most effectively disseminate their message of compassion and personal responsibility. This note concludes with the theory that it is only by isolating the roots of societal resistance to acknowledging all animals’ right to physical and psychological integrity and by identifying patterns in society’s reaction to prior social justice movements, like the emergence of feminism in the nineteenth century, that animal rights advocates can ever hope to break through the barrier of public apathy.

II. THE “CIVILIZED” WOMAN AS “CIVILIZER”

Just as it will be crucial to address the current societal forces surrounding the animal rights movement,¹³ one must take a close look at the socio-political and legal culture which enabled nineteenth-century middle-class women to gain some degree of autonomy. William Blackstone paints a concise portrait of woman’s legal identity under the doctrine of coverture:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . . But though our law in general considers man and wife as one person, [] there are some instances in which she is separately considered[] as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void.¹⁴

A common perception is that the Married Women’s Property Acts, the first passed in New York in 1848,¹⁵ abolished the law of coverture.¹⁶ Enabling married women to take title in

¹¹ See generally David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House, Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS 205, (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

¹² See SCULLY, *supra* note 5, at 262. See generally Charlie LeDuff, *At a Slaughterhouse, Some Things Never Die; Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1, available at LEXIS, News Library, NYT File.

¹³ See *infra* Parts III & IV.

¹⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765).

¹⁵ 1848 N.Y. LAWS 307, ch. 200, available at

http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html (last visited June 10, 2006).

Sec. 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

their own names proved beneficial to wealthy families who could now transfer property through married daughters without giving any control over the family assets to those daughters' husbands.¹⁷ The Married Women's Property Acts also allowed husbands to insulate assets from creditors by putting the property in their wives' names.¹⁸

Reva B. Siegel claims that the Married Women's Property Acts did not eradicate coverture from America's legal landscape.¹⁹ She contends that the doctrine continued to influence American legal culture well into the twentieth century, shaping both public and private law.²⁰ The notion of the family as a form of government was a fundamental part of the nation's constitutional culture, repeatedly expressed by the framers of the Fourteenth Amendment as the reason that a democracy did not need to enfranchise one-half of its adult members.²¹

Bradwell v. Illinois is an example of this thinking. The Supreme Court of Illinois stated:

It is urged [] that the law of the last session of legislature, which gives to married women the separate control of their earnings, must be construed as giving to them the right to contract in regard to their personal services. . . . [W]e find ourselves constrained to hold that the sex of the applicant, independently of coverture, is, as our law now stands, a sufficient reason for not granting this license.²²

The court's deference to old legislative intent trumped the new theories raised by the Married Women's Property Act.

Historically, the women's suffrage campaign has been linked with the passage of the Fourteenth Amendment, which abolished slavery, and the Fifteenth Amendment, which granted all *men* the right to vote, regardless of race, ethnicity or creed.²³ While many suffragists fought to abolish slavery, a number of them, most notably Susan B. Anthony and Elizabeth Cady Stanton, felt betrayed by the Republican party for granting African-American men the right to

Sec. 2 The real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted.

Sec. 3. It shall be lawful for any married female to receive, by gift, grant devise or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

Sec. 4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place.

Id.

¹⁶ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex, Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 983 (2002).

¹⁷ See Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 462 (2002).

¹⁸ Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO L.J. 2127, 2142 (1994).

¹⁹ Siegel, *supra* note 16, at 983. See also Zaher, *supra* note 17, at 462. In fact, until Title VII of the Civil Rights Act of 1964 was passed, women could legally be taken out of the running for promotions because it was assumed they were being supported by their husbands; married women needed their husbands' consent to obtain a loan, even when that loan was to be used for their own successful business; and corporate anti-nepotism rules usually entailed the wife being forced to seek new employment. *Id.*

²⁰ Siegel, *supra* note 16, at 983.

²¹ *Id.*

²² *Bradwell*, 55 Ill. at 537.

²³ NEWMAN, *supra* note 9, at 3.

vote while ignoring the nation’s women.²⁴ This perceived deception led to schisms between the races, and marginalized minority women within the women’s movement.²⁵

The first half of the nineteenth century had already united middle-class white women in America through exposure to such ideals as companionate marriage, women’s higher education, and an exalted view of motherhood as the vehicle for transmitting civic virtue.²⁶ By the 1830s and 1840s, a number of white northern middle-class Protestant women were able to break out of the domestic sphere and become leaders of moral reform and abolitionism.²⁷ Louise Michele Newman claims that “white activists had a heightened racial consciousness of themselves as civilized women, contributing to and reinforcing dominant religious, scientific, and cultural ideologies that attributed to them unique moral and political roles on the basis of this identity.”²⁸

The Civil War contributed to a rapid escalation in white female activism, bringing northern middle-class “women into public view in record numbers--a breakdown temporarily at least in the rigid ideology of separate spheres.”²⁹ More than simply creating new jobs, the war also introduced northern women to new venues for social reform, while limiting them to occupations traditionally deemed “acceptable” for their gender and class.

Roughly three thousand women became army nurses during that period.³⁰ The newly created Sanitary Commission, which would later be renamed the Red Cross, helped train nurses for work in hospitals and on battlefields.³¹ It would also raise millions of dollars to furnish supplies to soldiers, widows and orphans.³² Immediately following the war, an additional four thousand northern white women went south to help set up schools for the Freedmen’s Bureau.³³ “The temporary shortage in manpower caused by the war created new economic opportunities for white middle-class women[;] the Civil War also fundamentally altered many of these women’s sense of their rightful place in the world.”³⁴

The resulting theories of rights among women were not homogenous. The Women’s Christian Temperance Union, founded in 1874 in Cleveland, Ohio,³⁵ serves as an example of this. The organization allowed women to choose which issues they wished to promote and did

²⁴ *Id.* at 4.

²⁵ *See generally* NEWMAN, *supra* note 9. “From Stanton’s perspective, the proposed Fourteenth and Fifteenth Amendments threatened to introduce a new gender-based hierarchy that overlooked distinctions of education, virtue, and refinement, qualities that Stanton believed existed in greater degree and preponderance in white women because of the more advanced development of their race.” *Id.* at 5.

²⁶ Joan B. Landes, *Republicanism* 1, at http://college.hmco.com/history/readerscomp/women/html/wh_032000_republicanis.htm (last visited Aug. 25, 2005) (copy on file with author).

²⁷ *Id.*

²⁸ NEWMAN, *supra* note 9, at 7.

²⁹ *Id.* at 26. A typical “separate spheres” sentiment would be as follows: “To the husband, by natural allotment . . . fall the duties which protect and provide for the household, and to the wife the more quiet and secluded but no less exalted duties of mother to their children and mistress to their domicile.” H.R. Rep. No. 48-1330, at 3 (1884).

³⁰ NEWMAN, *supra* note 9, at 26.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 27.

³⁵ *See* Woman’s Christian Temperance Union, Early History, <http://www.wctu.org/earlyhistory.html> (last visited June 10, 2006).

not require members to be activists for every plank of the W.C.T.U. platform.³⁶ As a result, the more “progressive” or “radical” women campaigned for issues like woman’s suffrage or better working conditions, while others focused solely on temperance matters.³⁷ In their speeches at annual events, the W.T.C.U.’s leaders tried to appeal to a broad ideological spectrum of beliefs and used temperance as the unifying force.³⁸

The W.C.T.U. also illustrates the deeper socio-political tensions underlying the mainstream women’s movement. Nativism and ideals of middle-class white society defined the organization’s views of purity, prohibition, and women’s status.³⁹ Americanizing and reforming immigrants was at the heart of the W.C.T.U.’s platform.⁴⁰ Temperance women blamed immigrants for the social and political corruption of the cities.⁴¹ W.C.T.U. women shared the belief of the eugenics movement that the “superior Anglo race” was being threatened by the more fecund “inferior races” who would soon control society.⁴² Since the consumption of alcohol was a cultural tradition in many Eastern European nations, prohibition and nativism had always been linked.⁴³

