ANIMAL ADVOCACY AND CAUSES OF ACTION

Panelists:
Carter Dillard, David Favre, Eric Glitzenstein,
Mariann Sullivan, and Sonia Waisman*

Moderator:
Leonard Egert†

In the third panel of the NYU Symposium, distinguished animal law professionals discuss various causes of action which may be used on behalf of animals in the courtroom. Panelists talk about traditional forms of standing, make suggestions for innovation using existing laws, and discuss visions of how they would like to see the law develop as it pertains to standing for animals.

Tara West: Welcome back. It is now my pleasure to introduce Len Egert. Len is going to be moderating the causes of action panel. He will be exploring different avenues that animal advocates might use to get into court. Len wanted me to keep this very short, because he has a lot of material he wants to cover. So I will just say briefly that he is a partner in the firm of Egert and Trakinski, and they do primarily animal law, which they have been doing for eight years here in New York City.[1] Now I will hand it over to Len.

Egert: Thank you very much. I have the distinct honor and pleasure of introducing this fantastic panel and all the speakers. Let me

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© Mariann Sullivan 2006. Mariann Sullivan is the Deputy Chief Attorney for the New York State Appellate Division, First Department. She earned her J.D. from Fordham University School of Law in 1980. The views expressed herein are solely her own.

© Sonia Waisman 2006. Sonia Waisman is a partner of Morrison & Foerster. She earned her J.D. from California Western School of Law in 1991.

† © Leonard Egert 2006. Leonard Egert is a partner of Egert & Trakinski. He earned his J.D. from Benjamin N. Cardozo School of Law in 1991.

1 *See generally On the Right Side of the Law: The Satya Interview with Amy Trakinski and Len Egert*, Satya Mag. 10 (Apr. 2005) (available at http://www.satyamag.com/apr05/trakinski.html) (interviewing Amy Trakinski and Len Egert on their practice and work in animal law).

just say before I introduce this group, for those of you who are lawyers and have to suffer through Continuing Legal Education, I guarantee you will not hear a more interesting discussion of standing in your legal career. That was just amazing.

I am not going to read the panelists' biographies, because you have them in your books. But I do want to just briefly run down the line here so you will know who is talking. I will start with Mariann Sullivan, who is a Deputy Chief Attorney for the New York State Appellate Division, First Department.[2] Mariann is a former Chair of the New York City Bar Association's Legal Issues Pertaining to Animals Committee,[3] which is a mouthful. Did we change it to the Animal Law Committee yet?

Sullivan: I do not think so.

Egert: She is a member of the American Bar Association's Animal Law Committee.[4] She has written extensively, commented on bills and pending legislation, and done a lot of fantastic work.[5]

Next is Eric Glitzenstein, who is a founding partner of Meyer Glitzenstein & Crystal, one of the preeminent public interest law firms in the country.[6] The program does not say that, but it is true.

Then we have Professor David Favre, who has been a pioneer in this field. For over twenty years, he has published books and articles dealing with animal issues and has some very unique ideas and perspectives in this area.[7] So we are happy to have him participating.

Sonia Waisman is next. Sonia is a partner at Morrison & Foerster.[8] She coauthored the first animal law casebook[9] and teaches animal law at Loyola Law School.[10] She has also written articles in this field.[11]

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[2] ABA, *Animal Law Committee Leadership* 10, http://www.abanet.org/tips/animal/animalldrs0106.doc (accessed Nov. 17, 2006); *see generally* N.Y. St. Sup. Ct., *New York State Supreme Court Appellate Division: First Department*, http://www.courts.state.ny.us/courts/ad1/index.shtml (accessed Oct. 15, 2006).

[3] ABA, *supra* n. 2, at 10 (noting Sullivan's membership and former chair position on the Committee on Legal Issues Pertaining to Animals).

[4] *Id.*

[5] *See e.g.* 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., Oxford U. Press 2004) (one example of Sullivan's work).

[6] Meyer Glitzenstein & Crystal, *About Us*, http://www.meyerglitz.com/aboutus.html (accessed Nov. 17, 2006).

[7] *See e.g.* David Favre, *Integrating Animal Interests into Our Legal System*, 10 Animal L. 87 (2004); David S. Favre & Murray Loring, *Animal Law* (Quorum Bks. 1983).

[8] Morrison & Foerster, *Attorneys*, http://www.mofo.com/attorney/individual.asp?ID=7571 (accessed Nov. 17, 2006).

[9] Sonia S. Waisman, Pamela D. Frasch & Bruce A. Wagman, *Animal Law: Cases and Materials* (3d ed., Carolina Academic Press 2006).

[10] Morrison & Foerster, *supra* n. 8.

[11] *See e.g.* Sonia S. Waisman & Barbara R. Newell, *Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 Animal L. 45 (2001).

Last but not least is Carter Dillard, who is now the Director of Farm Animal Litigation for the Humane Society of the United States.[12] He has been very creative in determining causes of action on behalf of nonhuman animals.

We are really excited to have this group of people together. Since this is the last panel, I want to thank the NYU Student Animal Legal Defense Fund, and particularly Delci Winders, who did a fantastic job putting this symposium together—a really great job.

This morning we heard a bit about cultural perspectives, evolving status, and issues surrounding nonhuman animals in our culture. The second panel, on standing issues, was fascinating and dealt with barriers and ideas about getting into courtrooms. What we are going to do now, I hope, is figure out what to do when we get into the courtroom: what types of actions and claims may be brought—and perhaps more importantly, what *should* be brought. That is what, as a movement, as animal advocates, we have to constantly be thinking about: the types of cases we bring and whether or not we are going to take a step forward in a direction we want to go. We need to think all the time about what our goals are and be very careful that we are not doing more harm than good, because we are really at the beginning stages, and we have to make sure we get to the place we want to be.

I want to give you a broad stroke of the kinds of topics we hope to delve into here. First, we will cover substantive causes of action that involve, for instance, companion animals in more of a traditional tort situation, and the issue of whether or not you can get damages, or certain kinds of damages, or the value of measure of a companion animal. Then we are going to talk a little bit about animal cruelty statutes, their limitations, and their potential. We will talk, hopefully, about false advertising and consumer protection claims. We will try to get into some constitutional issues and see if there is some potential there in litigating on behalf of animals. Then, just as important, we will explore the procedural issues.

It really comes down to something I think you have heard already, which is that agencies that are designed and have the authority to enforce certain laws have traditionally failed to do that when it comes to nonhuman animals. We are going to talk about, hopefully, private rights of action. We are also going to talk about citizen suits and how, potentially, under federal statutes, citizens can take the place of certain government agencies that are not doing their job. That is the broad overview. I encourage the panelists to jump in at any time with questions or comments.

We will start with the companion animal issues, particularly torts and damages. Increasingly, we see claims for emotional distress or something more than replacement value for dogs, cats, and other com-

[12] HSUS, *Humane Society of the United States Seeks Prosecution of New York Foie Gras Producer*, http://www.hsus.org/press_and_publications/press_releases/hsus_seeks_prosecution_ny_foie_gras.html (Sept. 13, 2006).

panion animals. I would like to ask Sonia [Waisman] to address what types of claims could be brought, and what the trend has been in terms of expanding the notion of damages.

Waisman: Thanks Len [Egert]. As you said, these cases are not new, but there have been a growing number of cases brought in recent years pressing for the recovery of noneconomic or emotional distress damages. The first barrier is that, in a number of jurisdictions, case precedent limits recovery in cases of negligence—negligent harm to property—precluding the recovery of noneconomic damages, such as emotional distress damages.[13] So how do you get around that?

There are exceptions. There are jurisdictions like Hawaii, which, from 1970 until 1986 explicitly allowed the recovery of emotional distress damages for harm to property.[14] The seminal case involved damage to a house; it was not even an animal case.[15] About fifteen years later, in a quarantine case involving harm to an animal, the defendant made the slippery slope argument, which we will get back to later, but which is a big issue with the courts and one of the biggest hurdles we face.[16] The defendant argued that if the court allowed a case for harm to one animal, there would be an onslaught of similar cases, which would be uncontrollable.[17] However, the Hawaii Supreme Court pointed out that, in Hawaii, a law allowing recovery for such emotional distress had been in effect for more than ten years, and the court had not seen any change at all in the number of related cases on its docket.[18]

We could be making that same argument to courts in all jurisdictions. The first step in confronting and surmounting the barrier, I think, is to get the court to recognize and acknowledge that the bond between people and animals does exist, that companion animals are more than mere property. Courts are doing that. For example, in 2001, the Wisconsin Supreme Court addressed this issue.[19] At the beginning of its opinion, the court stated, "[W]e are uncomfortable with the law's cold characterization of a dog, such as [the one at issue] as mere 'property.'"[20] The court then said that it was calling the dog property, because that is how the law currently defined dogs.[21] The court did not rule in favor of the plaintiff in that case.[22] It looked to Wisconsin precedent and construed it to bar recovery for emotional distress damages in cases of negligence.[23] The court did not foreclose the recovery of

[13] *See e.g. Mest v. Cabot Corp.*, 449 F.3d 502, 519 (Pa. 2006); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 187 (Va. 2006).

[14] *Rodrigues v. State*, 472 P.2d 509, 520–21 (Haw. 1970).

[15] *Id.* at 513.

[16] *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1066–71 (Haw. 1981).

[17] *Id.* at 1071.

[18] *Id.*

[19] *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 798–99.

[23] *Id.* at 801–03.

emotional distress damages in cases of intentional harm, but found that the facts in that case did not present such a situation.[24] The fact that the court was uncomfortable with the characterization of animals as property is an important step.

The key in bringing these cases is to always look at the facts you have. Find the best facts; look at the law, precedent, and jurisdiction; and analyze it all thoroughly. Because even where the law appears to say there is no noneconomic recovery for damage to property, there may be nuances. There may be public policy reasons why past courts have reached that conclusion, and you may be able to enlighten the court as to why it would be consistent with existing precedent in that jurisdiction to allow for the recovery of emotional distress damages in your client's case.

Let me just clarify one point. When we are talking about allowing recovery, in most instances, the question is whether the court will allow the cause of action or the claim for relief to stand in the first place. Very often, early in these cases, the cause of action for negligent infliction of emotional distress is kicked out before the plaintiff even gets the opportunity to bring evidence before a jury or the trier of fact. That is the first hurdle we face. Getting past that would at least allow the plaintiff to present evidence and put on the case.

Egert: Within the movement exists a fundamental discussion of animals' status as property. When we talk about companion animals, increasing damages, and including emotional distress damages, are we really talking about the value of the animal *vis-à-vis* the human companion? And, as someone asked in the last panel, does that help us take steps toward eliminating property status for animals?