Around the same time women were mobilizing in large scale as activists, a new theory about race and class relations was emerging. Social Darwinism described the idea that humans, like animals and plants, were subject to natural selection and “survival of the fittest.”⁴⁴ Drawing on theories of evolution developed by British naturalist Charles Darwin, social Darwinism characterized a variety of social policies and theories, from promotion of laissez-faire capitalism to theories of racial causes for human behavior with the study of eugenics.⁴⁵ Social Darwinism was invoked to rationalize racism and imperialism--rejecting compassion and social responsibility and justifying inequities between individuals, races and nations.⁴⁶

Social Darwinism played a role in the middle-class white woman’s rise in socio-political status. Newman claims that simultaneous development of the two ideologies--woman’s rights and social Darwinism--facilitated white women’s entry into the public sphere.⁴⁷ Laissez-faire capitalism created vast disparities in wealth between the educated white managerial class and the impoverished, often immigrant or nonwhite, working class.⁴⁸ “Social-Darwinian theorists encouraged and enabled the development of ideologies concerning white middle-class women’s emancipation and emphasized (white) women’s specific role as the ‘conservators of race traits’ and the ‘civilizers’ of racial and class inferiors.”⁴⁹

³⁶ Kathleen Kerr & Thomas Dublin, *How Did the Reform Agenda of Minnesota Woman’s Christian Temperance Union Change, 1878-1917?* 2, available at <http://womhist.binghamton.edu/wctu/intro.htm> (last visited Mar. 1, 2005) (copy on file with author).

³⁷ ODEM, *supra* note 9, at 10.

³⁸ Kerr & Dublin, *supra* note 36.

³⁹ NEWMAN, *supra* note 9, at 66.

⁴⁰ Kerr & Dublin, *supra* note 36.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Robert C. Bannister, *Social Darwinism*, in ENCARTA ONLINE ENCYCLOPEDIA (2005), at http://encarta.msn.com/encyclopedia_761579584/Social_Darwinism.html (last visited June 10, 2006).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ NEWMAN, *supra* note 9, at 23.

⁴⁸ *Id.*

⁴⁹ *Id.*

Social Darwinism gained a strong foothold in American society by melding with traditional majoritarian views and values. While evolutionary theory and Christian doctrine appear to make strange bedfellows, the two belief systems worked hand-in-hand during this era. The conception was that, as a result of the Christian love that civilized white women consistently received from their male protectors, these women evolved physically and mentally from their primitive, sexually-indistinct sisters, becoming “more delicate, intelligent, moral, chaste, and refined than women of ‘lower races[.]’”⁵⁰ Social Darwinism stopped just short of proclaiming that white middle-class women were deserving of socio-political recognition due to their successful domestication.

One of the most blatant and egregious examples of this was the selective blindness toward sexual violence against minority women. Throughout the nineteenth century, middle-class Americans were preoccupied with protecting the virtues of young working-class women who were now leaving their homes to take jobs in the city.⁵¹ Prostitution and vice, venereal disease, family breakdown and out-of-wedlock pregnancy became associated with the image of working-girl-as-“fallen-woman.”⁵² By the mid-1880s, white middle-class women took up a national crusade to portray the working-class girl as “victim” of male lust and exploitation; part of this campaign was to raise the state-mandated age of consent from ten and twelve years of age to sixteen and eighteen.⁵³

These reformers defined an appropriate code of morality for the subjects of their effort based on middle-class ideals of female sexual restraint and modesty.⁵⁴ The name of the primary evil being targeted was “white slavery;”⁵⁵ reformers held the position that “only young white women needed protection from sexual harm and that only white women’s virtue was worth saving.”⁵⁶ Young working-class African-American women faced the same social problems as their Caucasian counterparts, and they were also confronted with severe forms of sexual exploitation based solely on their race, especially by white men in the south.⁵⁷ Despite this, white reformers refused to address their plight.⁵⁸

African-American purity reformers were also educated, middle-class women, many of whom worked as teachers and were married to ministers, educators, lawyers or physicians.⁵⁹ These African-American reformers attempted to pick up where their white counterparts left off. Black middle-class women were concerned with a larger picture; moral reform was one component of a broad program of racial uplift, including improving education and health-care, promoting economic self-sufficiency, and ending racial violence.⁶⁰ They did not embrace the

⁵⁰ *Id.* at 34.

⁵¹ ODEM, *supra* note 9, at 3.

⁵² *Id.*

⁵³ *Id.* at 3, 14-15. This goal was almost completely accomplished throughout the country by 1920. *Id.* at 14-15.

⁵⁴ *Id.* at 4.

⁵⁵ The term was coined by contemporary English purity activists to refer to young women who were abducted for the purpose of being forced into prostitution. *Id.* at 11.

⁵⁶ ODEM, *supra* note 9, at 12.

⁵⁷ *Id.* at 25.

⁵⁸ *Id.* at 29.

⁵⁹ *Id.* at 26.

⁶⁰ *Id.* at 27.

age of consent campaign because they feared that it would be used to unjustly target black men, while doing very little to protect black women.⁶¹

One of the main goals of African-American reformers was to counter the prevalent stereotypes of the sexually-predatory black male and the immoral black female.⁶² In 1895, Texas State Representative Arthur C. Tompkins wrote:

We see at once what a terrible weapon for evil the elevating of the age of consent would be when placed in the hands of a lecherous, sensual negro woman, who for the sake of blackmail or revenge would not hesitate to bring criminal action even though she had been a prostitute since her eleventh year!⁶³

Racist rhetoric of this kind went unchallenged by white reformers of the day. Southern white women were particularly careful to side-step the issue of black women's sexual vulnerability at the hands of white men because they did not want to upset the system of white supremacy, even to the disruption of their own marital and family lives.⁶⁴

White middle-class women's slow but steady ascension to power and prestige, culminating in a Constitutional right to vote, resulted in large part from their ability to maintain the status quo.⁶⁵ While the struggle was anything but easy for these women, it was less arduous than the battles fought by their minority and immigrant sisters.⁶⁶ White native-born women had an advantage; associated with white native-born men, these women capitalized on their roles as propagators and nurturers of a civilized way of life to advance their own status within the public sphere.⁶⁷

Currently, there is a similar "class war" manifesting in regard to the animal kingdom. While the subjects of this battle are not themselves the agents of discrimination, each of their lives is directly affected by choices that the American public makes on a daily basis.

III. COMPANION ANIMALS AND THEIR PLACE IN SOCIETY

Two distinct models of womanhood crystallized during the nineteenth century, but two distinct classes of domesticated animals have been in the making for over ten millennia. Between 12,000 and 14,000 years ago, pre-historic man began training those wolf cubs that showed a tendency toward subordination.⁶⁸ These ancestors of the modern-day dog were used to hunt wild game, as well as to guard and herd another class of domesticated animal--those to be used for human consumption.⁶⁹

Around 8,000 years ago, when nomadic hunters became settled farmers in the Fertile Crescent of the Middle East, small wildcats would often settle along side them, preying on mice

⁶¹ ODEM, *supra* note 9, at 28.

⁶² *Id.* at 27, 29.

⁶³ A.C. Tompkins, *The Age of Consent from a Physio-Psychological Standpoint*, 13 ARENA, July 1895, at 223.

⁶⁴ ODEM, *supra* note 9, at 36.

⁶⁵ See NEWMAN, *supra* note 9, at 18, 39.

⁶⁶ See *id.* at 9.

⁶⁷ See *id.* at 53.

⁶⁸ The Evolution of Pet Ownership 1,

<http://www.pedigree.com/PedigreeCenter/Articles/Things+to+consider/Facts+about+dogs/The+evolution+of+pet+ownership.asp> [hereinafter Evolution] (last visited June 10, 2006).

⁶⁹ *Id.*

and other rodents that made their homes in grain silos and barns.⁷⁰ The Egyptians are often credited with having tamed the wildcat around 4,000 years ago.⁷¹ Egyptian cats were highly prized for religious purposes, often being mummified after death.⁷²

Over time, these domesticated animals evolved physically from their untamed brethren, shrinking in overall body size.⁷³ Perhaps more significantly, they continued to exhibit juvenile behavior into adulthood. This characteristic, known as neoteny, means an animal retains non-aggressive, submissive, care-needing tendencies throughout its life.⁷⁴ Due in part to the reduced functional capacity of a domesticated animal’s brain in comparison to its larger counterparts in the wild, the direct ancestors of today’s cats and dogs had lower states of alertness, duller senses and less fear of humans.⁷⁵ Traits that would have ensured an early death in the wild made these animals perfectly adapted for life among humans.⁷⁶

Ancient ruling classes and nobility, such as the Chinese, Greeks and Romans, were all known to have kept animals as pets.⁷⁷ The trend continued in medieval Europe, where pet-keeping became popular among the aristocracy and some senior clergy.⁷⁸ However, companion animals would be scorned as objects of pagan worship during the Dark Ages and ultimately persecuted as tools of Satan during the witch trials of the sixteenth and seventeenth centuries.⁷⁹ Pet-keeping would not be generally accepted in the western world until the late seventeenth century, gaining popularity among the middle-classes by the mid-eighteenth century, and finally developing into the companionship-based practice we are familiar with today during the Victorian era.⁸⁰

There are an estimated 100 million cats and dogs currently living in American households, with eighty-percent of these households describing their animals as family members.⁸¹ In Richard A. Epstein’s opinion, “[w]hen it comes to medical care, it’s better to be a sick cat in a middle-class U.S. household than a sick peasant in a Third World country.”⁸²

By contrast, approximately 9.5 *billion* animals are reared and killed for food production in this country each year.⁸³ This is almost forty-four times the number killed by hunters and trappers, animal shelters, fur-producers and researchers *combined*.⁸⁴ Non-farmed animals have certain protections which can serve as the basis for future legal developments, but as a practical

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

⁷² DAVID COMFORT, *THE FIRST PET HISTORY OF THE WORLD* 22-23, 42-43 (1994).

⁷³ *The Domestication of Dogs and Cats* 2,

<http://www.pedigree.com/PedigreeCenter/Articles/Behavior/Facts+about+Dogs/The+domestication+of+dogs+and+cats.asp?FILTER=Adult> (last visited June 10, 2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ COMFORT, *supra* note 72, at 57, 131.

⁷⁸ Evolution, *supra* note 68, at 2.

⁷⁹ COMFORT, *supra* note 72, at 95-101.

⁸⁰ Evolution, *supra* note 68, at 2.

⁸¹ Human-Animal Bond Statistics 2, <http://www.guardiancampaign.com/whatIsCampaignPollshow.htm> (last visited June 10, 2006).

⁸² Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS* 143, 148 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁸³ Wolfson & Sullivan, *supra* note 11, at 206.

⁸⁴ *Id.* Approximately 218 million animals are killed every year in non-farming-related practices. *Id.*

matter, farmed animals, who make up ninety-eight percent of all animals living in the United States, have no legal protection at all.⁸⁵

IV. FARMED ANIMALS AND *THEIR* PLACE IN SOCIETY

James Rachels contends that society generally thinks some animals are more worthy of protection than others.⁸⁶ An animal's rank essentially depends on its perceived degree of similarity to humans.⁸⁷ Cats and dogs rank high because of their aesthetic appeal.⁸⁸ The ability to relate to companion animals as members of the family explains the strong reaction that many people have against the use of cats and dogs in biomedical experiments,⁸⁹ as well as the outrage towards cat and dog fur-farming in China.⁹⁰

Gary L. Francione notes that, "although we may experience sorrow for the death of a beloved companion animal, we feel no sorrow for animals killed for food. Indeed, the only time we lament the deaths of farm animals is when they die *unproductively*["]."⁹¹ Matthew Scully recalls the extermination of nearly ten million livestock in Britain and mainland Europe as the result of a "mad cow disease" scare in early 2001.⁹² He describes the public's horror at seeing images of these mass killings in the news, but for the animals, it was only a matter of timing.⁹³

The farmed-animal industry has control over its own regulation.⁹⁴ The industry has successfully lobbied state legislatures to amend criminal statutes that purport to protect farmed animals against cruelty so that its members cannot be prosecuted for any farming practice that the industry itself deems acceptable.⁹⁵ No laws exist to curtail the amount of pain caused by

⁸⁵ *Id.*

⁸⁶ James Rachels, *Drawing Lines*, in *ANIMAL RIGHTS, CURRENT DEBATES AND NEW DIRECTIONS* 162, 164 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 30 (1995). An excellent illustration of this is the public outcry and Congressional action that resulted from the February 4, 1966 publication of Henry Luce's *Life* magazine article entitled "Concentration Camps for Dogs." See Bryn Nelson, *SCIENCE AT A PRICE; Ethics as the argument; New questions are raised about whether the gains of animal research are worth the ethical uncertainties*, *NEWSDAY*, Sept. 27, 2004, at A06, available at LEXIS, News Library, Nday File. Congress received more mail based on this article exposing the market for kidnapped pets being sold into research than it had received pertaining to either the Vietnam War or civil rights, ultimately resulting in the passage of the Animal Welfare Act of 1966. Christine Stevens, *Chapter IV, Laboratory Animal Welfare*, in *ANIMALS AND THEIR LEGAL RIGHTS, A SURVEY OF AMERICAN LAWS FROM 1641 TO 1990* 66, 74 (Animal Welfare Institute ed., 4th ed. 1990.)

⁹⁰ See *Dateline NBC: Victims of Fashion* (NBC television broadcast, Dec. 15, 1998). The Humane Society of the United States sent undercover agents to film the gruesome goings-on in Chinese fur farms, where over two million cats and dogs are slaughtered annually. Most of the fur makes its way to the West and its origins are generally unknown to retailers and consumers. Matthew Scully points out the hypocrisy in America's reaction to this exposé: "We like cats and dogs. We only allow that to happen to other animals. It's okay to stuff millions of other creatures like mink and beaver and fox into cages and torture and terrify and electrocute them[.]" SCULLY, *supra* note 5, at 121.

⁹¹ FRANCIONE, *supra* note 89, at 31 (italics in original).

⁹² SCULLY, *supra* note 5, at ix.

⁹³ *Id.* at x.

⁹⁴ Wolfson & Sullivan, *supra* note 11, at 206.

⁹⁵ *Id.*

such practices.⁹⁶ The United States Animal Welfare Act (AWA), enacted in 1966 to regulate animal experimentation and amended several times since,⁹⁷ is the primary piece of federal legislation relating to animal protection.⁹⁸ While the Act sets forth minimal standards for animal care, it completely exempts farmed animals from its regulatory umbrella.⁹⁹ Consequently, the United States Department of Agriculture (USDA)’s Animal and Plant Health Inspection Unit (APHIS), the only entity that can enforce the AWA,¹⁰⁰ has no statutory authority to promulgate regulations relating to the welfare of farmed animals on farms.¹⁰¹

The Humane Slaughter Act of 1958 is the primary piece of federal legislation affecting farmed animals.¹⁰² However, the USDA’s reticence to enforce the Act’s already vague standards for carrying out slaughter “only by humane methods” and for preventing “needless suffering” led Congress to pass a resolution in 2002 entitled Enforcement of the Humane Slaughter Act of 1958.¹⁰³ This rare instance of Congress re-enacting an existing statute did nothing to increase the likelihood of compliance in that it did not require fines or other significant penalties for violations.¹⁰⁴ Nor did the resolution amend the original Act’s poultry exemption, which means that ninety-five percent of all farmed animals (approximately 8.5 billion slaughtered per year) continue to have no federal legal protection from inhumane slaughter.¹⁰⁵

This carefully-crafted industry autonomy strips prosecutors, judges and juries throughout the United States of the power to determine whether a farmed animal has been treated in an acceptable manner.¹⁰⁶ Even when a case gets into court based on a statute explicitly proscribing “unnecessary” or “unjustified” cruelty, the defendant can easily raise a reasonable doubt by arguing that the cruelty was “necessary” to achieve some industry-sanctioned end.¹⁰⁷ Gary Francione explains:

[w]hen the conduct in question is part of an accepted institutional exploitation of animals, the notion of necessity is not interpreted in its ordinary sense, and

⁹⁶ *Id.* Thirty-three states have anti-cruelty statutes exempting some combination of “accepted,” “common,” “customary,” or “normal” farming practice. *Id.* at 212, 228.