Waisman: There are really mixed views on that. Yes, the animals' value is established *vis-à-vis* the human plaintiff. There is no question about that. Whether that helps animals in the long run, I would argue that it can. The fact that you are getting recognition of a bond—that many people do consider their companion animals to be part of the family—is significant. Not that courts in the past have never said or recognized that, but we are seeing it more and more in these cases. I think that, in the long run, this has to help the animals. Even if it does not change the property status *per se*, I think it is a stepping stone on that river, on David Favre's river, a stepping stone towards advancement.[25]

Egert: I will open this up to David [Favre] or Sonia [Waisman], or anyone who has an opinion on whether or not we should proceed along a litigation route and try to convince judges that this is the right thing to do, or whether it would be more practical or beneficial to go legislatively and try to enact laws increasing damages.

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[24] *Id.* at 803–04.

[25] David Favre, Symposium, *Confronting Barriers to the Court Room for Animal Advocates* 8 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

Favre: There is another important issue that Sonia [Waisman] did not raise regarding public policy. We have much trouble in our society in trying to decide whether, if you are emotionally harmed by harm to another human being, you will be able to recover. If you see a human get hit by a bus, can you recover for that? The answer is typically no, not unless they are a blood relationship.[26] If your best friend gets smashed in front of you, and you are traumatized for life, you have no cause of action. So the judges are likely pondering, particularly Supreme Court judges, why we would give a better status to an animal than we can to another human friend, and how we would measure that. Is a jury allowed to just go berserk and give a million dollars? How much is that pain and suffering worth?

I think that drives us to the legislature. I think that, in reality, if we want incremental change—for society to be willing to say, "okay, ten thousand, thirty thousand dollars"—politically, this is not going to happen unless we establish a ceiling. That is what I have learned in talking about this with other people. The powers that be in the legislature simply are not going to let an open-ended judgment exist where juries can return huge amounts of money for the loss of an animal. But these powers are willing to admit that animals have some value beyond market value. So we need to reach a political compromise. That would be the next step, to say that animals are more valuable than just market value.

Waisman: I would like to follow up on that. I think a lot of courts do defer to the legislature, and not only in animal cases, but in any case where the plaintiff is seeking to extend the right of recovery. Whether it is in the best interest of the animals to go the legislative route is a tough question. The first statute to do so was in Tennessee, originally known as the T-Bo Act, but now known as the General Patton Act of 2003.[27] It came about because the Shih Tzu of a state senator, Steve Cohen, was attacked by another dog and died, causing the senator to realize that the law did not provide for noneconomic damages in this circumstance.[28] The problem with the T-Bo Act—its restrictions—is significant. The Act was originally limited to a four thousand dollar recovery,[29] which has now been increased to five thousand dollars,[30] but many would argue that this is far from what it

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[26] *See* Dale Joseph Gilsinger, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Is Not Member of Victim's Immediate Family*, 98 A.L.R.5th 609, 609 (2002) (stating that recovery for negligent infliction of emotional distress as a result of witnessing injury to another is often only allowed where the direct injury was caused to an immediate family member).

[27] Tenn. Code Ann. § 44-17-403 (Lexis 2006) (amended 2004).

[28] Natl. Conf. St. Legiss., *Canine Loss Spurs New Law*, http://www.ncsl.org/programs/pubs/1011dog.htm (accessed Nov. 17, 2006).

[29] Tenn. Code Ann. § 44-17-403(a) (The 2004 amendment increased the maximum penalty from four thousdand dollars in section (a) of the original statute to five thousand dollars in section (a)(1) of the current statute).

[30] *Id.* at § 44-17-403(a)(1).

should be. The statute implicitly, and then later explicitly, excludes and exempts veterinary malpractice cases,[31] which is huge. It also defines the animals covered very narrowly, defining a pet to be a dog or a cat, period.[32]

Obviously, there is a lot of room to broaden and strengthen this legislation. The problem is that, if you start with a model statute that an animal advocate would ideally want to see passed, it is highly unlikely it will end up in the same form as you would like it to be. And the question is, how far do you go with the compromises? Sometimes we are better off without them. There is always that counterbalance. Are settlement values in these cases increasing to the point where we are better off without a four or five thousand dollar cap, if people are now getting significantly more than that in settlements? Or are we better off to have explicit recognition on the books that, yes, there is recovery for the loss of companionship of an animal? The bond between people and animals exists. There is some value here.

It is a tough process, and you really need to look at the legislature and the forces in play. Certainly, if you can work with a veterinary association in the state, achieve a compromise that they can live with, and obtain their backing on the proposed legislation, you are going to get further and hopefully have something that is stronger than it would be if the veterinarians were fighting it. These are all factors you need to consider. Ideally, yes, legislation seems like it may be a better route than the courts, but either way, you have to look at all the factors in play and really think it through before you move forward with it.

Sullivan: I would just like to add—and I do not mean to imply lawsuits are a bad thing; I think they are a really good thing—but in addition to the idea that such lawsuits reinforce the property status of companion animals—by arguing that animals are property, and that the loss of such property has caused the owner emotional harm—there exists the constant risk of reinforcing the idea that animals are valuable simply because individual humans value them. Most of the animals being harmed are not companion animals, and thus not particularly or individually valued by anyone. That is not a reason not to pursue these kinds of legislative remedies, but it is something to always keep in mind in order to create some space in arguing for animals in which to remind people that there are many animals who are not cared for at all.

Egert: One of the descriptions of this panel says that attention will be given to both existing law and new proposals. David [Favre], I know that you have a proposal relating to this issue, if you want to give us a thumbnail sketch of that.

Favre: One of the advantages of being a law professor, and there are many, is that I am paid to ponder and think about the future. I have been in this movement since 1981 and have pondered the future

[31] *Id.* at § 44-17-403(e).

[32] *Id*. at § 44-17-403(b).

quite a bit. Intellectually, what do I want to be before I die? Now that I am approaching sixty, it is not inconceivable that I might die. I would like the animal rights movement to reach the point where animals are plaintiffs. That is all I can want in my lifetime, that animals are allowed to be plaintiffs and to assert their individual interests against somebody who is seeking to harm those interests.

However, there exists a big barrier that is talked about within the animal rights movement all the time, and that is the property status. Many books have been written about this.[33] I keep pondering it. I pondered it for a decade. I said to myself, "It is not going to go away. I do not care what you say philosophically, the actual legal property status for animals in my lifetime is not going to go away. So we have got to do something else. We need another route to the rights that I want." Then I reflect back and think, is the property status in fact an absolute barrier to animals being plaintiffs? My answer is no, it is not. That exists in our heads. These are all our ideas—human ideas. Nothing in the real world says that our concept of property has to be a foreclosure to animals filing lawsuits.

My first law review article that got to this rather deep issue came out in *Duke Law Journal* about four or five years ago.[34] The article reflected my thinking of about a decade; it takes a long while to get articles out. In that article, I suggested that we have this really nifty little thing within the world of property called equitable interest, and for literally centuries this has been the case.[35] I am the most old-time law professor here to talk about legal interest and equitable interest. Ever since the Statute of Uses, there has been such an important distinction. Why can we not talk about humans retaining their legal property interest in animals, but also about giving animals their own equitable title, and by giving animals that status, allowing them to file lawsuits? I have talked to enough people now to know that this makes for a great discussion among property professors. But when I start trying to explain what equitable self ownership means to most people, the blank stare pops up pretty quickly.

In the last year, I have been thinking about another aspect of the property status issue. In an article that came out about a year ago in the *Michigan State Law Review*, I proposed a brand new tort, in which the animals are the plaintiffs.[36] In that article, I did not make any reference to equitable self ownership or anything else.[37] Again, I think that might be simply a canard to get to a particular point, to allow the legal system to be comfortable in what it is doing. I am now promoting a new approach. While some people in this room will be unhappy with

[33] *See e.g.* Gary L. Francione, *Animals, Property, and the Law* (Temple U. Press 1995) (discussing the legal status of animals as property).

[34] David Favre, *Equitable Self-Ownership for Animals*, 50 Duke L.J. 473 (2000).

[35] *Id.* at 477.

[36] David S. Favre, *Judicial Recognition of the Interests of Animals–A New Tort*, 2005 Mich. St. L. Rev. 333, 352.

[37] *Id.*

my idea, I think a lot of people today are in fact pushing towards this, but we need to articulate it a bit more clearly—I want to create a status of living property. We have personal property; we have real property; we have intellectual property. All animals are now under the category of personal property. I want to create a whole new category of property, called living property, within which the relationships would be construed in the guardianship mode.

In other words, if an animal is living property, then those responsible for it have guardianship-like obligations towards that animal. I think that is something. I try to be extremely pragmatic. How does the average person on the street feel; what would they buy? And, therefore, what would a politician ultimately buy to make this happen? What would a judge buy? In my career, I have met a lot of judges, and based on my experience, they are conservative. Judges are conservative not in a political sense, but in a change sense; they do not like radical change. Even liberal judges do not like radical change. Judges are not going to throw over the legal system and free the chimpanzees from every cage in the country. It is not going to happen, people. I am sorry, I just do not see it happening.

So how do we get there incrementally? How do we help this move a little bit forward? I think we need a construct of property that allows us to move to a new position. Maybe it is an interim position, and my children's grandchildren will move us somewhere else after that. But what I keep asking people is, "Where are we going in the next ten years?" I do not see us turning this into a vegan society in the next ten years; it is not going to happen. So is there someplace else we can go? Or do we simply keep holding our breath and turning blue and saying "everybody has to be a vegan," while all these millions of animals get harmed every year. Every day, more and more animals are harmed while animal advocates are holding their breath and trying to make everybody into a vegan. It is not going to happen. Why do we not simply say, "We're going to be more subtle now. Yes, they're property. But guess what, it's a new category of property, and because of that, we have very special obligations to those animals." Is that radical enough for you?

Egert: What I thought was interesting is the interim step part. If we go there, are we more likely to get all the way to non-property status? Also, this is a constant theme and consideration, is it going to get us to a place where that will be enough?

Favre: I answer that question in a book I am writing now, arguing that—for me—that is enough. I am very happy with that. I have a different view of the world. I want a view which includes domestic animals, more than dogs and cats.