⁹⁷ *See* 7 U.S.C. §§2131-2159.

⁹⁸ Wolfson & Sullivan, *supra* note 11, at 207.

⁹⁹ *Id.*

¹⁰⁰ Taimie Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 81 (2006).

¹⁰¹ Wolfson & Sullivan, *supra* note 11, at 207.

¹⁰² *Id.* The only other federal statute addressing the welfare of farmed animals is the Twenty-Eight Hour Law, enacted in 1877, which provides that animals cannot be transported across state lines for more than twenty-eight hours by a “rail carrier, express carrier, or common carrier (except by air or water)” without being unloaded for at least five hours of rest, watering, and feeding. *Id.* at 208 (*citing* 49 U.S.C. §80502 (2003)). The fact that the USDA has determined that the law was “written to apply only to transport by railcar” and that it “does not apply to transport by trucks,” along with the fact that the statute is rarely, if ever, enforced, with a maximum penalty of only \$500, however, renders it essentially meaningless. *Id.* at 208 (*citing* 60 F.R. 48362, 48365).

¹⁰³ *See* Wolfson & Sullivan, *supra* note 11, at 208. In 1985, the Government Accountability Office (GAO) issued a report stating that, while the USDA had complained of not having enough funding to properly carry out all of its inspections, the USDA itself had proposed for the years 1983 through 1986 that funding for APHIS inspections be eliminated or reduced and that state, local and private agencies take over the job of monitoring animal welfare. FRANCIONE, *supra* note 89, at 216. Taimie Bryant further contends that USDA veterinarians and their supervisors “want to . . . go easy on the [slaughterhouses] because they know that after they leave the USDA they can get a high-paying job as an industry consultant.” Bryant, *supra* note 100, at 82 n.50.

¹⁰⁴ Wolfson & Sullivan, *supra* note 11, at 208.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 206.

¹⁰⁷ FRANCIONE, *supra* note 89, at 134.

instead, the jury is directed to consider whether the conduct is justifiable by reference to the legitimate or accepted activity of which animal exploitation is a part.¹⁰⁸

The nation's lack of identification with the plight of farmed animals can be attributed in part to the near-complete removal of "farm life" from American society. Richard Polson, the vice president of Smithfield Foods, Inc., a Fortune 500 company,¹⁰⁹ analogized to Matthew Scully that a small-scale farmer raising his own livestock would make about as much sense as someone trying to build cars in his or her backyard;¹¹⁰ in this day and age, automation and mass production are required to keep up with a global economy.¹¹¹

Scully acknowledges that traditional farmers are not blameless when it comes to cruel practices, but states:

we need not romanticize either the lives of these farmers or the lot of their animals to see the crucial point. By the terms of basic husbandry, the animals served our needs and in return we showed a regard for theirs. We assumed certain rights, and with those rights certain obligations. There was honor in it. We didn't "grow" animals. We raised them, took the trouble to understand them, respected their need and natures.¹¹²

Today's mechanized approach to farming capitalizes on social and racial hierarchies. Society exploits and ignores certain classes of people the way it does certain "classes" of animals. While historically employed *en masse* by packing plants, unskilled immigrant laborers now contribute their services to the farmed animal industry.¹¹³ Many workers are here illegally, living in constant fear of deportation.¹¹⁴ Unionization is completely out of the question.¹¹⁵ Most of the time, workers return to their native land as soon as they have some savings and a new batch of immigrants arrives to fill the vacated positions.¹¹⁶

Charlie LeDuff describes the job placement hierarchy at Smithfield's plant in Tar Heel, North Carolina as follows: "The few whites on the payroll tend to be mechanics and supervisors. As for the Indians, a handful are supervisors; others tend to get clean menial jobs like warehouse work. With few exceptions, that leaves the blacks and Mexicans with the dirty jobs at the factory[.]"¹¹⁷ Prisoners, who are often bussed in on work release, occupy the bottom rung as well, regardless of race.¹¹⁸

Comments about the system like, "they don't kill pigs, they kill people"¹¹⁹ and "This job's for an ass. They treat you like an animal[.]"¹²⁰ abound among factory-farm workers. The

¹⁰⁸ *Id.*

¹⁰⁹ SCULLY, *supra* note 5, at 250.

¹¹⁰ Delving into the gruesome details of modern factory-farming would not serve any purpose. However, if one wishes to read an extremely powerful account of such practices, I would recommend Chapter Six, "Deliver Me from My Necessities," SCULLY, *supra* note 5, at 247-86.

¹¹¹ *Id.* at 255.

¹¹² *Id.* at 270-71.

¹¹³ *Id.* at 262.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ SCULLY, *supra* note 5, at 262.

¹¹⁷ LeDuff, *supra* note 12, at A24.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

implications of these statements require very little elaboration. The powers-that-be seem to have few qualms with this dual-exploitation of disenfranchised humans and beasts. Whether an animal is sent off to be “processed” while still alive¹²¹ or a worker is knocked unconscious by a vat of hog carcasses falling on her, “nothing stops the disassembly lines.”¹²²

V. CURRENT LEGAL REALITIES FOR ALL ANIMALS IN THE UNITED STATES

The law views domesticated animals as the personal property of the animal’s owner.¹²³ Property law is founded on the principle that property itself cannot have rights against or apart from the will of its owner.¹²⁴ Throughout the past forty years, there have only been a handful of cases in which courts have dared break away from the paradigm of animals as personal property.¹²⁵ These tort and “custody” cases edge the law closer to recognizing the value of companion animals as extending far beyond the animals’ value as chattel. The fact remains that the majority of cases, while often nodding to the sentimental value of companion animals, still regard them as property whose worth is to be limited to market value, and sometimes not even that.¹²⁶

¹²¹ SCULLY, *supra* note 5, at 284.

¹²² LeDuff, *supra* note 12, at A25.

¹²³ See generally FRANCIONE, *supra* note 89.

¹²⁴ *Id.* at 4 (citing JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 27 (1988)).

¹²⁵ See, e.g. Raymond v. Lachmann, 695 N.Y.S.2d 308 (N.Y. App. Div. 1st Dep’t 1999) (basing possession of a cat in a “custody” dispute on the “best interests of the cat”); Bueckner v. Hamal, 886 S.W.2d 368, 373 (Tex. App. 1994) (concurrency focusing on “the intrinsic or special value of domestic animals as companions and beloved pets.”). The concurring judge goes on to say “I consider them to belong to a unique category of ‘property’ that neither statutory law nor caselaw has yet recognized.” *Id.* at 377; *In re Fouts*, 677 N.Y.S.2d 699 (N.Y. Sur. Ct. 1998) (appointing an enforcer to receive process for chimpanzees, and proclaiming that the enforcer would perform the same function as a guardian ad litem for an incapacitated person); Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980) (factoring in loss-of-companionship when valuing a dog for damages as a result of the animal’s death while in the defendant’s care); Corso v. Crawford Dog and Cat Hosp., 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979) (holding “that a pet is not just a thing but occupies a special place in between a person and a piece of personal property.” *Id.* at 183); Zovko v. Gregory, No. CH-97544 (Va. Cir. Ct. 1997) (applying a “best interests of the pet” standard in awarding possession of a cat to one roommate over the other after they had gone their separate ways).

¹²⁶ See generally Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987) (holding that, because the appellee airline’s limited liability policy for damaged baggage was clearly printed on appellant-air-traveler’s ticket, appellant could not recover more than that minimal amount for the negligent deaths of seven of his greyhound dogs); Richardson v. Fairbanks N. Star Borough, 705 P.2d 454 (Alaska 1985) (limiting the damage award for the death of plaintiff’s dog, caused by defendant’s negligence, to the dog’s market value or replacement cost); Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996) (awarding plaintiffs costs and declining to base damages on the intrinsic value of the dog); Green v. Leckington, 192 Or. 601 (1951) (ruling that there is nothing unconstitutional about a statute which allows someone to shoot a dog caught chasing their livestock or poultry); Katsaris v. Cook, 180 Cal. App. 3d 256 (1986) (holding that respondent-livestock owners were justified in killing appellant’s two dogs and dumping them in a ditch in accordance with a statute that permits livestock owners to kill any dog that steps onto their property, with no duty to notify the dog’s owner of their actions); Soucek v. Banham, 524 N.W.2d 478 (Minn. App. 1994) (refusing to grant punitive damages absent personal injury, and since dogs are considered personal property, no personal injury occurred when respondent police officers intentionally killed the animal); Young v. Delta Air Lines, Inc., 432 N.Y.S.2d 390 (N.Y. App. Div. 1980) (limiting plaintiff’s damages for the death of his dog caused by defendant-airline’s negligence to a standard amount for lost property set by the Civil Aeronautics Board); Daughen v. Fox, 372 Pa. Super 405 (1988) (holding that a dog is not a unique chattel and under no circumstances can there be recovery for loss of companionship due to the death of an animal); Smith v. Palace Transp. Co., 253

In a 1994 case, *Gluckman v. American Airlines*,¹²⁷ the United States District Court for the Southern District of New York granted American Airlines' motion to dismiss the plaintiff's tort claims pertaining to his dog. The dog suffered heat stroke and brain damage; the baggage compartment in which he was traveling reached one-hundred-forty degrees while the plane was stalled prior to take-off.¹²⁸ The dog had to be euthanized as a result.¹²⁹ The court declined to consider the plaintiff's claims aside from his contention that the airline breached its obligation to him as bailee of the animal.¹³⁰ In so doing, the *Gluckman* court reaffirmed the current legal status of animals. "In viewing a pet as more than property . . . the *Corso* opinion,¹³¹ and the few cases that follow it, are aberrations flying in the face of overwhelming authority to the contrary."¹³²

The AWA's text provides further proof of the existence of arbitrary limitations within the current legal landscape pertaining to animals. A cursory look at the Act's definition of "animal" reveals that the purpose of the statute is not to ensure the overall welfare of the animal kingdom, but rather, to attempt to protect *certain* animals within *certain* environments, so long as the human purpose for confining them within that environment is not disturbed. The Act says:

The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; *but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.*¹³³

This stark legal differentiation between animals that can be described as anthropomorphically-pleasing to humans, or to put it in simpler terms, "cute," and those which are viewed purely as means to a human end paints a seemingly bleak future for farmed animals.

N.Y.S. 87 (N.Y. Mun. Ct. 1931) (proclaiming that a person's feelings for their pet could not be used as a factor when valuing damages) *overruled by* *Corso v. Crawford Dog and Cat Hosp.*, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979). Note that *Smith v. Palace Transp. Co.* continues to be followed, despite its status as having been overruled by *Corso*. See, e.g., *Jason v. Parks*, 638 N.Y.S.2d 170 (N.Y. App. Div. 1996); *Fowler v. Ticonderoga*, 516 N.Y.S.2d 368 (N.Y. App. Div. 1987); *Zager v. Dimilia*, 524 N.Y.S.2d 968 (N.Y. Just. Ct. 1988); *Stettner v. Graubard*, 368 N.Y.S.2d 683 (Town Ct. 1975).

¹²⁷ *Gluckman v. American Airlines*, 844 F.Supp 151 (S.D.N.Y. 1994).

¹²⁸ *Id.* at 154.

¹²⁹ *Id.*

¹³⁰ *Id.* Specifically, Gluckman sought both compensatory and punitive damages as a result of the dog's death and his own emotional distress as Count One; compensatory damages for loss of the companionship of his pet in Count Two; compensatory damages for the dog's own pain and suffering as Count Three; compensatory damages based upon the "tort of outrage," defined as the defendant having acted with reckless disregard of the probability that its conduct would cause Gluckman severe mental anguish as Count Four; and finally, Gluckman claimed in Count Five that American breached its obligation to him by failing to deliver and return the dog in the same healthy condition in which he was received. *Id.* at 156.

¹³¹ See note 125.

¹³² 844 F. Supp. at 158.

¹³³ 7 U.S.C. §2132(g) (emphasis added).

Tom Regan identifies the many forces that stand in the way of social justice for all animals:

First, we have several thousand years of Western civilization teaching that animals exist to satisfy human needs and satiate human desires. Next, we have the great masses of humanity buying into the wisdom of the ages. Then we have the major animal user industries, spending hundreds of millions of dollars in advertising money, protected by the laws of the land, telling the great masses that, yes, it is true, animals exist to satisfy our needs and satiate our desires. Finally, we have the social arrangements (the education system, religious institutions, legal traditions, restaurants, clothing stores, family-friendly forms of entertainment, the biomedical industrial complex, and what passes for sport among the adventurers in field and stream, for example.)¹³⁴

He offers hope, however, in declaring that “the verdicts of history teach that entrenched social practices not only *can* change, they *have* changed. But never without a struggle.”¹³⁵

VI. STRATEGIES FOR CHANGE

While all animals in America are legally considered to be the property of their owners, public sentiment clearly leans toward acknowledging the inherent value of the lives of cats and dogs we call our “pets.” Matthew Scully claims that the only reason society-at-large does not recognize the moral equality between a dog and a pig is because “human caprice and economic convenience [] say otherwise.”¹³⁶ Taimie Bryant posits the theory that

[s]imilarity is seen as a legitimate basis for concern; dissimilarity is taken to be a legitimate basis for disregard. For example, a white person who sees a black person as inevitably and significantly different from herself will not spend very much time trying to understand the black person’s experience, unless the black person makes it important for her to do so or unless an epiphany closes the gap of irrelevance.¹³⁷

Bryant further illustrates this notion by recalling the words of Mary Boykin Chesnut, wife of a U.S. Senator from South Carolina and author of the 1860 “A Diary from Dixie.” Chesnut, reacting to the sight of a young slave woman on an auction block, wrote, “I felt faint, seasick. The creature looked so much like my good little Nancy. She was a bright mulatto, with a pleasant face.”¹³⁸

We must not write Mary Boykin Chesnut’s words off as merely the condescending and matriarchal sentiment of a member of the privileged and oppressive class; they should be viewed as a prime example of the potential for breaking through barriers of inertia and edging toward the

¹³⁴ REGAN, *supra* note 5, at 192.

¹³⁵ *Id.* at 193.

¹³⁶ Matthew Scully, *Fear Factories, The Case for Compassionate Conservatism--for Animals*, THE AMERICAN CONSERVATIVE, May 23, 2005, at 7, 10.

¹³⁷ Bryant, *supra* note 100, at 106-07.

¹³⁸ *Id.* at 41 (quoting MARY BOYKIN CHESNUT, A DIARY FROM DIXIE 13 (1905), available at <http://docsouth.unc.edu/chesnut/maryches.html> (last visited June 10, 2006)).

empathy required for social change. Whenever a mid-nineteenth-century white southern woman actually stopped and *looked* at an enslaved woman, allowing herself to see the other woman for her individual characteristics and not just for her status as a commodity, the lines of “us” and “them” blurred, even if only for a moment.

The question now is, what is it going to take to get Americans to stop in front of their butcher shop or deli section and look beyond the hanging body parts to see the *whole being* that is being offered up for sale?

A. Media Attention

Animal rights activists’ daily efforts to educate and campaign for change go largely unnoticed by the American media; the only time their work makes the evening news is when someone does something unlawful or outlandish.¹³⁹ Capturing sensational acts on tape provides instant currency for “reputable” institutions of animal exploitation. “Opponents of social movements throughout history have found it easy to generate feelings of suspicion toward those who are ‘different’ or ‘foreign’ and to create fears about social movement motives and objectives.”¹⁴⁰ Nineteenth century media warned the nation that, if women gained the right to vote, soldiers, workers, husbands, and fathers would all be stripped of their manhood, fostering anxieties that continued to undercut the women’s movement well into the next century.¹⁴¹

How can the public’s fears surrounding the animal rights movement be assuaged? Perhaps this could be accomplished if an “unlawful” or “outlandish” act were able to inspire compassion and sympathy for mistreated animals. Tom Regan believes that “open rescues,” like the one performed by Compassion over Killing (COK) in April of 2001, manage to do just that.¹⁴² After learning of the deplorable conditions at a large battery hen operation, COK contacted the company to request a tour, but never received a response.¹⁴³ Subsequently, four COK members made several unauthorized visits to the facility, using video and photography to document the sight of numerous dead hens in cages with live ones, as well as hens with their wings and feet caught in wire mesh.¹⁴⁴ COK brought their findings to the state attorney general and to the local sheriff, but was turned away by both.¹⁴⁵

On a final visit to the battery hen facility, the COK members took eight hens in desperate need of medical attention with them.¹⁴⁶ They then made a public announcement about the actions they had taken, declaring their willingness to be arrested.¹⁴⁷ The result was not an arrest, but rather, major newspapers and television programs giving COK’s open rescue extensive, positive coverage with primary focus on the hens *themselves*, and not the rescuers.¹⁴⁸

¹³⁹ REGAN, *supra* note 5, at 183.