Egert: We might have to wait for the book to come out to go further into this topic. Thinking about the theoretical side of this property status is interesting, because, true, animals are considered property, but then there is this whole body of case law and statutory law that offers nonhuman animals protection from cruelty. What other property

out there has a similar protection codified in statute that protects it from the unjustifiable infliction of cruelty? So, let us turn to cruelty statutes. Carter [Dillard], if you can give us a brief overview of state cruelty statutes, how they can possibly be used, and some of their limitations, that would be great.

Dillard: Sure. Very simple. Criminal provisions, generally speaking, prohibit the malicious, intentional, or negligent infliction of suffering upon animals.[38] They vary with as many states as we have, and generally, they can only be brought by the state. These provisions come with a range of criminal sentences, including probation, and occasionally provide for special disposition to protect the animals.[39] Criminal provisions are often noted for exempting farm animals[40] and animals used in research;[41] although my personal opinion is that those exemptions are overrated, mostly because they have not been tried. But these are the basic criminal principles that exist to prohibit what society considers to be the reprehensible, immoral treatment of animals.

Egert: I think we are all familiar with the sort of individual cruelty cases involving companion animals, where it is clear that somebody stomped on a dog and that constitutes cruelty. Hopefully, it will be prosecuted and followed up, and the person will be punished. But when we get into other areas with other animals, when we are talking particularly about farm animals—or *farmed* animals—how are laws applied to farmed animals in the states so that they are not completely exempt? And can we use the same structure to attack more institutionalized cruelty, Mariann [Sullivan]?

Sullivan: I agree with Carter [Dillard] about the fact that farmed animals themselves are not usually exempted from statutes. What *are* exempted are customary farming practices, as a general rule.[42] There are many variations, fifty states, and such exemptions exist in only about half the states. We are not exactly sure what they mean at this point, because they have not been litigated. But even where such exemptions do not exist, there are a lot of problems in applying state cruelty laws that do purportedly apply to farmed animals in states, including New York, in that kind of context, or really in any institutional context.

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[38] *See e.g.* Or. Rev. Stat. § 167.315(1) (2005) (referring to malicious and intentional crimes); Cal. Pen. Code § 597(a) (1999) (referring to malicious and intentional crimes); *see also* Or. Rev. Stat. § 167.325(1) (referring to animal neglect as negligent infliction of suffering); Cal. Pen. Code § 597(b) (referring to animal neglect as negligent infliction of suffering).

[39] *See e.g.* Or. Rev. Stat. § 167.350(2) (regarding the disposition of animals to humane facilities); *see also* Cal. Civ. Proc. Code § 1208.5 (2004) (regarding liens and reimbursement for costs of seized animals).

[40] *See* Or. Rev. Stat. § 167.335(3) (exempting commercially grown poultry).

[41] *See id.* at § 167.335(9) (exempting animal research).

[42] *See e.g.* Wyo. Stat. Ann. § 11-29-113 (2005) (permitting dehorning of cattle); *see also* Or. Rev. Stat. § 167.335(1), (3) (exempting transportation of livestock and commercial poultry).

Anti-cruelty statutes are very simply worded and do not create a regulatory system, by and large, except in New Jersey, which does have a regulatory system.[43] But even New Jersey pretty much only says that you cannot cause an animal unnecessary or unjustifiable pain.[44] So the first problem is that the statutory language is very vague, making it difficult to know exactly what is prohibited in an institutional setting. The proof has to be beyond a reasonable doubt, which is, of course, an extremely high standard. No regulatory system would require that kind of rigorous standard. Plaintiffs frequently have to prove a particular state of mind, either intentional or knowing.[45] In a case that Len [Egert and Amy Trakinski] brought, which perhaps he could talk about—the ISE case—a conviction was lost on the fact that the ISE Corporation, on whose behalf two living hens were thrown into the garbage, could not have known that those hens were thrown in the garbage.[46]

Anti-cruelty statutes are publicly enforced of course, as we have gone through. But the District Attorneys (DA) have other things to do, and DAs in rural counties are not likely to want to pursue this kind of action.

Also, there is no inspection system.[47] There is no right to go into a farm and find out whether the law is being broken. These are criminal laws. You must have a warrant to go in and investigate a crime,[48] and that warrant must be based on probable cause to believe that a crime is being committed.[49] So you need to have reports coming out, but of course everything is very secretive.

The fact that these statutes are worded in such general terms and are so vague, I think this is probably the greatest single problem in enforcing them. People have been doing this in good faith—confining hens to battery cages, believing it is legal—for years. To bring such people into court and accuse them of a crime, not just of breaking a regulation, not just of doing something they should not have done, but to label it as a crime—a criminal action—and to tell them that as a

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[43] N.J. Stat. Ann. § 4:22 (West 1998).

[44] *Id.* at § 4:22-17(a)(1)–(3).

[45] *See e.g.* Or. Rev. Stat. § 167.315(a) (requiring intentionally or knowingly committing animal cruelty).

[46] *N.J. v. ISE Farms, Inc.*, ___ N.J. Super. 49–50 (N.J. Super. L. Div. Mar. 8, 2001) (on file with *Animal L.*).

[47] *See e.g.* N.J. Stat. Ann. § 4:22-46 (West 1998) (New Jersey's statute for the prevention of cruelty to animals authorizes "[a]ny court having jurisdiction of violations of the law in relation to cruelty to animals [to] issue search warrants to enter and search buildings or places wherein it is reasonably believed that such law is being violated." However, the statute does not provide for an inspection system by which individuals may regularly enter property to monitor the prevention of cruelty.).

[48] *See* U.S. Const. amend. IV (providing that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

[49] *Id.*

result, they have to stop doing this as of now and can no longer be in this business, is a pretty hard thing to ask a court to do. But, as Carter [Dillard] said, it is not necessarily impossible. Maybe Carter [Dillard] could expand on that a little.

Dillard: I would say that in every factory farm in the United States today, there is probably a violation of that state's cruelty code going on, whether or not there is a common practice exemption. For instance, there is a case being brought on Tuesday regarding animals that were trapped in the wires of their battery cages.[50] The defendant was not charged with using battery cages; he was charged with cruelty, because the animals were trapped in the wires of those cages.[51] And that fine distinction means that we are not challenging the practice itself. So with that in mind, I would say that in every state where there are factory farms, there are probable violations going on. It is not impossible to bring these cases, because as we will discuss, there are private rights of action that allow citizens, Societies for the Prevention of Cruelty to Animals [SPCA], and Animal Control Officers to sidestep recalcitrant DAs. So even in situations that are politically impossible, you may be able to get into court. And if the judge applies the letter of the law and ignores the fact that what he or she is facing is a politically sensitive case, you may win. So I tend to be hopeful about our cruelty statutes and their application to farm animals.

Egert: I will just chime in briefly on farm animal prosecutions. Though they are few and far between, I think we need to really look at the potential there. I think Carter [Dillard] is absolutely right; if the court sticks to the letter of the law and really applies it in a fair manner, there is a potential to win those cases and start pushing the envelope, because it is a closed world there. Basically, whatever a factory farm facility wants to do, it can, because nobody is in there watching what it is doing. I will say that I have been pleasantly surprised, and it depends on which judge you go before. Amy [Trakinski] and I originally obtained a conviction on behalf of those two hens at ISE.[52] This was reversed on appeal based on the intent factor—whether or not the employee knew that the hens were alive when he put them in the garbage with the other dead hens.[53] But in the process, and this is why sometimes it is good to continue litigation, we got rid of a precedent that was floating around in New Jersey that you had to maliciously treat an animal in order to be convicted of cruelty.[54] The court clarified in that case that all you need is a knowing element in your mental state,[55] which was very good according to the SPCA officers, who carry

[50] *See* Harold Brubaker, *Lancaster County Egg Farm Is Cited for Animal Cruelty*, Phila. Inquirer (Jan. 10, 2006) (available at http://www.cok.net/inthenews/011006.php) (discussing the charges brought against Esbenshade Farms).

[51] *Id.*

[52] *N.J. v. ISE Am.*, N.J. Super. 59 (Warren County Ct. Oct. 17, 2000).

[53] *ISE Farms*, N.J. Super. at 49–50.

[54] *Id.* at 45.

[55] *Id.*

around that decision from court to court. Another positive result was that the corporation was trying to claim protection from any and all claims of cruelty under the Right to Farm Act, but the court found that the Right to Farm Act did not apply.[56]

If I could just go off on one tangent in terms of not getting into facilities, or people who do go into facilities, Mariann [Sullivan] do you want to address a potential justification defense?

Sullivan: Yes. Another interesting way in which the cruelty law could come into play in the courts is if one were to happen to have a client—it does not have to be in a factory farm situation, it can be any situation—who has, in their belief, rescued an animal, but they have been charged with either trespassing or stealing that animal. In about half the states, there is on the books (these vary a lot, so I am going to talk about the New York one) a type of justification defense.[57] It is often called the lesser of two evils defense.[58] If you will forgive me, I am just going to read through the defense in New York.

Conduct which would otherwise constitute an offense is justifiable . . . [where] [s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[59]

In New York, if somebody takes an animal that is being mistreated (you do not even have to establish that the cruelty to that animal was actually illegal, although it is probably a good idea to be able to do that) this defense could establish that they were not actually guilty of a crime, because they were justified in that act. It is an interesting way of bringing the whole anti-cruelty law into court in the reverse posture. A particularly nice thing about this is that the burden of proof is, of course, reversed.[60] The prosecutor has to prove beyond a reasonable doubt that the act was unjustified.[61] So rather than proving that the animal was treated cruelly, as in a typical criminal animal abuse scenario, the state, seeking a conviction for trespass or theft, has to prove that the animal was not treated cruelly, making the taking of the animal unjustified.[62]

I am not suggesting that anybody go out and steal chickens. Please do not take this to be my suggestion. But if you were in a posi-

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56 *Id.* at 43–44.

57 N.Y. Penal Law § 35.05 (McKinney 2006).

58 *Id.*

59 *Id.* at § 35.05(2).

60 *People v. Gray*, 150 N.Y. Misc. 2d 852, 855 (N.Y.C. Crim. Ct. 1991) (discussing the burdens of proof in necessity defense cases under N.Y. Penal Law § 35.05(2)).

61 *Id*.

62 *Id.*

tion of representing somebody who is being accused of that kind of crime, this is certainly a defense that you want to keep in mind.

Waisman: One other point I want to raise about these cases is, win or lose, we have been talking about what goes on behind closed doors, and the media attention that these cases may get can also be helpful.

Egert: I think we are going to have to move along to false advertising and consumer protection. We just have a lot of areas to cover and are trying to leave enough time to allow members of the audience to ask questions. So Carter [Dillard], you have been successful in false advertising and consumer protection claims. Could you just give us a brief summary of what those claims involve?