¹⁴⁰ DENTON, SMITH & STEWART, *supra* note 1, at 328.

¹⁴¹ *Id.* at 327.

¹⁴² REGAN, *supra* note 5, at 195.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ REGAN, *supra* note 5, at 195. As seemingly damning as footage of eleven birds wedged into a space the size of a file cabinet drawer is, it did not stop Ken Klippen, Vice President of Government Relations for United Egg Producers from proclaiming that “having chickens in cages is the humane way of producing eggs.” *Id.*

B. Legislation

Taimie Bryant discusses the two-fold benefit of using legislation as a tool for gaining public sympathy. Promoting legislation not only has the potential to result in the banning of a cruel practice, but it also educates the public about the very existence of that practice.¹⁴⁹ Bryant cites the then-pending California bill to ban the force-feeding of birds in the production of foie gras¹⁵⁰ as a good example, contending that even if the legislation were to fail, mass media coverage will have educated the public about a cruel practice which would not have otherwise been covered.¹⁵¹ However, she points out the foreseeable drawbacks of this course of action, stating that it

invites much more intense opposition from defenders of foie gras production, who have more incentive to defend against a proposed legislative ban than a mass public information campaign about the cruelty of foie gras production waged separately from proposed legislation. In fact, greater incentives on *both* sides of the legislative proposal result in advocacy methods that carry considerable potential for public confusion about the reality of cruelty and about the credibility of animals' advocates.¹⁵²

Bryant goes on to say that because the public is willfully ignorant about how animals are turned into meat and does not want to believe they are eating cruelly produced foods, they are open to any apparently respectable entity's assurances that their meat is not cruelly produced.¹⁵³

Nevertheless, the passage of California's SB 1520, which will ultimately ban both production of foie gras by means of force-feeding ducks and geese, and sale within the state of foie gras produced that way, proves that despite any mixed messages that may have arisen during the campaign, the definition of “cruelty” is clear.¹⁵⁴

C. Education

“Humane Education” is the term used to describe any educational program that promotes compassion and respect for people, animals and the environment, along with recognition of the interdependence of all living things.¹⁵⁵ Humane education is seen by many in the animal rights movement as a long-term preventative strategy that will bring about a lasting, large-scale improvement in the quality of animals' lives.¹⁵⁶

¹⁴⁹ Bryant, *supra* note 100, at 84.

¹⁵⁰ See States Join California in Considering Bans on Force Feeding of Ducks and Geese, <http://avar.org/foiegras2.html> (last visited June 10, 2006). In September of 2004, California Governor Arnold Schwarzenegger signed the bill, SB 1520, into law. The bill also bans the sale of foie gras in the state when made from force-fed birds; both the sale and production provisions will take effect in the year 2012. *Id.*

¹⁵¹ Bryant, *supra* note 100, at 84.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See note 150.

¹⁵⁵ See Humane Education, <http://worldanimal.net/humane-ed.html> (last visited June 10, 2006).

¹⁵⁶ *Id.* The American Humane Association, The Fund for Animals, the Humane Society of the United States and the National Anti-Vivisection Society are just a few organizations that promote youth outreach as a means of combating animal cruelty. See <http://www.humaneedu.com/edurefer.html> (last visited May 30, 2006).

Focusing on children as instruments of change serves not only to encourage compassionate behavior toward animals at an early age, but might possibly curb future violent behavior in other realms of a child's life. Studies have shown that there is a strong correlation between childhood animal abuse and the exhibition of sociopathic tendencies later in life.¹⁵⁷ Putting this "humanistic" spin on humane education will help to make it all the more palatable to the general public.

D. Religious Institutions

Matthew Scully dares to ask "When did you last hear any Christian minister caution against cruelty to animals? It comes up about as often as graven images[.]"¹⁵⁸ Scully speaks of the dual-world in which many Christians live:

[T]here is this one world in which man made in the image of God affirms the inherent goodness of animals, feeling himself the just and benevolent master. ... And then there is the world of the Easter feast of lamb or ham or veal, to be enjoyed without the slightest thought of the privation and misery the lamb or pig or calf endured at human hands.¹⁵⁹

And yet, as a Catholic and a conservative, Scully has by no means given up on religious institutions as vehicles for change.¹⁶⁰ He notes that many Christians, C.S. Lewis and Billy Graham among them, believe that God might allow animal companions into Heaven based on the value set for them by their *human* counterparts.¹⁶¹ He draws this premise out to its logical conclusion, stating, "One would think this only further reason to spread our care as far and wide as possible, to be His instrument in a loving concern for all creation."¹⁶² Scully claims that many of today's cruelties come at the hands of people quick to identify themselves as "good Christian folk."¹⁶³

Matthew Scully's proposal for converting the hearts of America and its largely faith-oriented population¹⁶⁴ begins with converting animal rights terminology into words that resonate with a greater segment of society. He contends that "[a]nimal advocates sometimes speak a language of liberation bearing little resemblance to the world that animals actually inhabit, or to

¹⁵⁷ See generally CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION (Frank R. Ascione, Ph.D., and Phil Arkow eds., 1999).

¹⁵⁸ SCULLY, *supra* note 5, at 15.

¹⁵⁹ *Id.* at 17.

¹⁶⁰ See generally SCULLY, *supra* note 5, at 1-46.

¹⁶¹ *Id.* at 19-20.

¹⁶² *Id.* at 20.

¹⁶³ *Id.*

¹⁶⁴ A recent poll conducted by the National Broadcasting Corporation asked participants, "How often do you attend services at a church, synagogue, or other place of worship?" to which forty-one percent replied, "Once a week or more." When those surveyed were asked, "How often do you pray?" sixty-four percent said they prayed daily. NBC Poll, <http://www.msnbc.msn.com/id/7231603/> (conducted by Peter D. Hart Research, which interviewed 800 adults by telephone on March 8-10, 2005, with a margin of error of plus or minus three percentage points) (last visited June 10, 2006).

our own world for that matter.”¹⁶⁵ Scully posits that speaking in terms of abuse of power, or, to key in on Biblical terminology, the abuse of dominion,¹⁶⁶ will have a much greater effect.¹⁶⁷

Matthew Scully acknowledges America’s tendency to be outraged by anomalous horrors when they occur on factory farms: “We cringe when things go wrong at the farm and [all the animals] have to be shot, incinerated, and buried. But it is just as hard to watch when things are going right.”¹⁶⁸ He also recognizes that there was a time when animal exploitation was necessary for humankind to survive, but declares that that time is now coming to pass.¹⁶⁹ “When substitute products are found, with each creature in turn, responsible dominion calls for a reprieve. The warrant expires. The divine mandate is used up. What were once ‘necessary evils’ become just evils.”¹⁷⁰

VII. CONCLUSION

Abolishing, or even limiting, human exploitation of animals may appear to be a virtually insurmountable challenge, considering that these practices have been engrained in most of the world’s culture for several millennia, and have certainly been an accepted part of American life since the nation’s founding. Yet the same could easily have been said about recognizing the basic rights of women less than a hundred-and-fifty years ago. In practice, the gender and race divides in this country have not been completely bridged by any means; however, from a legal standpoint, the chasm has been narrowed considerably.

Equally significant, if not more so, is the fact that it is no longer culturally acceptable, or to use the popular catch-phrase, “politically correct,” to publicly disparage or discriminate against women and minorities. In contrast, the animal rights movement is a long way away from being considered a “politically correct” cause, “perhaps because more than allegiance to any idea or doctrine the cause requires a conscious act of will and a change in personal habits.”¹⁷¹

Animal activists must be attuned to the public’s tendency toward accepting only that part of a movement that capitalizes on the status quo. Just as nineteenth-century white middle-class men came to accept their wives taking on limited but nonetheless influential roles in society, modern America has no qualms about standing alongside animal rights proponents in their call for tougher criminal penalties for dog and cat abusers. But when it comes to staring squarely into the eyes of those being institutionally oppressed, whether the victims be human or non-human animals, society has always been quick to look away.

By channeling their message of compassion and personal responsibility through mainstream vehicles such as the media, legislation, educational facilities and religious institutions, animal activists can connect with people who might not otherwise seek out information on animal exploitation. This kind of earnest, straight-forward exposure to the realities of life on factory farms will aid in dispelling industry-propagated myths about the happy

¹⁶⁵ SCULLY, *supra* note 5, at 20.

¹⁶⁶ See *Genesis* 1:26-30.

¹⁶⁷ SCULLY, *supra* note 5, at 24.

¹⁶⁸ *Id.* at 29.

¹⁶⁹ *Id.* at 42.

¹⁷⁰ *Id.* at 43.

¹⁷¹ SCULLY, *supra* note 5, at 107.

existence of farmed animals. Victory for the animal rights movement will be built on a succession of small, highly-individualized epiphanies; animal activists must present opportunities for people to look into the eyes of the powerless, suffering victims of institutionalized cruelty, and hopefully, like that slave-holding southern woman who could not take her eyes off the horrors of the auction block, the American public will not look away either.

		Summary of Facts	Summary of Holding
<i>Benson v. State</i>	710 N.W.2d 131 (S.D. 2006).	Landowners brought an action seeking declaratory and injunctive relief against the State of South Dakota and other state defendants, challenging the constitutionality of a statute that addresses the shooting of small game from a public right-of-way.	<p>The conduct authorized by statute was temporary in nature, and thus was not a per se taking;</p> <p>The enactment of statute did not legally cause the alleged damage to landowners property, and therefore was not a regulatory taking; and</p> <p>The possible decrease in the value of the landowners' hunting business did not constitute a regulatory taking.</p>
<i>City of Toledo v. Tellings</i>	2006 WL 513946 (Ohio App. 6 Dist. 2006).	Defendant, who owned three pit bulls, challenged the constitutionality of a city ordinance limiting ownership to only one pit bull per household, and of a statute requiring the owner of a "vicious dog" to provide liability insurance.	<p>The statute requiring the owner of a "vicious dog" to provide liability insurance was unconstitutional in that it denied procedural due process;</p> <p>Ordinance limiting ownership to one pit bull per household was unconstitutional as applied;</p> <p>Statute providing that the ownership of a pit bull is prima facie evidence of the ownership of a vicious dog was unconstitutional because pit bulls are not inherently dangerous or vicious;</p> <p>City ordinance limiting ownership to one pit bull per household was unconstitutional;</p> <p>Statute which provides that ownership of a "pit bull dog" is prima facie evidence of ownership of a vicious dog was unconstitutionally void for vagueness.</p>

<i>Fund for Animals, Inc. v. Hogan</i>	428 F.3d 1059 (D.C. Cir. 2005).	Animal advocacy groups brought an action against the Fish and Wildlife Service (FWS) after FWS denied their petition to list the trumpeter swans inhabiting Wyoming, Montana, and Idaho. as endangered or threatened	FWS's issuance of a 90-day finding under the Endangered Species Act detailing why trumpeter swans inhabiting Wyoming, Montana, and Idaho were not a distinct population segment entitled to protection as endangered or threatened mooted the claim that the letter did not comply with the ESA; Claims under the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), and the Migratory Bird Treaty Act (MBTA) did not fall within the “capable of repetition yet evading review” exception to the mootness doctrine.
<i>State of Utah v. Reber</i>	128 P.3d 1211 (Utah Ct. App. 2005).	Defendant was convicted of aiding or assisting in wanton destruction of protected wildlife, and two other defendants entered conditional guilty pleas to attempted wanton destruction of protected wildlife. The defendants asserted that the state lacked jurisdiction.	The Court of Appeals held that the state court lacked jurisdiction over hunting violations committed on Indian lands.
<i>Butler v. City of Palos Verdes Estates</i>	135 Cal.App.4th 174 (Cal. App. 2 Dist. 2005).	The city had a program to manage the size of a feral peafowl population that inhabited parklands and canyon property it owned. Residents sued the city on the ground that the program violated certain deed restrictions. The court enjoined the city from allowing peafowl to use the parklands and canyons, and the city appealed.	The trial court erred in determining that the deed restrictions operate to prevent the city from continuing its peafowl management program, as the program did not constitute “keeping” wild peafowl.
<i>State v.</i>	128 P.3d 133	Defendants were convicted	The Court of Appeals held that

<i>Paulson</i>	(Wash. App. Div. 2 2006.).	of animal cruelty for tying a dog to a tree and repeatedly shooting arrows into it.	the evidence supported a finding of intent to cause undue suffering.
<i>Miccosukee Tribe of Indians of Florida v. U.S.</i>	2006 WL 650694 (S.D. Fla. 2006).	Indian tribe, conservation groups, and Cape Sable seaside sparrow (an endangered species), brought an action alleging, inter alia, that the water management decisions of the Army Corps of Engineers, designed to avoid jeopardy to the sparrows while carrying out Congressionally-authorized water control projects in South Florida, violated National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Parties and Intervenor cross-moved for summary judgment.	<p>Army Corps of Engineers violated NEPA by failing to prepare a supplemental environmental impact statement (SEIS) for changes to water control plan;</p> <p>Corps did not act arbitrarily or capriciously by relying on limited modeling information when making changes to water control plan;</p> <p>Corps did not improperly delegate authority to the Institute for Environmental Conflict Resolution (IECR) when preparing changes to water control plan;</p> <p>IECR was not an advisory committee subject to provisions of the Federal Advisory Committee Act (FACA); and</p> <p>Intervenors' motion for declaratory judgment was moot.</p>
<i>Justice for Animals, Inc. v. Lenoir County SPCA, Inc.</i>	607 S.E.2d 317 (N.C. App. 2005).	Non-profit corporation dedicated to humane treatment of animals filed action seeking injunctive relief and challenging private non-governmental animal control facility's practice of euthanizing feral cats without holding them for 72 hours.	<p>Private non-governmental facility was not subject to a public health statute governing dogs and cats, which permitted administrative remedies against local health department and local health director, and thus, the trial court lacked subject matter jurisdiction over complaint filed under the statute;</p> <p>Complaint set forth a cause of action against facility sufficient</p>

			<p>to establish subject matter jurisdiction for a claim of cruel treatment; and</p> <p>Involuntary dismissal of claim for civil remedy for protection of animals lacked required findings and conclusions of law.</p>
<i>Savage v. Prator</i>	921 So.2d 51 (La. 2006).	Game clubs filed action for declaratory judgment and injunctive relief against parish commission and parish sheriff's office after being informed by the sheriff that an existing parish ordinance prohibiting cockfighting would be enforced.	The parish ordinance prohibiting cockfighting did not violate general law or infringe upon the State's police powers in violation of the Constitution.
<i>Center for Biological Diversity v. Bureau of Land Management</i>	2006 WL 662735 (N.D. Cal. 2006).	Several environmental organizations filed a complaint alleging that defendants had violated the Endangered Species Act, the National Environmental Policy Act, the Federal Land Policy and Management Act of 1976 and the Administrative Procedure Act by failing to adequately protect the Peirson's milk-vetch and the desert tortoise from recreational off-highway vehical use.	<p>The court held that the 2005 Biological Opinion was legally inadequate;</p> <p>The final rule designation of critical habitat for the milk-vetch was arbitrary and capricious;</p> <p>The Environment Impact Statement is legally inadequate; and</p> <p>The BLM did not take a "hard look" at the impact of the recreation area management plan on endemic invertebrates.</p>

Correio da Bahia
9th Criminal Court

HABEAS CORPUS - 833085-3/2005

In favor of: Suica

Requested by: Heron Jose de Santana, Luciano Rocha Santana, Antonio Ferreira Leal Filho and others

Co-plaintiff authority: Thelmo Gavazza, Director of Biodiversity, Environmental and Hydrological Resource Department

Sentence: Pages 170 to 173: Hons. HERON JOSE DE SANTANA and LUCIANO ROCHA SANTANA, Prosecutors from the Environmental Department and other entities and individuals indicated in the petition (page 2), have requested a REPRESSIVE HABEAS CORPUS in favor of "Suica," a chimpanzee (scientific name *Anthropopithecus troglodytes*), a monkey who is caged at Parque Zoobotanico Getulio Vargas (Salvador's zoo), located at Av. Ademar de Barros, in this capital, and the co-plaintiff authority in this case is Mr. Thelmo Gavazza, Director of Biodiversity of the Environmental and Hydrological Resource Department, SEMARH.