Dillard: Yes, I will try to be brief about it. Essentially, any situation where an animal is used to produce a good or is used in the rendering of a service, the person using the animal will have to advertise the good or service to consumers by making representations. Those representations have to jive with the actual use of the animal and not misrepresent it.[63] Advertising is false if it misrepresents the use of animals. This applies equally to animal products as it does to any other consumer product on the shelf. To some extent, the market can help improve animals' lives. Consumers generally want to make ethical choices and purchase goods that cause less suffering to animals. The reason false advertising claims might be a helpful tool for animal welfare and rights litigators is that, by eliminating false advertising in the marketplace, consumers can begin to make more perfect market choices and drive the level at which animals are treated, sort of bring the level of humaneness up by their purchase choices. We can use false advertising as a tool to eliminate deceptive advertising that prevents consumers from making humane choices and thus changing the way that the subject animals are treated. I would not say that it has proven to change conditions, but it has been shown to drive people creating the standards—and creating the advertising—to reconsider (a) whether they want to put the advertising on the product, which is the immediate effect of false advertising law, and (b) whether they want to raise the level at which they treat the animals to meet the advertising, making it true. To the extent that happens, it is good for animals used in goods and services.

Egert: By no means are we suggesting that this list of topics is all encompassing. Obviously, we all need to think about what types of

[63] *See* Lanham Act, 15 U.S.C.A. § 1125(a)(1)(B) (West 2006) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." Note that the Lanham Act currently does not include a requirement for disclosure in its express language, only a requirement that representations made be truthful.).

claims could be brought and we all should think about that. These are areas where claims have been filed and dealt with. I think it is important that we look beyond that. And in that vein, I turn to Eric [Glitzenstein] and ask a simple question: Laurence Tribe suggested that the Eighth Amendment's prohibition against cruel and unusual punishment seems well suited to the problem of cruelty to animals, given that it does not limit itself with regard to who is being punished.[64] What are your thoughts about this?

Glitzenstein: It seems like we are going from the very practical to the extremely abstract and theoretical in the flash of the moment. This is obviously a huge topic that I will just touch on very briefly—the concept of using constitutional provisions, including not only the Eighth, but also the Thirteenth Amendment, to really create not only evolutionary, but revolutionary, change in the way that animals are treated under federal law. I think Professor Tribe's suggestion really reflects the kind of opportunities, but also difficulties, that we all face. The reason he suggested the Thirteenth Amendment is because it does not contain a particular word—and that particular word is "person."[65] His argument is that the amendment basically prohibits a kind of activity, as opposed to on its face conferring specific rights on a set of entities.[66] In particular, it prohibits the institution of slavery.[67] As I presume people know, even though the Thirteenth Amendment was passed specifically to outlaw the slavery of African Americans, it has been widely extended to prohibit any kind of slavery of human beings, broadly defined.[68] So the question this raises is, can we look to that kind of constitutional protection, or some other basis in constitutional law, to extend such protections to at least some categories of animals?

This obviously could be an enormous topic in and of itself. I would simply say that it is the kind of issue, as the last panel suggested and others here have already touched upon, that is worth continuing to take a hard look at. It is worth looking for the right opportunity to at least debate the issue, get the concept out there, particularly with regard to certain kinds of animals like chimpanzees, gorillas, bonobos, and other great apes, as to which there is an enormous new range of scientific, cultural, and other kinds of information available to suggest that this presumed gulf between human beings and at least some of our closest relatives is really not quite as wide as people may have assumed.[69]

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64 Laurence Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 Animal L. 1, 4 (2001).

65 U.S. Const. amend. XIII, § 1.

66 Tribe, *supra* n. 64, at 4.

67 U.S. Const. amend. XIII, § 1.

68 *Hodges v. U.S.*, 203 U.S. 1, 16–17 (1906) (declaring the Thirteenth Amendment to be a "denunciation of a condition" that "reaches every race and every individual").

69 *See e.g.* Dennis O'Neil, *Humans*, http://anthro.palomar.edu/primate/prim_8.htm (accessed Nov. 17, 2006); Jane Goodall Inst., *Chimpanzee Central: Similarities between Chimpanzees and Humans*, http://www.janegoodall.org/chimp_central/chimpanzees/

My own view is that this kind of case would encounter significant problems, to say the least. For one thing, it is difficult, I think, to define exactly what slavery means in the context of a particular nonhuman animal. The question would be: if slavery applies to the great apes, why would it not also apply to other kinds of animals that are held in captive situations? I think obviously one would—particularly with this federal judiciary and this Supreme Court—rapidly get into the problem of looking to determine the original intent of the Thirteenth Amendment. Clearly, some members of the Supreme Court largely consider themselves to be originalists, which means that they look to the original intent of the framers of whatever provision is in question.[70] One would be hard-pressed to imagine Justices Roberts, Alito, Scalia, and the like concluding that that original intent was sufficient to encompass nonhuman animals. Obviously, there are enormous difficulties with that.

Very quickly, the other constitutional provision that I personally think is at least worth taking a continuing look at is the Fifth Amendment. This amendment does obviously apply to persons and says you cannot deprive persons of life, liberty, or property without due process; it has also been held to extend to nonhuman entities, even though it refers to "persons."[71]

It refers not only to noncitizens, as we know from the recent Guantanamo line of cases,[72] but it also applies to, for example, corporations.[73] I found it fascinating, when I was doing some research in this area, to look back at the original way in which corporations became recognized as persons in 1886.[74] As Justice Rehnquist, of all people, in the later decision noted, the Supreme Court pretty much just made that up without almost any analysis or any argument.[75] There was a Supreme Court decision way back then that seemed to assume that it was so obvious that corporations should be given legal rights that they were willing to recognize them as persons without extended discussion of the issue, which probably tells you more about what was going on in

similarities (accessed Nov. 17, 2006) (discussing the similarities and differences between humans and primates).

[70] *See* Jack M. Balkin, *"Alive and Kicking"—A Commentary by Prof. Jack Balkin*, http://www.law.yale.edu/news/1846.htm (Sept. 19, 2005) (stating that Justices Antonin Scalia and Clarence Thomas are both professed originalists); Stephen B. Presser, *Whither the Post-O'Connor Court?* http://www.law.northwestern.edu/news/article_full.cfm?eventid=2557 (May 1, 2006) (noting Justice Samuel Alito's presumed status as an originalist in a discussion of his impact on the Supreme Court).

[71] U.S. Const. amend. V; David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. Chi. L. Sch. Roundtable 235, 235–36 (1999) ("Near the turn of the century, the Court granted corporations the equal protection and due process rights accorded persons under the Fourteenth and Fifth Amendments.").

[72] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

[73] *First Natl. Bank Bos. v. Belloti*, 435 U.S. 765, 780 (1978); *Brooks v. St. Bd. Funeral Dirs. & Embalmers*, 195 A.2d 728, 733 (Md. 1963).

[74] *Santa Clara Co. v. S. Pac. R. Co.*, 118 U.S. 394, 396 (1886).

[75] *First Natl. Bank of Bos.*, 435 U.S. at 822.

1886 in this country than anything else.[76] But what it clearly suggests is that there are opportunities, perhaps not today and perhaps not tomorrow, to convince the court that the same kind of expansive view of what a person can be is something that should extend to the kinds of interests we are talking about. So I think that it does at least speak to the appropriateness of what people like Steve Wise, people on this panel, and others are doing in expanding people's consciousness, both legally as well as practically, as to what is possible when you look at constitutional protections. I think that is probably sufficient for an overall introduction.

The only other area that feeds into all that is using the habeas corpus statute as a potential avenue, and the Constitution's habeas language actually does not contain the word "person" either.[77] Once again, I think arguing that the habeas corpus provisions can be used to, at least at this juncture in time, address a specific animal's interest is obviously farfetched. That is not to say it is not worth thinking about, and perhaps even bringing a case. And I am one who thinks that there may be some value to bringing a case, particularly with regard to one of the great apes, in the right factual context, for publicity purposes and to use it as a vehicle for getting people like Jane Goodall and Roger Fouts and others into a courtroom to testify on Court TV and really sort of raise the profile of peoples' thinking on this issue. I do not think that is too farfetched a notion, even if legally it may have not a great chance of success. So I just throw that out as a provocative thought that we perhaps can pick up on later.

Egert: I think it is very important to see the big picture and look at what potentially is down the line so that we can do the hard work of figuring out incrementally, as was raised earlier, what cases and steps are going to lead to that, or at least to an ability to make those arguments and really have them heard in court. So thanks for that overview. At the same time, maybe we could get that corporation decision for the animals, where the court just says it without having those incremental steps, although I doubt that is likely to happen.

Glitzenstein: Just one point that I neglected to mention. People tend to look at this personhood thing as an all or nothing proposition, and I think what the corporation example shows is that it is not. The courts have actually been rather nuanced in their approach as to what rights corporations have. Courts have said that corporations have certain limited First Amendment rights, and certainly due process rights when it comes to property, but they obviously do not have the right to vote.[78] Corporations do not have full liberty rights; there are all kinds of rights they do not have.[79] So I think one way of approaching the whole concept of personhood is by saying, "Look, the courts for more

[76] *Santa Clara Co.*, 118 U.S. at 396.

[77] U.S. Const. art. I, § 9, cl. 2.

[78] *First Natl. Bank of Bos.*, 435 U.S. at 779, 784.

[79] *Id.* at 778, n. 14.

than one hundred years have had no trouble having a fairly nuanced flexible notion of what personhood can mean. And it doesn't necessarily imply this whole slippery slope problem is going to come in if you just simply say, well the right not to be tortured doesn't imply the right to vote, or the right never to be subject to any form of captivity." I think it does allow a sort of line drawing in the history of constitutional law. It shows that, if nothing else, courts have proven themselves to be rather adept in engaging in that kind of fine line drawing when they regard it as necessary.

Egert: One of the cases Mariann [Sullivan] mentioned that we handled was prosecuted on behalf of Gene Bauston at Farm Sanctuary, as an individual.[80] And it was one of those unique situations where we found a provision, in this case, under state law in New Jersey, where an individual has a private right in certain low-level offenses, within which animal cruelty fell, to go in as an individual, file a criminal complaint, and hire an attorney to represent the complainant on behalf of the state.[81] Our role in that case was representing the state of New Jersey on behalf of Gene Bauston at Farm Sanctuary, which thrilled us, because we had control and could prosecute this factory farm for abusing their hens.[82] Are there other examples of which the panel is aware? And are there other opportunities in that regard?

Favre: The North Carolina statute is one, but not identical, because it is more limited in nature.[83] In North Carolina, "any person"—this is the actual phrase used—can enforce the cruelty law of the state.[84] That is the hook that the Animal Legal Defense Fund (ALDF) used when it went into North Carolina and took out, I forget how many hundreds of animals, in one particular hoarding situation.[85] It also had the effect of encouraging the prosecutor to ultimately bring criminal charges that went in parallel to our civil action.[86] Unfortunately, they are both still ongoing after well over a year of activity, again suggesting that this is not a trivial activity in which to be engaged.[87]

Waisman: I just want to clarify that the North Carolina statute allows for a civil action, as opposed to the criminal.[88]

Sullivan: And I just want to clarify, not that I am any expert on the North Carolina statute, but even though procedurally it is probably the best in the country, substantively it is probably the worst. It

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[80] Farm Sanctuary, *Egg Corporation Appeals Cruelty Conviction: Contends That Hens Can be Discarded Like Manure and that Disposing of Live Hens in Trash Can is Legal*, http://www.farmsanctuary.org/media/pr_eggs.htm (Feb. 25, 2001) (press release regarding the ISE case).

[81] N.J. Stat. Ann. §§ 2A:15-18 (West 2000).

[82] Farm Sanctuary, *supra* n. 80.

[83] N.C. Gen. Stat. § 19A-2 (Lexis 2005).

[84] *Id.*

[85] ALDF, *Resources: ALDF v. Woodley*, http://www.aldf.org/resources/details.php?id=162 (Mar. 31, 2005).

[86] *Id*.

[87] *Id*.

[88] N.C. Gen. Stat. §19A-2

exempts virtually everything the drafters could think of exempting.[89] So it is interesting that they were willing to be very progressive on one end and very conservative on another. It kind of works together.

Egert: One of the most frustrating things, no matter what we do—animal protection, animal rights, or animal advocacy—is when state and federal agencies fail to even enforce existing laws. The more we can find ways to get in and do this ourselves on behalf of nonhuman animals, the better off we are going to be, if this continues to be the structure—relying on agency action to enforce the laws. Carter [Dillard], did you mention you had something else to say in terms of private rights of action?

Dillard: There exists what is generally called a private attorney general statute. It is simply any situation where a private entity steps in to enforce a law on behalf of public interests.[90] Probably the most well known statute was in California, up until its change two or three years ago pursuant to a state initiative, that allowed private citizens to bring unfair competition cases against businesses that were violating any state law, including cruelty laws.[91] The statute gave In Defense of Animals a toehold to bring a cruelty case against a *foie gras* producer in California, and that litigation, along with what was at the time a sort of budding state lobbying front, resulted in state legislation banning the production and sale of *foie gras* in the state.[92] It was a great substantive win, banning a horrific practice. Unfortunately, the cause of action fell shortly thereafter.

The trend is that activists find a cause of action and file a suit, and then the various trade associations and the institutions with whom they work to identify our lawsuits jump on the causes with state legislation and snuff them out. But I encourage people to think that it is not always that way. Of course, you can find friendly legislatures and get these causes of action inserted into state law. That is something we should be looking towards prospectively, not that we are losing causes of action, but that we should be creating them.

Egert: And on the federal level, Eric [Glitzenstein], are there examples that we could look to in terms of designing that legislation or getting those protections?

Glitzenstein: There are a whole series of federal laws that we use in the absence of a strong citizen suit provision of the Animal Welfare Act (AWA), as well as other provisions specifically geared toward animal protection, that we have employed to safeguard and pursue the

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89 *Id.* at §19A-1.1.

90 Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 L. & Contemp. Probs. 179, 179 (Winter 1998).

91 League of Women Voters, *Proposition 64: Limit on Private Enforcement of Unfair Business Competition Laws: State of California*, http://www.smartvoter.org/2004/11/02/ca/state/prop/64/ (accessed Nov. 17, 2006).

92 Cal. Health & Safety Code Ann. §§ 25980–84 (West 2004).

interests of animals.[93] These laws range from the Endangered Species Act (ESA) to the Clean Water Act to the Toxic Substances Control Act, and many others.[94] I think the ESA is one that is worth profiling, both because it has a very far ranging and effective citizen suit provision that I think could serve as a model for virtually any other state or federal law, and also because those of us who are actively litigating in this area have, in fact, employed the ESA in some contexts pretty much as a direct animal welfare statute.[95]

The example that Kathy [Meyer] mentioned in the last panel, the *Ringling Bros.* case, was brought under the ESA, which prohibits the taking of listed animals not only in the wild, but also in captivity—a little known fact.[96] That case was brought directly under the broad citizen suit provision of the ESA.[97] Let me disagree with David [Favre] a little bit on this: to me, it does not matter really who the plaintiff is, as long as you can bring a lawsuit and effectively accomplish the result you want. I think animals may be different from human beings in at least one respect, which is that as long as their interests are being addressed, I do not think they care that much what their designation under the law is. I may get some disagreement on that, but to me it has to be an entirely functional test. Are you in fact accomplishing the result of reducing the cruel, inhumane treatment of animals, or are you not? And if John Doe is the one who is bringing the case, who cares?

In the ESA context, I do not think standing has turned out to be a huge barrier to bringing those cases. Because of the citizen suit provision, the cause of action has not proven to be a serious problem. In particular, and I am talking mainly in the wildlife context—it is more of a problem in the captive animal context—the statute, on its face, allows any person to bring a lawsuit.[98] It essentially eliminates, with that language, any kind of zone of interests requirement. You do not have to worry about prudential standing, which has proven to be a problem in a number of areas. The ESA also allows litigation to be brought against two critically important classes of entities: violators and implementers of the statute.[99] The class of violators includes, broadly speaking, any corporation, private party, municipality, or state government.[100] This is obviously subject to Tenth and Eleventh Amendment limitations, which have proven to be something of a prob-

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93 *See generally* Meyer Glitzenstein & Crystal, *Wildlife & Animal Protection*, http://www.meyerglitz.com/wildlife.html (accessed Nov. 17, 2006) (summarizing cases brought on behalf of animals by Meyer Glitzenstein & Crystal, and some of the federal statutes employed) [hereinafter *Wildlife & Animal Protection*].

94 *Id*.

95 *See e.g. ASPCA v. Ringling Bros.*, 317 F.3d 334 (D.C. Cir. 2003) (one case in which an animal welfare organization brought a claim under the ESA).

96 *Id.*; The Endangered Species Act of 1973, 16 U.S.C.A. § 1538(a)(1) (West 2000)

97 16 U.S.C.A. § 1540(g).

98 *Id.* at § 1540(g)(1).

99 *Id.* at § 1540(g)(1)(A).

100 *Id*.

lem.[101] The class of implementers includes entities such as the Department of the Interior and the Department of Commerce, who are subject to litigation for failing to carry out mandatory duties under the law. These duties include not only the failure to list species, but also the failure to protect habitat, and in some instances, the failure to extend other protections to the list of endangered and threatened species.[102]

Finally, and of particular value to those of us who must figure out not only how to bring these cases, but how to keep bringing them, the ESA has a very favorable and broad attorneys' fees provision under which, if you prevail, you could actually get a court to award attorneys' fees so you can bring your next case.[103] I think the ESA actually provides a good blueprint for how these cases can be brought. However, one thing I would say is: the fact that many lawsuits have been brought under the ESA—and there are many—has not shamed the federal government into effectively implementing the law. In fact, it is arguable that, if anything, the fact that the government knows it can sit back and wait for private parties to bring litigation may have had the effect of suppressing enforcement, which I do not believe would have ever been substantial, anyway, given the resources available. But it is sort of an empirical example of where that shaming effect has certainly not been the case.

The other aspect of the ESA I would mention—I do not know if there was discussion before I came in—is the *Cetacean Community* case from the Ninth Circuit, with which a lot of you may be familiar.[104] In that case, the Ninth Circuit determined whether or not something called the Cetacean Community could itself bring a lawsuit under the ESA.[105] It concluded that although Congress could, in principle, confer standing on animals under Article III that could be brought by some kind of a next friend or someone on behalf of the animals, the Cetacean Community was not a person within the meaning of the ESA's citizen suit provision.[106] This was a kind of narrow analysis of what "person" meant within that particular context. But just to tie it back to what we were talking about a moment ago, this case will probably prove to be very unhelpful in other contexts in which people try to argue that animals can be considered persons within various legal constructs. The Ninth Circuit said that however you read the word "person," Congress did not mean for it to encompass that "community" or to broadly read

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101 *See* Mercer U. Sch. L., *Virtual Guest Speakers: Professor Susan Smith, Willamette University College of Law: The Endangered Species Act Comes to the City*, http://www.law.mercer.edu/elaw/ssmith.html (accessed Nov. 17, 2006) (discussing how the Tenth and Eleventh Amendment limits on federal power may limit actions under the ESA).

102 16 U.S.C. § 1540(g).

103 *Id.* at § 1540(g)(4).

104 *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

105 *Id.* at 1171.

106 *Id.* at 1176.

other animals in under the ESA.[107] So that is sort of a cautionary note for people to be aware of.

Egert: Although the federal agency was not—and probably never will be—shamed into changing its behavior, it is important to note that the resulting public awareness is just as significant. I think just by bringing these litigations, we can make the public more aware of the failures of government agencies to do their jobs in many respects. That is important in and of itself.

We have heard previous mention—I think Eric [Glitzenstein] mentioned it, and also Kathy [Meyer] in the prior panel—of creating a citizen suit provision in the AWA. Mariann Sullivan has a specific proposal regarding that.

Sullivan: It is actually not my proposal; the New York City Bar Association adopted this proposal several years ago.[108] Kathy [Meyer] very passionately advocated for a citizen suit provision for the AWA, and I will try to do the same. The Committee on Legal Issues Pertaining to Animals felt that, even though it is very difficult to imagine Congress passing such a thing, it was a good vehicle for the bar association to advocate for, to bring to other bar associations, and to perhaps bring to the American Bar Association at some point, if we can get enough support. Lawyers like standing, because it means they get to bring lawsuits, and it is also a good educational tool to teach people a little bit about animal law in the bar association context.

The Committee put together this proposal, and since then, *Cetacean Community v. Bush* has come out.[109] Although this case has very bad implications in a number of ways, it did reinforce our position, in that if Congress wanted to give standing to animals, it could.[110] This was stated in very strong language. Of course, it is dicta, and it is the Ninth Circuit, but still there it is, in print. This is the only court that has ever addressed the issue.