To support the request, the petitioners alleged that "Suica" is caged in a cage that has severe infiltration problems in its physical structure, which would hinder the animal's access to the direct transit area, which is larger, and also to the hall used to handle the animal; the cage's total area is 77.56 square meters and 4.0 meters high in the solarium, with a confinement area 2.75 meters high, thus preventing the chimpanzee to move around. With the purpose of showing the grounds of this writ, the petitioners allege, in short, that "in a free society, committed to ensuring freedom and equality, laws evolve according to people's thinking and behavior, and when public attitudes change, so does the law, and several authors believe that the Judiciary can be a powerful social change agent." They also state, in short, that as of 1993 a group of scientists began to openly defend the extension of human rights to large primates, giving rise to the Great Ape Project, which is supported by primatologists, ethologists and intellectuals, which is based on the premise that human beings and primates became different species about 5 to 6 million years ago, and some evolved into the current chimpanzees and bonobos, and another into 2-footed erect primates, wherefrom *Homo Australopithecus*, *Homo aridipithecus* and *Homo paranthopus* descend, in short, the intent is to equate primates to human beings for the purposes of granting habeas corpus. Lastly, the petitioners say that this instrument alone, can extend the definition of personality (or humanity) to hominids. They base it on the concept of environmental safety, and seek a grant of Habeas Corpus in favor of "Suica" the chimpanzee, determining its transfer to GAP's Great Ape Sanctuary in the city of Sorocaba, State of Sao Paulo, having already made available the transportation for this transfer.

One could, from the very topic of the petition, have enough grounds to dismiss it, from the very outset, arguing the legal impossibility of the request, or absolute inapplicability of the legal

instrument sought by the petitioners, that is, a Habeas Corpus to transfer an animal from the environment in which it lives, to another. However, in order to incite debate of this issue, with persons and entities connected to Criminal Procedural Law, I decided to admit the argument. In fact this is an unprecedented case in Bahia's law, although I am aware of a case heard by the Federal Supreme Court, wherein a Rio de Janeiro attorney, in conjunction with an animal protection agency, requested an Habeas Corpus to release a bird, which was caged, however, the Court dismissed the case, according to the opinion writer justice, Hon. Justice Djalci Falcao, who voted for dismissal, with the understanding that "an animal cannot be involved in a legal relationship as subject of law, it can only be object of law, acting as a thing or asset." (STF RHC - 63/399). I have been on the bench for 24 years, always working in criminal courts, and this is the first case I have been assigned where the subject of the Habeas Corpus is an animal, to wit, a chimpanzee. However, the theme is deserving of discussion as this is a highly complex issue, requiring an in-depth examination of "pros and cons", therefore, I did not grant the Habeas Corpus writ, preferring rather to obtain information from the co-plaintiff authority, in this case, Mr. Thelmo Gavazza, Director of Biodiversity of the Environmental Department, requesting he did so within 72 hours.

It is true that, in this initial ruling, admitting the debate of this matter, I have displeased some overzealous jurists¹ who might have forgotten a Roman Law maxim, which says that "in any provision, the petition must be submitted so that words are not superfluous, and rendered worthless." Additionally, I would like to recall the wise words of the late Prof. Vicente Rao, who wrote in his monumental work, *The Law and Life of Rights*, "jurists should not seek demagogic applause, which they are not in need of. Quite the contrary, they have to courageously set forth the true scientific and philosophical principles of Law, proclaiming them loud and clear. They have to make these prevail in a tumultuous legislative scene, where changes are dictated by social contingencies, extracting there from rules which govern new needs, without sacrificing freedom, dignity and human personality." Among the factors that influenced my accepting this matter for discussion is the fact that among the petitioners are persons with presumed broad legal knowledge, such as Prosecutors and Law professors.

On the last day of the 72-hour deadline for submission of information, the illustrious co-plaintiff, SEMARH's Biodiversity Director, filed a petition in this Court (page 166), requesting the extension of the deadline, by another 72 hours, as due to internal issues at the Court, there was a delay collecting information. I accepted the extension of deadline, by another 72 hours, and did so because I understood that the Biodiversity Division of the Environmental and Hydrological Resource Department, a direct administration agency, cannot be compared to a Police Precinct (normally, in habeas corpus the co-plaintiff is a police authority) therefore there was no police authority involved, which deals with human detainees, and the petitioners supposedly had enough time to research and back-up their claims, gathering opinions of several persons and entities connected to the matter. However, surprisingly, I became aware, through a second petition sent to this Criminal Court, signed by the SEMARH's Biodiversity Director (page 168) received today at this Court (on 09/27/2005), that "Suica" the chimpanzee, the subject of this Habeas Corpus, was deceased inside the Salvador Zoo. The petitioner indicated that this sad fact took place "in spite of all efforts made and all care provided to the chimpanzee."

¹According to the translator, this could mean either "overzealous jurists" or, if meant sarcastically, "jurist wannabees," people who claim to have an understanding of the law, but really don't.

The news took me by surprise, no doubt causing sadness, as I visited the Ondina Zoo, covertly, on the afternoon of 10/21/2005, last Saturday, and did not perceive any apparent abnormality concerning "Suica" the chimpanzee, although I would like the record to show that I am not an expert on the matter. I am sure that with the acceptance of the debate, I caught the attention of jurists from all over the country, bringing the matter to discussion. Criminal Procedural Law is not static, rather subject to constant changes, and new decisions have to adapt to new times. I believe that even with "Suica's" death the matter will continue to be discussed, especially in Law school classes, as many colleagues, attorneys, students and entities have voiced their opinions, wishing to make those prevail.

The topic will not die with this writ, it will certainly continue to remain controversial. Thus, can a primate be compared to a human being? Can an animal be released from its cage, by means of a Habeas Corpus? As for the final decision, I recall article 659 of the CPPB: "If a Judge or Court finds that violence or illegal coercion has ended, the request will be dismissed." Thus, with the death of the chimpanzee, subject hereof, the Habeas Corpus has lost its purpose, its reason of being, thus ending the action. The doctrine says: "In a legal action, there must be a petitioner interest in seeking the end of the illegal constraint, which has either been consummated or about to be so. Therefore, if the violence or coercion no longer exists, one of the conditions for the action has disappeared, ending the admissibility of the habeas corpus." (Guilherme de Souza Nucci, *Codigo de Processo Penal Comentado (Annotated Criminal Procedure Code)*, 2nd edition 2003, page 878). "The judgment of a habeas corpus request, whether by a single judge or by a competent Court, can be dismissed if the alleged constraint is found to be unreal." (Article 659, CPP)--Habeas Corpus--Heraclito Antonio Mossin, 4th edition, 1998, page 192. On the other hand, article 267, of the current Civil Procedure Code establishes on section IV that a case should be dismissed, without judging the merits, when missing the elements for valid and regular constitution and development of the proceeding. The Civil Procedure Code also applies, by analogy, to the criminal area, where applicable.

Therefore, I dismiss the case. Enter. Notify and file a certified copy with the Court of record. Salvador, September 28, 2005.

Edmundo Lucio da Cruz, Judge.

Translation Prepared by Carlos de Paula