Starting off with bad enforcement, also since we first proposed this, the United States Department of Agriculture's (USDA) Office of the Inspector General (OIG), which you have just got to love, has come out with the fourth in a series of audits over about the past ten years, of the Animal and Plant Health Inspection Service (APHIS).[111] APHIS is the division of the USDA that enforces the AWA.[112] The audit report is scathing; it is a great read. You should go on the site and read it if you can, because it is just unrelenting in its criticism. I think things have probably gotten even worse under the Bush Administration; the

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107 *Id.* at 1177–78.

108 Assn. of the Bar of the City of New York, *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 Animal L. 345 (2003).

109 386 F.3d 1169.

110 *Id.* at 1176.

111 USDA, *Audit Report: APHIS Animal Care Program Inspection and Enforcement Activities*, http://www.usda.gov/oig/webdocs/33002-03-SF.pdf (Sept. 30, 2005).

112 *Id.* at i.

country is divided into regions, and particularly in this region—the eastern region—the USDA has completely abdicated enforcement. I think that only a third of the number of cases have been brought this year, compared with the year before. Also, the OIG is critical of the practice of APHIS—the eastern half of it—of allowing violators to use fines to improve their facilities, such that these fines are not even a cost of doing business. The USDA audit report is a great report. It is very, very critical in tone, and seems to show that the agency is not doing its job, so it is a great argument for the idea that there should be a citizen's enforcement mechanism.

The easy thing to do, if you can get Congress to do it, is to just create a private cause of action. It could be exactly the same as in the ESA or a lot of environmental statutes. That is not a particularly complicated thing. We also addressed the question of standing, which is a bit more complicated. Eric [Glitzenstein] does not seem to think standing is a problem anymore, that we could just secure plaintiffs with aesthetic injury. Maybe that is the case. Maybe we overreact to the idea that it would be difficult. But we propose two ways of ensuring that the plaintiff has standing. One is to give animals standing, which sounds very radical. I suppose it is radical, but according to *Cetacean Community*, Congress can do it.[113] The important thing is, this is not like giving animals a common law cause of action that you have no idea where it is going. It is a much more limited concept when you grant an animal standing to simply enforce a specific statute. You are not opening any floodgates, which ultimately is something perhaps we do not like. We would like to open those floodgates, but this really does not. So it makes a particularly appealing way to argue the case for animal standing.

We did come up with another mechanism, which I directly attribute to a talk that Eric [Glitzenstein] gave ten years ago, probably, at the City Bar Association—which he does not recall—in which he advocated using the False Claims Act (FCA), which is a *qui tam* statute, to sue.[114] The FCA is a very old Civil War statute that allows individuals to sue on behalf of the government anyone who is filing a false claim, a fraudulent claim, with the government.[115] It was created because of all of the people who were filing bad claims after the Civil War,[116] and it is still on the books. It is still an active statute. Eric [Glitzenstein] suggested finding some vivisectors who were doing particularly nonsensical research financed by the federal government—I may be misquoting him here—and bringing actions against them under the FCA. I had never heard of *qui tam* statutes before. So the other idea of a way to

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113 386 F.3d at 1176.

114 31 U.S.C. §§ 3729–30 (2006).

115 *Id.*; *see also* Gregory C. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 Hamline L. Rev. 373, 375–84 (2002) (discussing the history of the False Claims Act).

116 *See U.S. v. Bornstein*, 423 U.S. 303, 309, n. 5 (1976) (citing Cong. Globe, 37th Cong., 3rd Sess., 952 (1863) (remarks of Sen. Howard)).

create standing, and it really does create standing, is that you can create a provision in the AWA, if you do not want to give animals standing themselves, to give people standing. You just have to provide that they will receive a reward out of the amount that the government recovers, and for some reason, Justice Scalia thinks this creates standing.[117] It astounds me, but there is a fairly recent Supreme Court decision, *Vermont Natural Resources Agency*, which says that this does create standing.[118]

The real point is that, if we could get a statute through Congress creating a citizen suit under the AWA, it is entirely possible to create one that is not too radical, does not open any floodgates, and for which standing would be limited to enforcing this one statute. I think this is a very appealing way to bring this concept to lawyers.

Obviously, it is not something that is going to happen in the near future. Even bringing it to bar associations, we have found that people initially think we are crazy. But they will listen if you present it in a respectful way, and I think it is a very good way of educating people about the problem.

Egert: Rats, mice, and birds are excluded from the AWA—which is—I will guess—ninety-five percent of animals used in research facilities.[119] Do we need to focus our energies and efforts on being able to go in as private citizens to enforce an otherwise weak act that does not really provide any meaningful protections?

Sullivan: Even more important is the fact that farmed animals are also excluded from the AWA.[120] The AWA really only covers animals in three industries: research, the wholesale pet trade, and exhibition.[121] It is a very limited statute. That is a good point, as a matter of resources. But if we are going to think of the way we want this all to look—not the end game, not eradicating the property status of animals, not where we really want to go, but where we would like to go in a realistic sense legally in the next twenty or thirty years perhaps—we would like to see federal or state statutes that protect all animals and that have a citizen enforcement mechanism. I think we should be looking at both broadening the protection of which animals are covered and how the statute would be enforced. Working on this, even though it does cover a very limited number of animals, would still affect millions

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117 *Vt. Agency of Nat. Resources v. U.S. ex. rel. Stevens*, 529 U.S. 765, 773–74 (2000) (Scalia, J., writing for the majority).

118 *Id.*

119 See Animal Welfare Act, 7 U.S.C. § 2132(g) (2000) (excluding rats, mice, and birds from AWA standards); *See generally* Delcianna J. Winders, Student Author, *Combining Reflexive Law and False Advertising Law to Standardize "Cruelty-Free" Labeling of Cosmetics*, 81 N.Y.U. L. Rev. 454, 486 n. 7 (2006) (discussing the exclusion of rats, mice, and birds from AWA standards and estimates of the numbers of these animals used in testing).

120 9 C.F.R. §1.1 (2006) (definition of "animal" specifically excludes farm animals).

121 Animal Welfare Act, 7 U.S.C. §§ 2131 et seq. (2000).

of animals, and it is an important way to get people thinking about the problem.

Egert: Even further, when we talk about the questions that keep coming up, what are those interim steps going to be to get us further along in the path and to reach the goal? If you can get a citizen suit provision in a federal statute, regardless of how effective it is in protecting animals, then the next statute that comes along, the one that might provide more protection, it is going to be perhaps an easier road to go down if you have an example of an animal protection statute with a citizen suit provision.

Eric [Glitzenstein] is going to talk briefly about the Administrative Procedure Act (APA) and how that may be used in terms of animal litigation.[122] Then we are going to open up the floor to questions.

Glitzenstein: It is important to understand a little bit about how the federal APA is used for animal protection cases, because that is pretty much what we have got in the absence of a citizen suit provision. If a statute does not have a citizen suit provision, you are stuck with bringing claims under the federal APA, which allows you to bring cases in order to set aside an agency action that is arbitrary, capricious, an abuse of discretion, or contrary to the law, or to try to force an agency to take action which it is illegally withholding.[123] Those are the kinds of claims that have generally been brought. The kind mentioned in the last panel, dealing with primate conditions and psychological enrichment, challenged the regulations that were put out by the USDA on that topic.[124] The case that was brought challenging the exclusion of rats, mice, and birds was an APA claim, arguing that that the exclusion was arbitrary and capricious, before Congress saw fit to step in and confirm that its intent was, in fact, to exclude those animals.[125]

Just to be clear about it, when you bring those kinds of claims, there are a couple of concerns that you should have in mind. Those kinds of cases have become more difficult as a result of several recent Supreme Court cases.[126] One overarching concern is that you must be careful you are suing over a discrete federal agency action. A classic example is a formal regulation issued by an agency. It can also be a policy that is less than formal in some circumstances, such as an interpretive rule. But one thing the Supreme Court stated, in a case called *Lujan v. National Wildlife Federation*, and more recently reinforced in a case called *Ohio Forestry*, is that basically you cannot challenge an entire agency program, because it is not a discrete agency action.[127]

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122 5 U.S.C. § 551 (2000).

123 5 U.S.C. § 706(2)(A).

124 *ALDF. v. Glickman*, 154 F.3d 426, 430–31 (D.C. Cir. 1998).

125 *ALDF v. Madigan*, 781 F. Supp. 797, 798–99 (D.D.C. 1992); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 §1 0304, 116 Stat. 134, 492–93 (2002).

126 *See e.g. Lujan v. Natl. Wildlife Fedn.*, 497 U.S. 871 (1990); *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726 (1998).

127 497 U.S. at 890; 523 U.S. at 739.

That does not mean you cannot bring a programmatic challenge, but you should avoid phrasing it in those terms. We can talk more about that later, about how you circumvent those kinds of barriers. But if you basically go in and suggest that you are doing large-scale, institutional type reform, you will be thrown out of federal court extremely rapidly. There are ways of trying to take advantage of civil rights law and sue over what are called "patterns, practices, and policies." Again, for those who are interested, we could talk more about that. It is a huge concern in light of a range of Supreme Court decisions over the last ten or fifteen years.

The other point I would simply reinforce is the point that Kathy [Meyer] made earlier, which is that you cannot generally bring claims under the APA challenging an agency enforcement or lack of enforcement.[128] Unless you have a citizen suit provision which authorizes you to do that, you cannot go in and sue the USDA simply because it is failing to enforce the AWA.[129] That is because of a case called *Heckler v. Chaney*, which basically said that, just like you cannot sue a prosecutor for failing to enforce the drug laws, you cannot sue a federal agency for failing to enforce other kinds of statutes.[130] Seems counterintuitive, but that is what the case says. There is an exception in a footnote which says that if you can demonstrate that the agency is completely abdicating its statutory responsibilities, then maybe we would allow that kind of lawsuit to proceed.[131] So far, since that case came out in the mid-1980s, I do not believe a single person has prevailed on the "complete abdication" claim in any context; I am not just talking about animal law. So I would not place a great deal of stock in that being a growth industry in the future, as the courts get more conservative. But that is the other enormous barrier, as well as standing, to worry about when you are dealing with any kind of an APA claim. You also have to meet the zone of interests requirement to show that the statute related to your APA claim actually encompasses the kinds of interests you are articulating.[132] Those are the big items to be concerned about in doing APA litigation.

Waisman: One final point I want to make is that, if we want to effectuate change on behalf of animals, it is imperative that we keep working at all levels, through all means: legislative and through the courts, both federal and state. There is no bad case, unless you have not thought it through, and then it is two steps backwards and one

128 *See Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding that an agency's discretion not to enforce a statute is immune from judicial review, unless Congress has indicated that its intent is otherwise within the statute).

129 The AWA does not contain a citizen suit provision. For an explanation of the requirements for a citizen suit action under the ESA, *see Cetacean Community*, 386 F.3d at 1177.

130 470 U.S. at 837–38.

131 *Id.* at 833, n. 4.

132 *See Assn. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (discussing zone of interests requirement).

forward. But if you are thinking it through and you believe it can make any difference on a small or large level, there are voter initiatives, there are shareholder derivative actions, there are all forms of action that each and every individual can take as a lawyer or as a citizen to effectuate change and to work along those cobblestones to make a difference in the long run. And I think it is all very important.

Sullivan: I would just like to add that in addition to the APA at the federal level, there is certainly the possibility of administrative causes of action at the state level.[133] The standards tend to be as difficult; arbitrary and capricious standards usually apply.[134] But there are various kinds of determinations that state agencies may have made. If you can find the right plaintiff, there may be lots of opportunities to bring actions at the state administrative level. I think that is an area where there are a lot of opportunities that have not yet been explored.

I would also like to add one thing to what Sonia [Waisman] was saying about shareholder derivative actions. I do not know anything about them. I heard about them in law school and have not really thought about them since. I do not think anybody has ever brought one on an animal issue. But it just seems like there might be something there. You have to be a shareholder of course, which means that we should all go out and buy one share of Tyson tomorrow, because you never know. These actions are also very limited; it is very hard to bring them. Because of the business judgment rule, the courts will afford enormous discretion to what directors of corporations do.[135] But if you recall from law school, a shareholder derivative action is when a shareholder brings the action on behalf of the corporation.[136] The corporation is the real party in interest, arguing that management has failed to take appropriate action to protect the corporation.[137] If a corporation is actually breaking the law by being cruel to animals, or in some other way, management is exposing the corporation to liability. It seems like that is an unexplored area that has some potential.

Unfortunately, the business judgment rule not only applies to the actions of directors of the corporation in the first instance, but also in most states, I think you have to give the corporation notice that you would like the suit to be brought.[138] Then the directors can decide

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133 For a comparison of Ohio's Administrative Agency Act to other states and the model acts, as well as causes of actions, *see* Elizabeth Ayres Whiteside, Student Author, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 Ohio St. L. J. 355 (1985).

134 *Id.*

135 *See e.g. In re Bal Harbor Club, Inc. v. AVA Dev., Inc.*, 316 F.3d 1192, 1194 (11th Cir. 2003) (noting that the business judgment rule recognizes that directors are better qualified to make business decisions than judges). For a more thorough explanation and list of cases, *see* 3A *Fletcher Cyclopedia of the Law of Corporations* § 1036 (2002).

136 19 Am. Jur. 2d *Corporations* § 1944 (2006).

137 *Id.* at § 1946.

138 *Id.* at § 1960.

whether they want to bring the suit on behalf of the corporation. The business judgment rule applies to that decision as well.[139] It is totally discretionary and not an easy cause of action to bring. But illegal behavior, and certainly criminal behavior, would be one ground that is a possibility there.

Glitzenstein: Consistent with that, one thing we have not mentioned at all is open government laws. I think part of what Mariann [Sullivan] is suggesting is that using these mechanisms to bring bad practices to light can, itself, have an enormous impact. An old phrase about the First Amendment was that sunlight is the best disinfectant.[140] Many animals have been protected through creative uses of the Freedom of Information Act, Federal Advisory Committee Act, and other open government laws under state statutes.[141] So I think it probably is self evident, but always consider ways of using those mechanisms to bring bad things to light. That sometimes has the beneficial effect that you are looking for without a lot more being done.

Egert: I would just reinforce the notion of looking at state laws as well, because although you may not have a claim to challenge federal agency inaction, you may have a claim under state laws, in at least some states, to challenge the inaction of agencies.[142]

Sullivan: We have not mentioned the New Jersey litigation at all. It is really interesting on this note, on agency action. Some of you are probably familiar with the fact that New Jersey, a few years ago, for some reason which is hard to understand, amended their cruelty law[143]—I hate describing this, because there are so many lawyers in this room that know more about this case than I do, and I am looking at Kathy [Meyer] right now—to require the New Jersey Department of Agriculture (NJDA) to develop regulations for the treatment of farm animals.[144]

Egert: Humane treatment.

Sullivan: Yes, humane treatment. The law provided that the farming industry would not be exempted from the cruelty law, but in essence, an exemption from the cruelty law would exist if they were following the regulations.[145] In spite of the fact that the NJDA was required to promulgate those regulations in six months, it took seven years,[146] and that was only after the agency was hounded a bit by the animal rights movement. The regulations were staggeringly bad. They

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139 *See e.g. Donner Mgt. Co. v. Schaffer*, 48 Cal. Rptr. 3d 534, 543 (Cal. App. 4th Dist.); *Memphis Health Ctr., Inc. v. Grant*, 2006 WL 2088407 (Tenn. App. 2006).

140 *Skehan v. Kelly*, 2005 WL 1023206 (S.D.N.Y. 2005).

141 *See e.g. In Def. of Animals v. OHSU*, 112 P.3d 336, 341, 344 (Or. App. 2005).

142 Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 679–80 (1985); *Lewis C. Educ. Assn. v. Iowa Bd. of Educ. Examiners*, 625 N.W.2d 687, 692 (Iowa 2001).

143 N.J. Stat. Ann. § 4:22.

144 *Id.* at §16.1.

145 *Id.*; *see also* N.J. Admin. Code 2:8-1.1 (2006).

146 *Id.*

pretty much allowed every common farming practice, no matter how cruel, that anyone has ever thought of.[147]

But there is now a lawsuit being brought in New Jersey in the appellate division attacking the regulations as not comporting with the statute.[148] The standard for that cause of action in New Jersey is arbitrary and capricious, which is a very high standard.[149] I think it is a truly fascinating case, and another interesting way that these issues can be brought into court.

Egert: What is really at issue is whether or not these standard farming practices—these horrible cruel practices that happen on factory farms on a daily basis—are "humane," because that is how the statute reads.[150] That was what the NJDA had to determine: whether or not the treatment of hens, pigs, and cows on factory farms is humane.[151] Of course, being the agency that they are, and given the fact that their primary goal is to protect the agricultural industry, the NJDA found this whole host of terrible inhumane practices to be humane.[152] It remains to be seen whether or not we have a chance of prevailing in that case, precisely because of the law on challenging agency action—whether or not the agency's actions were arbitrary or capricious and the amount of deference given to an agency which is supposed to be the expert in the field. That is an uphill battle, but one that is worth fighting, and hopefully we can get something out of it.

We will open the floor for questions now, if anybody has any.

Question: I get the impression that a lot of resources have been spent over the years on federal litigation and attempting to craft creative causes of action that will push the peanut forward in federal courts. It does not seem to be getting us very far, but it sure is costing us a lot of money, time, and talent. In the state courts, it seems like things are going better, partly because it involves different causes of action on a smaller scale most of the time. So one thing I was thinking is, what do we do with all this litigation talent if not litigate? I mean just speaking for myself, I am not going to become a lobbyist. I do not have the skills for the grassroots work, but I also did not see any progress being made in federal courts. So I would like your thoughts about taking a more mercenary approach to litigation.

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147 *Id.* at §§ 4:22-16–16.1.

148 *NJSPCA v. N.J. Dept. of Agric.*, No. A-006319-03T1 (N.J. Super. App. Div. filed Nov. 4, 2005). This action is now pending. NJFarms.org, *Coalition Asks Court to Overturn New Jersey Farming Regulations*, *http://www.njfarms.org/lawsuit_2005.htm* (Nov. 4, 2005).

149 *Mayurnik v. Bd. of Rev.*, 2006 WL 2919019 at *2 (N.J. Super. App. Div. 2006).

150 *See* N.J. Stat. Ann. § 4:22-16.1(a) ("The State Board of Agriculture and the Department of Agriculture . . . shall develop and adopt . . . (1) standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock; and (2) rules and regulations governing the enforcement of those standards.").

151 *See* 37 N.J. Register 2465(b) (July 5, 2005) (record of public comments—and corresponding agency responses—to proposed rules regarding humane treatment standards for farm animals).

152 NJFarms.org, *supra* n. 148.

Also, rather than bringing litigation that we think might actually succeed, for example, the research lab kinds of cases where the area is somewhat regulated, we could find whistleblowers who look like they will be viable plaintiffs. And we could go forward, filing lawsuits solely for the press conference. The focus might be on farm animals, so there would not be the whole issue of "my mother is dying and needs medicine, so we have to have research labs." We could focus on the most diabolical, but industry-wide, animal cruelty practices that we think maybe people do not know about, and file a lawsuit. It would not matter if the lawsuit gets dismissed, because the important part would be the press conference. We could put together a beautiful press package with video footage and feed it to the TV stations. Then we would actually be using litigation as a grassroots tool. What do you think?

Glitzenstein: This is sort of an existential crisis I have almost every day of the week, I guess. There is no question that it is frustrating, particularly litigating in the federal court system as it gets more conservative, but I would disagree that no progress has been made. I think Kathy [Meyer]'s discussion of the standing cases suggest that there have been some useful changes made in how the courts approach animals from the standpoint of getting into court. You cannot expect federal court litigation to be a panacea by any means, and it never will be. It has been useful in addressing certain kinds of issues, but by no means has it been useful in addressing the major abuses and misuses of animals. Nor do I think it would be, even if the federal court system were becoming more progressive rather than discernibly less progressive.

I also completely agree with, I think, your premise that looking to state claims and state causes of action, particularly in this day and age, makes an enormous amount of sense. My own view is that they are not mutually exclusive, that there will still be an important role for targeted federal court litigation to play. It will not be an era in which we are pushing the envelope, but it will be an era in which we can continue to use the National Environmental Policy Act, which we used to basically indefinitely shut down the hunting of whales by the Makah tribe.[153] We have used the ESA to stop grizzly bear hunting in Montana and to stop the hunting of bears in Florida.[154] So I think there will still be places where you can look to federal law under well entrenched concepts that can be tweaked and fine tuned, but it is not going to be a revolutionary change. I completely agree with that. I do not think that we should then, as a result, throw the baby out with the bathwater and say, "Let's not do it at all." But certainly, putting more resources, time, and attention into the state sphere and other ways of accomplishing change makes an enormous amount of sense to me.

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153 *Anderson v. Evans*, 314 F.3d 1006, 1030 (9th Cir. 2002).

154 *See Wildlife & Animal Protection*, *supra* n. 93 (summarizing cases brought on behalf of animals by Meyer Glitzenstein & Crystal, and some of the federal statutes employed).

I disagree with your notion of filing cases just for the press hit. I think that is, in the long run, likely to be counterproductive, in my own view. That is not to say that whatever kind of press opportunity or media attention you get is not an important consideration. You may basically say, "Oh, we've only got X percent chance of winning, but on the other hand we'll get an enormous press hit out of it, and that is a factor." But I think if you are saying, "We don't really care what the outcome is"—and I do not want to misstate your question—but if you are saying that, and then saying, "but we will get a good press hit out of it that day," I disagree with that for two reasons. One, you can create seriously bad case law that will not only set back the cause for that period of time, but also in the future, when the federal courts start, hopefully in twenty or thirty years, to change back. The court system is obviously extremely conservative, and it is very hard to undo bad precedents. Once they are on the books, they will be cited at you twenty, thirty, or forty years down the road. There is an enormous institutional problem with that, just looking at it from the standpoint of how the legal system operates.

My other reason is something that I do not know a lot about, or as much about, and that is the media. My sense is that the media is on such a fast-moving cycle that getting a press hit out of something that day, when it is going to disappear tomorrow in the coverage of Iraq or whatever it is, I am not saying that it is not valuable, but I think that it has probably not that much value compared to some of the potential downsides to that kind of approach. Along those lines, though, I agree with using a lawsuit as an organizing tool—not only for that one press opportunity, but also for galvanizing public support, publicizing an issue on the internet and in other ways—and I think the private right of action issue is a great example of this. How do we develop a strategy from which we are going to get ongoing press opportunities and build up a momentum and reach the tipping point where this just makes so much sense and there is so much public support for it that it has to be done? I think that way of creatively using the media in really a long-term sense is critically important, and we have not done enough of that. There has been, in some senses, too much impatience and not enough, "Well, we're not going to do this tomorrow or in two years, but maybe we can do it in fifteen years." We should have a fifteen-year strategy of creating media and using the internet and galvanizing public interest in an issue that way and take that kind of approach; that is my own personal response.

Egert: I completely understand the frustrations, having dealt with these issues, and usually whenever I am involved with talks or conferences, I come out thinking I have completely depressed everyone in the room, because there is nothing we can do as lawyers, as litigators. Although I have days where I feel like that, I do not think we are at that point where we need to file cases just to get an article in the paper. We are beyond that. We may not be much further beyond that, but there are claims that could be brought. It is important that we

adjust our expectations of what we are going to get out of a particular case, and I go back to the strategy of what is going to take us along to the ultimate goal. I do not think we are going to go into court and abolish the property status of animals with one case. There has got to be a strategy to get there.

The other point on that is that you lose a certain amount of respect when you do that as a lawyer, and the movement loses respect, as well. If you file frivolous cases on a continual basis, the next time you come in with a real case, the court is going to look at you and say, "okay, it's this group again," and not even look at it. Those are my thoughts on that.

Question: I am an assistant DA, and I do prosecute animal cruelty cases. I am a little bit surprised by the way prosecutors are being portrayed here today and the image that is being conveyed, because it makes it look like the DA's offices are not interested in prosecuting animal related cases. I can say from my own experience that is absolutely not the case. I have only been doing this for three years, but in those three years, I can already see that we are getting more cases of this kind, which is of course, on the one side, not a good thing, because it means that bad things are happening to animals. But the upside of it is that apparently these cases are being reported more and prosecuted more. That is a good thing, if you look at it that way.

DAs also feel a lot of the frustration that you have portrayed here today. The law frequently does not give us the opportunity to prosecute it to a greater extent than we are already doing, particularly when you are speaking of companion animals. We are often times limited to misdemeanor prosecution on animals that are not considered companion animals yet, even though they are for the person who owns them. Again, I can say we have issued a lot of search warrants. We have had a lot of felony convictions in the past years. I think it is actually getting better, and I am rather surprised that you do not seem to feel the same way. I guess my question to you is, would you not agree that what we need to do is to raise awareness in the community that these offenses are reportable, that people should call the police, the SPCA, or the DA's office if they observe things that they think might constitute animal cruelty? And also that maybe police officers should be trained better, because, again, from personal experience, we get a lot of calls from officers that are just not sure. They come to us for advice: "Should we arrest on this or not?" So, again, as a comment, I do think that prosecution is being taken seriously, that there are many interested people in the DA's offices, and that we just need more help from the legislature, and also from the community.

Waisman: I do not practice in the area of criminal prosecution, but I do want to respond to that based on my limited knowledge. I think there are certainly a fair number of DA's offices that are very active, some of which have specific animal abuse task forces and are able to focus on that, and that is wonderful. Unfortunately, there are a large number who are underfunded and understaffed, and I know from

working closely with Pamela Frasch at the ALDF what they go through with this in trying to secure prosecutions, and in bringing these cases to the attention of prosecutors when the ALDF is contacted. Very often, the prosecutors just say, "We do not have the time, we do not have the resources, we cannot do it."

Jenny Rackstraw wrote an article in 2003 in *Animal Law,* entitled *Self-Help Prosecution*.[155] Studies cited in that article indicated that basically about three percent of the number of cruelty cases called in were actually being prosecuted.[156] The Massachusetts SPCA did a study on this, showing that out of 80,000 complaints, only 268 were prosecuted.[157] The ALDF also did some studies, looking at one county in Oregon and some place in Ohio.[158] I think it definitely depends on the prosecutor's office and on the particular attorneys working there who have an interest and care and want to make it happen, and who have the resources to make it happen. I do not think it is as consistent as we would like it to be. But we did not mean to imply that there are not prosecutors who take these cases very seriously.

Comment: I would think that a lot of cases never make it to the prosecutor's office, that they are dismissed or not followed up before they even get to us. I worked on an animal cruelty unit and I can tell you, there was not a single case that was dismissed by us.

Egert: I think you are right. We have worked with very excellent DAs and assistant DAs who take the cases seriously and prosecute to the fullest extent. We have also worked with not-so-great DAs who do not care about animal cases and would just as soon get rid of them. I think it runs the gamut, but I also think you hit the nail on the head when you say that these cases are just not getting to you. There is so much in between that is not happening, and they are not being investigated. Often, when they are investigated, a shoddy job is done, and you are not given a complete case with which you could work. And, again, going back to the lack of interest in some cases, but also the lack of resources as Sonia [Waisman] says, we are really relying on underfunded, and untrained in many respects, SPCAs who, even if they want to do a good job, cannot. Especially when we are talking about less traditional cruelty cases, cases involving farmed animals, or other situations that are not simple. A lot of work has to go into these cases in order to prove them, and I agree completely, there needs to be a lot more work done in those areas.

Sullivan: That was the point I really wanted to make; I think it is very hard for DAs, particularly in rural counties, which is where most factory farms tend to be, to bring those kinds of institutional abuse cases. In the city, there is a great deal of interest in the prosecutor's

155 Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 Animal L. 243 (2003).

156 *Id.* at 246.

157 *Id.*

158 *Id.*

office in prosecuting cruelty cases. In the court where I work, which is here in Manhattan, I would just like to mention that a case came down a couple of weeks ago where the court affirmed a felony cruelty conviction involving stomping on a goldfish.[159]

Question: I am interested in Eric [Glitzenstein]'s comments, from the synergy of bringing new causes of action to creating a movement and then using that to create new causes of action. What does it take to really get a movement started?

Glitzenstein: I think the theme, if there is one, on which we have all basically agreed is that there is value to bringing different kinds of claims in different contexts as long as they are well thought out and have a good accompanying media and public education strategy. The hope, and I believe there is some reason for optimism, is that it has a spillover effect in places that we cannot necessarily anticipate; that there is a ripple effect. It may take years to change the way people think. Some people talk about how we have to wait until we have entirely new judges with new sensibilities. I am not sure you have to go to those extremes. Just realize that it can literally take decades of simply soaking this stuff in until people have a different kind of framework.

I also think David [Favre]'s idea is a great analogy, of basically saying, "Okay, animals are property, but we have recognized for years that they are not like other kinds of property, that a dog is not a chair."[160] Everybody knows that. So if a dog is not a chair, why are we treating it exactly like a chair? That does not mean we have to treat it necessarily like a child, but let us find some kind of a legal status which approximates what we all know is the truth. I think the hope we share, and hopefully this is not just misplaced optimism, is that if you speak the truth often enough, people will actually start to recognize it as truth. We do not know what the time frame is going to be, but the hope is that, eventually, our beliefs will be accepted at some level as the truth and will filter into the legal and political systems that way.

Egert: I think that the law follows activists, the community, and the public support behind it, not the lawyers. That is the most important thing. These cases may be vehicles towards changing public perception and public beliefs and how people feel about these issues, but if we think that we are going to get a judge to change the law before there is strong backing from the community, it is never going to happen. That is where the focus has to happen. Every case we handle and every step we take, we have to be thinking about both how it is going to affect public opinion, and also where it is going to take us along the road to the ultimate goal.

I think we can take one more question.

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159 *People v. Garcia*, 812 N.Y.S.2d 66, 73 (N.Y. App. Div. 1st Dept. 2006).

160 Review *supra* pages 12–13 for Favre's discussion of the creation of "living property" as a new category of property, distinguishable from personal property.

Question: This should probably be a fairly simple question. What about the idea of trying to tie together noneconomic damages and cruelty prosecutions, whereby if somebody is convicted of cruelty to a companion animal, part of that person's sentence would include reimbursing the human victim for their emotional damages?

Waisman: As a practical matter, very often a civil suit will accompany or follow the criminal prosecution without any statutory guidelines for it.

Question: But civil lawsuits have not worked, because they do not allow noneconomic damages. I guess what I am saying, and I know none of you are prosecutors, but is there an opening there to bring the noneconomic damages into the criminal arena?

Egert: There might be. That is an interesting point. Depending on the jurisdiction, most criminal sentencing provisions contain restitution statutes, although they do not call for noneconomic damages, depending on the language of the particular statute.[161] They typically only call for replacement or reimbursement for the amount lost.[162] But in the brainstorming phase, maybe there is some language, some vague language, that could say, "My loss is X, Y, and Z, and that does not just encompass replacement value."

Okay, thank you all very much. Thanks to the panel.

[161] *See e.g.* Wis. Stat §§ 951.02, 951.18 (2006) (requiring that restitution be paid for pecuniary losses as a result of violation of the statute).

[162] *Id.*